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**Northwestern University School of Law**

THE  
FEDERAL REPORTER.

VOLUME 86.

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CASES ARGUED AND DETERMINED  
IN THE  
CIRCUIT COURTS OF APPEALS AND CIRCUIT  
AND DISTRICT COURTS OF THE  
UNITED STATES.

PERMANENT EDITION.

MAY—JUNE, 1898.

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# RULES OF COURT.

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## UNITED STATES CIRCUIT COURTS OF APPEALS.

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### Second Circuit.

#### 36.

It is hereby ordered that the following rule be adopted by this court:

Rule 36. In all cases the plaintiff in error or appellant on docketing a case and filing the record, shall enter into an undertaking with the clerk, for the payment of his fees or otherwise satisfy him in that behalf.

At the expiration of ten days after a case has been decided, the order or decree thereon will be entered by the court, and the clerk will thereupon prepare and tax the bill of costs and issue the mandate. Within said ten days the parties may file with the clerk their proposed orders or decrees and bills of costs with proof of service of the same upon the opposing attorneys.

### RULES IN ADMIRALTY.<sup>1</sup>

#### 16, 19.

It is further ordered that rule XVI. of the admiralty rules be amended by striking out the second paragraph of the rule, and that rule XIX. of the admiralty rules be amended by adding thereto the words "and rule 36."

As amended May 18, 1898.

<sup>1</sup> For rules as originally adopted in the Second circuit, see 21 C. C. A. xlix., 78 Fed. xlix.

## Fifth Circuit.

APPENDIX TO RULE 37.<sup>1</sup>

[Form of Appearance Bond on Writ of Error in Criminal Cases.]

Know all men by these presents:

That we, ———, as principal, and ———, as sureties, are held and firmly bound unto the United States of America in the full and just sum of ——— dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this ——— day of ———, in the year of our Lord one thousand eight hundred and ninety ———.

Whereas, lately at the ——— term, A. D. 189—, of the ——— court of the United States for the ——— district of ———, in a suit pending in said court between the United States of America, plaintiff, and ———, defendant, a judgment and sentence was rendered against the said ———, and the said ——— has obtained a writ of error from the United States circuit court of appeals for the Fifth circuit, to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the said United States of America, citing and admonishing the United States of America to be and appear in the United States circuit court of appeals for the Fifth circuit, at the city of New Orleans, Louisiana, thirty days from and after the date of said citation, which citation has been duly served.

Now, the condition of the above obligation is such that if the said ——— shall appear in the United States circuit court of appeals for the Fifth circuit on the first day of the next term thereof, to be held at the city of ———, on the first Monday in ———, A. D. 189—, and from day to day thereafter during said term, and from term to term, and from time to time, until finally discharged therefrom, and shall abide by and obey all orders made by the said United States circuit court of appeals for the Fifth circuit in said cause, and shall surrender himself in execution of the judgment and sentence appealed from as said court may direct, if the judgment and sentence of the said ——— court against him shall be affirmed by the said United States circuit court of appeals for the Fifth circuit, then the above obligation to be void; else to remain in full force, virtue, and effect.

Approved: \_\_\_\_\_

\_\_\_\_\_[Seal.]  
 \_\_\_\_\_[Seal.]  
 \_\_\_\_\_[Seal.]

\_\_\_\_\_,  
 Judge of the ———.

<sup>1</sup> For appendix to rule 37 as originally adopted in the Fifth circuit, see 24 C. C. A. v., 80 Fed. iv.

# JUDGES

OF THE

## UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

### FIRST CIRCUIT.

- Hon. HORACE GRAY, Circuit Justice.  
Hon. LE BARON B. COLT, Circuit Judge.  
Hon. WILLIAM L. PUTNAM, Circuit Judge.  
Hon. NATHAN WEBB, District Judge, Maine.  
Hon. EDGAR ALDRICH, District Judge, New Hampshire.  
Hon. THOMAS L. NELSON, District Judge, Massachusetts.<sup>1</sup>  
Hon. FRANCIS C. LOWELL, District Judge, Massachusetts.<sup>2</sup>  
Hon. ARTHUR L. BROWN, District Judge, Rhode Island.

### SECOND CIRCUIT.

- Hon. RUFUS W. PECKHAM, Circuit Justice.  
Hon. WILLIAM J. WALLACE, Circuit Judge.  
Hon. E. HENRY LACOMBE, Circuit Judge.  
Hon. NATHANIEL SHIPMAN, Circuit Judge.  
Hon. WILLIAM K. TOWNSEND, District Judge, Connecticut.  
Hon. ALFRED C. COXE, District Judge, N. D. New York.  
Hon. ADDISON BROWN, District Judge, S. D. New York.  
Hon. CHARLES L. BENEDICT, District Judge, E. D. New York.<sup>3</sup>  
Hon. ASA W. TENNEY, District Judge, E. D. New York.<sup>4</sup>  
Hon. EDWARD B. THOMAS, District Judge, E. D. New York.<sup>5</sup>  
Hon. HOYT H. WHEELER, District Judge, Vermont.

### THIRD CIRCUIT.

- Hon. GEORGE SHIRAS, Jr., Circuit Justice.  
Hon. MARCUS W. ACHESON, Circuit Judge.  
Hon. GEORGE M. DALLAS, Circuit Judge.  
Hon. EDWARD G. BRADFORD, District Judge, Delaware.<sup>6</sup>  
Hon. ANDREW KIRKPATRICK, District Judge, New Jersey.  
Hon. WILLIAM BUTLER, District Judge, E. D. Pennsylvania.  
Hon. JOSEPH BUFFINGTON, District Judge, W. D. Pennsylvania.

<sup>1</sup>Deceased November 21, 1897.

<sup>2</sup>Commissioned January 10, 1898.

<sup>3</sup>Resigned June 5, 1897, to take effect on appointment of successor.

<sup>4</sup>Confirmed July 8, 1897. Deceased December 10, 1897.

<sup>5</sup>Commissioned February 15, 1898.

<sup>6</sup>Confirmed May 11, 1897.

## FOURTH CIRCUIT.

Hon. MELVILLE W. FULLER, Circuit Justice.  
Hon. NATHAN GOFF, Circuit Judge.  
Hon. CHARLES H. SIMONTON, Circuit Judge.  
Hon. THOMAS J. MORRIS, District Judge, Maryland.  
Hon. AUGUSTUS S. SEYMOUR, District Judge, E. D. North Carolina.<sup>1</sup>  
Hon. THOMAS R. PURNELL, District Judge, E. D. North Carolina.<sup>2</sup>  
Hon. ROBERT P. DICK, District Judge, W. D. North Carolina.<sup>3</sup>  
Hon. WILLIAM H. BRAWLEY, District Judge, E. and W. D. South Carolina.  
Hon. ROBERT W. HUGHES, District Judge, E. D. Virginia.<sup>4</sup>  
Hon. EDMUND WADDILL, Jr., District Judge, E. D. Virginia.<sup>5</sup>  
Hon. JOHN PAUL, District Judge, W. D. Virginia.  
Hon. JOHN J. JACKSON, District Judge, West Virginia.

## FIFTH CIRCUIT.

Hon. EDWARD D. WHITE, Circuit Justice.  
Hon. DON A. PARDEE, Circuit Judge.  
Hon. A. P. McCORMICK, Circuit Judge.  
Hon. JOHN BRUCE, District Judge, M. and N. D. Alabama.  
Hon. HARRY T. TOULMIN, District Judge, S. D. Alabama.  
Hon. CHARLES SWAYNE, District Judge, N. D. Florida.  
Hon. JAMES W. LOCKE, District Judge, S. D. Florida.  
Hon. WILLIAM T. NEWMAN, District Judge, N. D. Georgia.  
Hon. EMORY SPEER, District Judge, S. D. Georgia.  
Hon. CHARLES PARLANGE, District Judge, E. D. Louisiana.  
Hon. ALECK BOARMAN, District Judge, W. D. Louisiana.  
Hon. HENRY C. NILES, District Judge, N. and S. D. Mississippi.  
Hon. DAVID E. BRYANT, District Judge, E. D. Texas.  
Hon. JOHN B. RECTOR, District Judge, W. D. Texas.  
Hon. THOMAS S. MAXEY, District Judge, W. D. Texas.

## SIXTH CIRCUIT.

Hon. JOHN M. HARLAN, Circuit Justice.  
Hon. WILLIAM H. TAFT, Circuit Judge.  
Hon. HORACE H. LURTON, Circuit Judge.  
Hon. JOHN WATSON BARR, District Judge, Kentucky.  
Hon. HENRY H. SWAN, District Judge, E. D. Michigan.  
Hon. HENRY F. SEVERENS, District Judge, W. D. Michigan.  
Hon. AUGUSTUS J. RICKS, District Judge, N. D. Ohio.  
Hon. GEORGE R. SAGE, District Judge, S. D. Ohio.  
Hon. CHARLES D. CLARK, District Judge, E. and M. D. Tennessee.  
Hon. ELI S. HAMMOND, District Judge, W. D. Tennessee.

<sup>1</sup>Deceased February 19, 1897.

<sup>2</sup>Confirmed May 5, 1897.

<sup>3</sup>Resigned January 12, 1898, to take effect on appointment of successor.

<sup>4</sup>Resigned March 4, 1898.

<sup>5</sup>Commissioned March 22, 1898.

## SEVENTH CIRCUIT.

Hon. HENRY B. BROWN, Circuit Justice.  
 Hon. WILLIAM A. WOODS, Circuit Judge.  
 Hon. JAMES G. JENKINS, Circuit Judge.  
 Hon. JOHN W. SHOWALTER, Circuit Judge.  
 Hon. PETER S. GROSSCUP, District Judge, N. D. Illinois.  
 Hon. WILLIAM J. ALLEN, District Judge, S. D. Illinois.  
 Hon. JOHN H. BAKER, District Judge, Indiana.  
 Hon. WILLIAM H. SEAMAN, District Judge, E. D. Wisconsin.  
 Hon. ROMANZO BUNN, District Judge, W. D. Wisconsin.

## EIGHTH CIRCUIT.

Hon. DAVID J. BREWER, Circuit Justice.  
 Hon. HENRY C. CALDWELL, Circuit Judge.  
 Hon. WALTER H. SANBORN, Circuit Judge.  
 Hon. AMOS M. THAYER, Circuit Judge.  
 Hon. JOHN A. WILLIAMS, District Judge, E. D. Arkansas.  
 Hon. ISAAC C. PARKER, District Judge, W. D. Arkansas.<sup>1</sup>  
 Hon. JOHN H. ROGERS, District Judge, W. D. Arkansas.<sup>2</sup>  
 Hon. MOSES HALLETT, District Judge, Colorado.  
 Hon. OLIVER P. SHIRAS, District Judge, N. D. Iowa.  
 Hon. JOHN S. WOOLSON, District Judge, S. D. Iowa.  
 Hon. CASSIUS G. FOSTER, District Judge, Kansas.  
 Hon. RENSSELAER R. NELSON, District Judge, Minnesota.<sup>3</sup>  
 Hon. WM. LOCHREN, District Judge, Minnesota.<sup>4</sup>  
 Hon. ELMER B. ADAMS, District Judge, E. D. Missouri.  
 Hon. JOHN F. PHILIPS, District Judge, W. D. Missouri.  
 Hon. ELMER S. DUNDY, District Judge, Nebraska.<sup>5</sup>  
 Hon. WILLIAM D. McHUGH, District Judge, Nebraska.<sup>6</sup>  
 Hon. W. H. MUNGER, District Judge, Nebraska.  
 Hon. ALFRED D. THOMAS, District Judge, North Dakota.<sup>7</sup>  
 Hon. CHARLES F. AMIDON, District Judge, North Dakota.<sup>8</sup>  
 Hon. ALONZO J. EDGERTON, District Judge, South Dakota.<sup>9</sup>  
 Hon. JOHN E. CARLAND, District Judge, South Dakota.<sup>10</sup>  
 Hon. JOHN A. MARSHALL, District Judge, Utah.  
 Hon. JOHN A. RINER, District Judge, Wyoming.

<sup>1</sup>Deceased November 17, 1896.<sup>2</sup>Commissioned December 15, 1896.<sup>3</sup>Resigned May 16, 1896.<sup>4</sup>Commissioned May 18, 1896. Confirmed same date.<sup>5</sup>Deceased October 28, 1896.<sup>6</sup>Resigned.<sup>7</sup>Deceased August 8, 1896.<sup>8</sup>Commissioned August 31, 1896. Confirmed February 18, 1897.<sup>9</sup>Deceased August 9, 1896.<sup>10</sup>Commissioned December 15, 1896.

## NINTH CIRCUIT.

Hon. STEPHEN J. FIELD, Circuit Justice.<sup>1</sup>

Hon. JOSEPH McKENNA, Circuit Justice.<sup>2</sup>

Hon. JOSEPH McKENNA, Circuit Judge.<sup>3</sup>

Hon. WM. W. MORROW, Circuit Judge.<sup>4</sup>

Hon. WILLIAM B. GILBERT, Circuit Judge.

Hon. ERSKINE M. ROSS, Circuit Judge.

Hon. JOHN J. DE HAVEN, District Judge, N. D. California.<sup>5</sup>

Hon. OLIN WELLBORN, District Judge, S. D. California.

Hon. HIRAM KNOWLES, District Judge, Montana.

Hon. CORNELIUS H. HANFORD, District Judge, Washington.

Hon. THOMAS P. HAWLEY, District Judge, Nevada.

Hon. CHARLES B. BELLINGER, District Judge, Oregon.

Hon. JAMES H. BEATTY, District Judge, Idaho.

Hon. ARTHUR K. DELANEY, District Judge, Alaska.<sup>6</sup>

Hon. CHARLES S. JOHNSON, District Judge, Alaska.<sup>7</sup>

<sup>1</sup>Resigned December 1, 1897.

<sup>2</sup>Commissioned January 21, 1898.

<sup>3</sup>Resigned.

<sup>4</sup>Commissioned May 20, 1897.

<sup>5</sup>Commissioned June 8, 1897.

<sup>6</sup>Removed.

<sup>7</sup>Commissioned July 23, 1897.

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# CASES

## ARGUED AND DETERMINED

IN THE

## UNITED STATES CIRCUIT COURTS OF APPEALS AND THE CIRCUIT AND DISTRICT COURTS.

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CROSS et al. v. EVANS.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1898.)

No. 246.

**1. APPEAL AND ERROR—REFUSAL TO TAKE CASE FROM JURY.**

Where there was testimony as to the bad condition of the road at the place where the accident occurred, and also that the accident was due to a drawhead pulling out, which was a matter of pure accident, it was not error to refuse to take the case from the jury.

**2. JURISDICTION—CITIZENSHIP—DISCHARGE OF RECEIVERS.**

The jurisdiction of the federal court having attached in an action at law against the receivers of a railroad, such jurisdiction is not lost because the ownership of the railroad subsequently passes to citizens of the same state as the plaintiff, nor by reason of an order of a court in another district discharging the receivers, especially when it expressly provides that pending cases shall not be affected.

**3. RAILROAD RECEIVERSHIPS—DAMAGES FOR PERSONAL INJURIES.**

Damage occurring during the time a railroad is in the hands of a receiver is part of the operating expenses, payable out of the income, if there is any; if not, out of the corpus of the property.

**4. LIMITATION OF ACTIONS—AMENDED PETITION.**

The assignment of additional specifications of negligence in an amended petition does not create a new cause of action.

Pardee, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

This was an action to recover damages for personal injuries sustained by the defendant in error on September 1, 1890, while he was in the employ of Cross and Eddy, receivers of the Missouri, Kansas & Texas Railway Company. At the time of the injury, defendant in error was employed as a brakeman on the Taylor, Bastrop & Houston Branch, which was a part of the Missouri, Kansas & Texas System, and was operated by the above receivers; and it is alleged that the injuries were brought about by the derailing of a train through the negligence of said receivers. This suit was originally brought in the district court of Wood county, Tex., on the 5th day of March, 1891, against George A. Eddy and H. C. Cross, receivers of the Missouri, Kansas & Texas Railway Company. On the 20th of April, 1891, Eddy and Cross filed their

petition and bond for removal of said case on the ground of diverse citizenship,—Eddy and Cross alleging that they were citizens of Kansas,—and on the further ground of a federal question involved; and on May 4, 1891, the bond was approved, and the petition granted, and the case removed to the United States circuit court for the Eastern district of Texas. Plaintiff in his original petition alleged that he received serious and permanent injuries; among others, the loss of his leg. He was working as a brakeman for said receivers, when a wreck occurred, derailing the train, and inflicting upon him the injuries because of which he brought the suit. It was alleged in said original petition that the wrecking of said train was brought about by the drawhead of the fifth or sixth car, or other car, in said train of cars, pulling out and dropping down on the track, catching on the ties, and jamming the cars back, and throwing them off the track and into a creek. It was charged that the drawhead was old, defective, out of repair, and in no fit condition to serve for the purpose for which it was intended; that by reason of the bad and defective drawhead the wreck occurred, and plaintiff was injured. This was the only ground of negligence alleged in plaintiff's original pleading. On the 19th day of January, 1892, defendants Cross and Eddy filed their original answer, in which they set up negligence of plaintiff, and negligence of plaintiff's fellow servants, in causing the jerk which pulled out the drawhead and caused the accident. On August 23, 1892, defendant in error filed his first amended original petition, claiming of Eddy and Cross, receivers, and also of the Missouri, Kansas & Texas Railway Company, incorporated under the laws of Texas (though he did not give it its full corporate name), in which petition he alleged that since the commencement of his suit all the properties in the hands of the receivers had passed into the hands of the railway company, and set forth additional grounds of negligence on the part of the receivers. In this petition, in addition to the grounds of negligence set out in the original petition, plaintiff for the first time alleged further grounds of negligence upon the part of the receivers, substantially as follows: That the track at the point where the cars were derailed was out of repair, and in an unsafe and dangerous condition, and that said train of cars upon which plaintiff was riding was overturned by reason of said bad and defective condition of said roadbed, ties, fish plates, and rails. On August 23, 1893, defendant in error filed his second amended original petition, complaining of the receivers, and of the Missouri, Kansas & Texas Railway of Texas. From this last petition it appeared that plaintiff at the time he was injured was employed on the Taylor, Bastrop & Houston Railway; that this road was a part of the system of the Missouri, Kansas & Texas Railway, and was operated by the receivers. It further appeared: That on the 16th day of April, 1891, the legislature of the state of Texas enacted a law authorizing the sale and conveyance of the Missouri, Kansas & Texas Railway Company's lines of railroad, heretofore operated as the property of the Missouri, Kansas & Texas Railway Company, as a part of the system of roads within the state known as the Missouri, Kansas & Texas Railway, and to provide for and authorize the sale and transfer and conveyance of said lines of railway to, and the purchase and operation thereof, by a single corporation, incorporated under the laws of the state of Texas. First part of section 3 of said act is as follows: "Sec. 3. The sale herein authorized to be made, shall be subject to all just and legal incumbrances, suits or actions for damage or rights of way, liens, judgments and debts given, contracted or incurred by said Missouri, Kansas and Texas Railway Company and other companies herein mentioned upon or against said property or any part thereof, as well as the payment and discharge of all and singular the legal obligations and liabilities whatsoever against said Missouri, Kansas and Texas Railway Company and properties herein mentioned, and for all debts, judgments, suits and all claims for damages against the receivers of said Missouri, Kansas and Texas Railway Company, to the same extent that the property would be liable therefor if the property remained in the possession and control of the Missouri, Kansas and Texas Railway Company, and the purchasing company or corporation shall take the same charged therewith, and subject to the payment thereof and the assumption by such purchasing company or corporation of such incumbrances, debts and liabilities may enter into and constitute a part of the consideration for such sale and conveyance

thereto." That thereafter, on or about the — day of —, 1891, the said Missouri, Kansas & Texas Railway Company, which was organized by and under the laws of the state of Kansas, bargained, sold, and conveyed all its property, including all of the lines of railway named in the fifth section of said special law, to the defendant the Missouri, Kansas & Texas Railway Company of Texas, which, as heretofore alleged, is a corporation organized by and under the laws of the state of Texas. That by an order of the federal court the defendants Cross and Eddy turned over and delivered all of the property in their possession, which included all of the lines heretofore described in said fifth section of said special law, to the defendant the Missouri, Kansas & Texas Railway Company, and thereafter all of said property was turned over by said last-named company to the Missouri, Kansas & Texas Railway Company of Texas; the said last-named company having on the — day of —, 18—, purchased same from the Missouri, Kansas & Texas Railway Company. Said petition further alleged as follows: "That by reason of said law, and sale and delivery of said property, and in conformity therewith, the defendant the Missouri, Kansas & Texas Railway Company of Texas took and received all of said property subject to all of the claims, demands, and liabilities of the old company, and also all of the claims, demands, and liabilities of the receivers, defendants Cross and Eddy. That the defendant the Missouri, Kansas & Texas Railway Company of Texas, by reason of said purchase, and said order of court under which said property was delivered to it, was and is now liable for whatever judgment may be rendered in favor of plaintiff in this cause."

On September 14, 1893, the Texas Company, having been served, filed its original answer, and excepted to the maintenance of the suit against it because it appeared from the plaintiff's petition that both it and the plaintiff were citizens of the state of Texas. It further pleaded that, if the plaintiff had any cause of action, it arose against Eddy and Cross while they were operating the Missouri, Kansas & Texas Railway Company as receivers, and that they were appointed receivers about June 9, 1898, in a certain suit brought in the United States circuit court of Kansas, and by ancillary proceedings in the United States circuit court for the Northern district of Texas, and that on or about the 1st day of July, 1891, by virtue of an order of said United States circuit court, all the property in the hands of said receivers was by them returned to the Missouri, Kansas & Texas Railway Company (not the Missouri, Kansas & Texas Railway Company of Texas, but a corporation of that name formed under the laws of Kansas), and, further, that Eddy and Cross were then discharged as receivers of said property; that said courts retained jurisdiction of said property and of said pending litigation for the purpose of enforcing against said receivers and said property such claims as might be presented to and allowed by them, and it was further provided in the order discharging receivers that all persons having claims against them by reason of causes of action arising during the receivership should present the same on or about January 1, 1892, and in the event of their failure to do so their rights should cease and determine. On September 14, 1893, Eddy and Cross adopted the answer of the Missouri, Kansas & Texas Railway Company of Texas; it and they for the first time then pleading the discharge of the receivers. The defendants' demurrers both to the jurisdiction and to the merits were overruled. The case was tried before a jury, and on Monday, January 11, 1894, resulted in a verdict and judgment for plaintiff, and against the Missouri, Kansas & Texas Railway Company of Texas, for \$7,500; dismissing the action in respect to Cross and Eddy, receivers. Motion for a new trial was overruled, and subsequently writ of error allowed to Cross and Eddy, receivers, and the Missouri, Kansas & Texas Railway Company of Texas.

F. C. Dillard, for plaintiffs in error.

J. M. Duncan, T. J. Freeman, and Ben. B. Cain, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.



SWAYNE, District Judge, after stating the facts as above, delivered the opinion of the court.

The cause comes here on 10 assignments of error. The sixth, seventh, and eighth object in part to the refusal of the court below to take the case from the jury and direct a verdict for the defendants "because there was no evidence that any defect in the roadbed had aught to do with bringing about the accident, but on the contrary the same was shown to have been caused by a drawhead pulling out, which was a matter of pure accident." The other questions raised by the assignments are: First, the jurisdiction of the federal court; second, the statute of limitations; and, third, the absence of allegation or proof of betterments by the plaintiff to the road while in the hands of the receivers.

On inspection of the record, we find considerable testimony as to the bad condition of the road at the place where the accident occurred. In addition to the testimony of the plaintiff, the depositions of Baker, Guy, and Carriker were read in evidence, and Weaner, who had been foreman of the section, was examined; and they all testified the track was in bad condition at the time of the accident. There was also testimony offered as to the accident being caused by the drawhead. We think the court very properly submitted this testimony all to the jury under the charge given, and there was no error in so doing.

The question of the jurisdiction of the court is the most important in this case. It is vigorously contended by the plaintiffs in error that, because the defendant the Missouri, Kansas & Texas Railway Company of Texas is a citizen of the same state with the plaintiff, the federal court has no jurisdiction in the cause. There can be no doubt that, at the time the suit was removed from the state to the federal court by the receivers, it was properly removed, and that the jurisdiction of the federal court attached, both on account of diverse citizenship and the federal question involved; but plaintiffs in error contend that, because the ownership of the property subsequently passed from the hands of a citizen of another state to those of a citizen of the same state with the plaintiff, therefore the jurisdiction was lost by the federal court, and the cause should be remanded to the state court. This does not seem to be a new question, and the reported cases do not support the contention. In *Clarke v. Mathewson*, 12 Pet. 164, Story, J., speaking for the court, says:

"The parties to the original bill were citizens of different states, and the jurisdiction of the court completely attached to the controversy. Having so attached, it could not be divested by any subsequent events, and the court had a rightful authority to proceed to a final determination of it. If, after the commencement of the suit, the original plaintiff had removed into, and become a citizen of, Rhode Island, the jurisdiction over the cause would not have been divested by such change of domicile;" citing *Morgan's Heirs v. Morgan*, 2 Wheat. 290; *Mollan v. Torrence*, 9 Wheat. 537; and *Dunn v. Clarke*, 8 Pet. 1.

The same doctrine is announced by Matthews, J., in *Stewart v. Dunham*, 115 U. S. 61, 5 Sup. Ct. 1163, and later by Foster, J., in

Jarboe v. Templer, 38 Fed. 213, who, after reviewing the above, and other cases to the same effect, adds that:

"If a change of domicile, making both parties citizens of the same state, would not divest jurisdiction, it is useless to argue that a transfer of the subject of litigation, producing the same result, would affect the jurisdiction."

This would seem to be so well settled a doctrine that citation of authorities is not required to maintain it.

In addition to the question of citizenship, plaintiffs in error contend that the order of the federal court discharging Cross and Eddy, as receivers, in the Northern district of Texas, defeated the right of the defendant in error to recover in a suit at law in the Eastern district of Texas, because intervention had not been filed by the plaintiff below in the suit in the Northern district of Texas within the time prescribed. Plaintiff below at no time sought his remedy by intervention, but was content to rely upon his right to sue in an action at law. He never submitted his claim to the federal court for the Northern district, and was in no way bound by the order thereof. When he brought suit against the receivers, Cross and Eddy, as he did, and they moved the cause from the state to the federal court on the grounds of diverse citizenship, jurisdiction of that court attached, and no orders of a court in another district in any way affected it; and we have seen above that because the property changed owners after suit brought in no way affected the jurisdiction. But, if this were not so, the sixth paragraph of said order, brought up in the bill of exceptions, sufficiently defines the purpose and action of the court at the time it was made:

"(6) That nothing in this decree contained is intended to affect, or shall be construed as affecting, the status of any pending or undetermined litigation in which said receivers appear as parties. Such litigations may continue to determination in the name of the receivers, but for the use of the Missouri, Kansas & Texas Railway Company, and at its costs and expense, and with the right to that company, should it be so advised, to appear and be substituted in any such litigation."

The Missouri, Kansas & Texas Railway Company of Texas was organized under the act of legislature of that state of April 2, 1891, and it purchased the property of the Missouri, Kansas & Texas Railway Company under the same act, and that of April 16, 1891; the latter providing, as we have seen, that the purchaser shall take the property subject to all suits and claims for damages against the receivers of the Missouri, Kansas & Texas Railway Company, and the purchasing company shall take the same charged therewith, and subject to the payment thereof. And it further provides that the assumption by such purchasing company of such liabilities may enter into, and constitute a part of, the consideration for such sale and conveyance. Of all of which the Missouri, Kansas & Texas Railway Company of Texas had full notice at the time of purchase; and there can be no doubt that it took the property as the act prescribed, with the liability to pay all such claims as the appellee here presents, as a part of the consideration thereof. We do not see, under the facts of this case, how any question of betterments can arise. Plaintiff below, as we have shown, is not claiming inter-

vention under the receivers, but in another jurisdiction, and in consequence of the act of the Texas legislature; but, if it were not so, damages occurring during the time the railroad property was in the hands of the receivers has been held to be part of the operating expense, and payable out of the income, if there is any, and, if not, it must come out of the corpus of the property.

The mistake the plaintiff in error makes in reference to the remaining question of error raised is in his definition of a cause of action. He cites from Sayles' Rev. Civ. St. § 3202, as follows:

"There shall be commenced and prosecuted within one year after the cause of action shall have accrued, and not afterwards, all actions or suits in court, of the following description: (1) Actions for injuries done to the person of another."

The cause of action in this case was the injury done to the person of the plaintiff below by the negligence of the defendant below. This action was brought within a year from the time the injury occurred, and it is not barred by the statute of limitations. The assignment of additional specifications of negligence on the part of defendant in the subsequent amended petition of plaintiff to that first set up does not create a new cause of action. This holding is sustained by the case of *Smith v. Railway Co.*, 12 U. S. App. 426, 5 C. C. A. 557, and 56 Fed. 458, by Thayer, J., in which he cites several cases substantiating the same doctrine.

Although Cross and Eddy were discharged in the court below, they seem to be dissatisfied with this, and come here on appeal. For what purpose, and on what ground, they would seek to be held for this accident, it is difficult to determine from the record. On the whole record, we do not find any of the assignments of error well taken, and therefore hold the judgment of the court below should be affirmed.

PARDEE, Circuit Judge (dissenting). I am compelled to dissent from the opinion and judgment of the court, on the following grounds:

1. The action below was one at law. The court was without jurisdiction to bring into the case, and make a party defendant, a citizen of the same state as the plaintiff, on the ground that the newly-made defendant assumed the obligation of paying the plaintiff's demands because it had acquired property in the possession of the original defendants, upon which property the plaintiff could not claim, nor the court below enforce, a lien.

2. Even if the court below had jurisdiction of the parties, and could be supposed in an action at law to have equitable jurisdiction under the peculiar circumstances, still the defendant in error was entitled to no judgment or decree against the Missouri, Kansas & Texas Railway of Texas without allegation and proof of betterments made by the defendant receivers on the Missouri, Kansas & Texas Railway while the same was in custodia legis. On this point the decision of the supreme court of the state of Texas in *Railway Co. v. McFadden*, 33 S. W. 853, appears to be conclusive.

3. The opinion in the instant case appears to be based on the proposition that the United States circuit court of the Eastern dis-

trict of Texas in an action at law can administer and enforce all the equities within the power of the United States circuit court of the Northern district of Texas, which latter court, under a bill in equity there pending, and under proper equity pleadings and proceedings, had possession by receivers of a railroad, and was permitting the operation of the same.

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CRUIKSHANK et al. v. BIDWELL.

(Circuit Court, S. D. New York. March 30, 1898.)

**CUSTOMS LAWS—EXCLUSION OF INFERIOR TEAS—CONSTITUTIONAL LAW.**

The provision in the present tariff law, excluding from this country teas of inferior quality, and leaving the final determination of the question in respect thereto to the customs officers, is a valid exercise of the legislative power.

This was a suit by William J. Cruikshank and others for an injunction against George R. Bidwell, collector of the port of New York, to restrain his action in respect to the importation of certain teas.

John S. Davenport, for the motion.

Arthur M. King, Asst. U. S. Atty., opposed.

LACOMBE, Circuit Judge. The act which plaintiff criticises in this case is apparently framed, as are the exclusion acts, in conformity with prevailing theories, to leave the decision of disputable questions with an administrative officer rather than with the courts. Such a system is, of course, open to abuse, but it is not, necessarily, in all cases unconstitutional. No citizen of the United States has a vested right to import teas, if congress, under its power to regulate commerce, prohibits their importation. And if that body chooses to admit only those teas which may be approved by such administrative officer as it selects, the legislation is similar to that which gives to an administrative officer the power to determine finally whether an alien has or has not sufficient property to be allowed to enter. In view of the decisions of the United States supreme court in *Lem Moon Sing v. U. S.*, 158 U. S. 538, 15 Sup. Ct. 967, and a line of similar cases, such legislation seems not to be obnoxious to the objection that it is unconstitutional. Motion denied.

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COCKRILL v. COOPER et al.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 968.

**1. LIMITATION OF ACTIONS—ARKANSAS STATUTES—SUIT AGAINST NATIONAL BANK DIRECTORS.**

The provision contained in Rev. St. Ark. 1837, c. 91, § 7, barring "all special actions on the case" after the lapse of one year, was repealed by implication by the code of procedure adopted in that state in the year 1868, so far as it affected actions on the case other than actions for crim. con., assault

and battery, false imprisonment, slander, and actions for words spoken whereby special damages are sustained. It was accordingly held that said provision has no application to an action on the case brought against the directors of a national bank under Rev. St. § 5239, for making excessive loans, or to actions brought against such officers for other acts, either of misfeasance or nonfeasance. 78 Fed. 679, reversed.

**2. NATIONAL BANK—LIABILITY OF DIRECTORS FOR EXCESSIVE LOANS.**

The forfeiture of the bank's charter in a suit brought by the comptroller of the currency is not a condition precedent to the maintenance of a suit against its directors, under Rev. St. §§ 5200, 5239, for excessive loans.

**3. EQUITY JURISDICTION—SUITS AGAINST DIRECTORS.**

A court of equity has jurisdiction of a suit against the directors of a national bank for excessive loans, under Rev. St. §§ 5200, 5239, where the suit is against a large number of directors, whose terms of service were not identical, where the excessive loans were inaugurated by one set of directors, and continued, renewed, or enlarged by another, and where the directors were also charged with a violation of Rev. St. § 5204, in declaring dividends.

**Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.**

On June 19, 1895, Sterling R. Cockrill, as receiver of the First National Bank of Little Rock, Ark., the appellant, exhibited his bill of complaint against E. J. Butler, since deceased, and the appellees Mark M. Cohn, John W. Goodwin, Nick Kupferle, P. K. Roots, M. G. Hall, Gus Blass, George H. Sanders, C. M. Taylor, William Farrell, Henry M. Cooper, H. G. Fleming, John M. Taylor, James Joyce, C. T. Abeles, and against Mrs. Emily M. Roots, P. K. Roots, and John McClure, as executors of Logan H. Roots, deceased, in the circuit court of the United States for the Eastern district of Arkansas. The bill charged, in substance, that the aforesaid bank was insolvent on February 1, 1893, and that Logan H. Roots was duly appointed receiver thereof by the comptroller of the currency; that Roots subsequently died, and that the complainant had been duly appointed receiver in his place and stead; that from June 2, 1890, until February 1, 1893, E. J. Butler and certain of the above-named appellees, to wit, John W. Goodwin, Gus Blass, and Nick Kupferle, were members of the board of directors of the aforesaid bank, and that during said period Logan H. Roots, now deceased, and the other appellees above named, served respectively at various times as members of the directory; that on May 23, 1890, the bank had a capital stock of \$250,000, and was then solvent and prosperous; that on June 19, 1890, H. G. Allis was elected president of the bank, in place of Logan H. Roots, who had previously served in that capacity; and that thereafter, under the direction and guidance of said Allis, and with the knowledge and consent of the aforesaid directors, the bank entered upon and pursued a business policy which soon impaired its capital, and ultimately led to its insolvency. The particular derelictions of duty complained of in the bill consisted in the charge that during their respective periods of service the above-named directors of said bank, in violation of section 5200, Rev. St. U. S., knowingly suffered and permitted loans to be made in excess of one-tenth of the amount of the capital of said bank actually paid in, to each of the following persons and corporations; that is to say, to H. G. Allis, the president of the bank; to the City Electric Street-Railway Company, a corporation of which said Allis was president; to the McCarthy-Joyce Company, a corporation in which said Allis was interested; and to the Press Printing Company, a corporation whose stock was principally owned by one George R. Brown, who was an intimate friend and business associate of said Allis. It was also alleged in the bill that by reason of such illegal and excessive loans to irresponsible parties the funds of the bank were dissipated and lost, and that it was thereby rendered insolvent. It was further charged, in substance, that on January 1, 1892, July 1, 1892, and on January 10, 1893, after the capital of the bank had become seriously impaired, so that it could not lawfully pay dividends, the directors above named nevertheless declared and paid a dividend of 4 per cent. at each of said dates, the total amount so paid being \$60,000, and that the aforesaid directors, as stockholders, each received and accepted a portion of the dividends so paid. The bill also showed that the comp-

troller of the currency had caused an assessment of 92 per cent. to be levied on the shareholders of the bank, and that such assessment, together with all of the bank's other assets, would be insufficient to pay its liabilities. The appellees above named, who were the defendants below, demurred to the bill for the following reasons: First, that it disclosed no equity; second, because it did not appear that the comptroller of the currency had procured a forfeiture of the charter of the bank, pursuant to section 5239 of the Revised Statutes of the United States; third, because the bill was uncertain, indefinite, and insufficient in its allegations, and did not show what wrongs complained of had been committed by the respective defendants; and, fourth, because the action was barred by the statute of limitations of the state of Arkansas. The circuit court held that the first three grounds of demurrer were untenable, but that the fourth ground was well taken. It accordingly dismissed the bill, upon the assumption that the action was barred by limitation. The case comes to this court on appeal from such decree.

J. M. Moore and Sterling R. Cockrill (Ashley Cockrill, on brief), for appellant.

W. E. Hemingway and John McClure (U. M. Rose, G. B. Rose, E. W. Kimball, and Morris M. Cohn, on brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Inasmuch as the case in hand was decided by the circuit court on the ground that the action was barred by limitation, that contention will be first noticed. The following provisions relative to the limitation of actions are found in Rev. St. Ark. 1837, c. 91:

"Sec. 6. The following actions shall be commenced within three years after the passage of this act \* \* \*: First, all actions of debt founded upon any contract obligation or liability (not under seal) excepting such as are brought upon the judgment or decree of some court of record of the United States of this or some other state; second, all actions upon judgments rendered in any court not being a court of record; third, all actions for arrearages of rent (not reserved by some instrument in writing under seal); fourth, all actions of account, assumpsit or on the case, founded on any contract or liability, expressed or implied; fifth, all actions for trespass on lands or for libels; sixth, all actions for taking or injuring any goods or chattels.

"Sec. 7. The following actions shall be commenced within one year after the cause of action shall accrue, and not after: First, all special actions on the case, for criminal conversation, assault and battery and false imprisonment; second, all actions for words spoken slandering the character of another; third, all words spoken whereby special damages are sustained."

Although it might seem from a casual reading of section 7, last quoted, that the one-year bar was only applicable to actions for crim. con., assault and battery, false imprisonment, and slander, yet in an early case (*Patterson v. Thompson*, 24 Ark. 55, 71, 72) the one-year bar was held applicable to an action for seduction; and language was employed from which it is plainly inferable that the court concluded that the one-year bar was applicable to all special actions on the case, as well as to those causes of action which are specifically enumerated. The foregoing sections of the limitation act appear to have remained in force, unaltered, until the adoption of the Code of Procedure during the year 1868, which contained the usual provisions abolishing all forms of action theretofore existing, and declaring that there should

thereafter be but one form of action for the protection of private rights and the redress of private grievances, to be termed "a civil action." Mansf. Dig. Ark. §§ 4914, 4915. Since the adoption of the Code of Procedure in 1868, the laws of Arkansas have been three times digested and published, in pursuance of legislative authority, namely, by Edward W. Gantt, in 1874; by W. W. Mansfield, in 1884; and by Sandels and Hill, in 1894. The several digesters last named appear to have acted on the assumption that the Code of Procedure necessarily repealed so much of section 7 of the limitation act, above quoted, as prescribed a limitation of one year for "all special actions on the case." In accordance with that view the several digesters cast sections 6 and 7 of the limitation act, above quoted, into the following form:

"The following actions shall be commenced within three years after the cause of action shall accrue, and not after: First, all actions founded upon any contract or liability, express or implied, not in writing. \* \* \* The following actions shall be commenced within one year after the cause of action shall accrue, and not after: First, all actions for criminal conversation, assault and battery and false imprisonment; second, all actions for words spoken slandering the character of another; third, all words spoken whereby special damages are sustained." Ark. Dig. St. 1874, §§ 4120, 4121; Mansf. Dig. 1884, §§ 4478, 4479; Sand. & H. Dig. 1894, §§ 4822, 4823.

Such action on the part of the digesters seems to have met with the full approval of the bench and bar of the state of Arkansas for the past quarter of a century. The supreme court of the state has never decided that the provision found in section 7, c. 91, Rev. St. Ark. 1837, barring "all special actions on the case" in one year, is still in force. On the contrary, it has expressly ruled that the limitation applicable to an action brought against a railway company for overflowing the land of an adjoining proprietor by wrongfully obstructing a ditch or drain is three years, and that the same period of limitation applies to an action to recover damages occasioned by a nuisance. *Railway Co. v. Morris*, 35 Ark. 622; *Railway Co. v. Chapman*, 39 Ark. 463, 472; *Railway Co. v. Biggs*, 52 Ark. 240, 12 S. W. 331; *Railway Co. v. Anderson*, 62 Ark. 360, 365, 35 S. W. 791. Prior to the Code, wrongs of such a nature would have been redressed by actions on the case. Therefore the cases cited decide, in effect, that the provision barring all special actions on the case after the lapse of one year is no longer in force. Nor is this view, which seems to have been entertained by all the digesters of the Arkansas statutes, wholly without reasons for its support. Statutes of limitation sometimes operate to extinguish a cause of action, but generally they are so worded as to bar the remedy by which a cause of action may be enforced. *Finnell v. Railway Co.*, 33 Fed. 427. Before the various forms of action known to the common law were abolished by the Code, a litigant frequently had a choice of remedies for the enforcement of a right or the redress of a wrong; and in such cases it sometimes happened that relief could be obtained in one form of action, as, for instance, by an action of debt or assumpsit, although the remedy for the same wrong by an action of trover was barred by limitation. This effect of the statute upon different forms of action is illustrated both by the text-books and the authorities, although the cases are not numerous. *Lamb v. Clark*, 5 Pick. 193; *Burdoine v. Shelton*, 10 Yerg. 41, 47; *Bedford v.*

Brady, Id. 350, 354; McCluny v. Silliman, 3 Pet. 270, 278; Ang. Lim. (5th Ed.) § 72; Wood, Lim. §§ 35, 58, and cases there cited. In view of this well-known operation of the statute of limitations in certain cases, the able lawyers who were selected to digest and arrange the Arkansas statutes, subsequent to the adoption of the Code, doubtless concluded that the clause of the limitation act barring "all special actions on the case" after the lapse of one year was addressed simply to a particular form of action, and that, when the form of action in question was abolished by the Code, nothing was left upon which the limitation could legitimately operate, and that it was therefore repealed. Whether this reasoning was entirely conclusive, we need not stop at present to inquire. It is sufficient for present purposes, and in this jurisdiction, to say that it has been accepted as satisfactory by the bench and bar of the state of Arkansas for the past 25 years, and that it is now too late to disturb a rule which has become firmly established in the courts of that state. If an action for unlawfully obstructing a water course is not barred until after the lapse of three years, then we can perceive no reason why the liability which the defendants below incurred by the acts of misfeasance and nonfeasance charged in the bill should be barred by a shorter period. In both classes of cases the liability is one that is imposed or created by law, and there is nothing in the statutes of the state which indicates that the period of limitation is, or ought to be, different. The circuit court erred, therefore, in holding that the one-year bar was applicable to the present controversy.

The other points raised by the demurrer were decided below in favor of the receiver, but as they have been discussed by counsel for the appellees, and as the case returns to the lower court for a further hearing, it becomes necessary to consider them.

The question whether the directors of a national bank can be made to respond for losses occasioned by excessive loans, under the provisions of sections 5200 and 5239 of the Revised Statutes, in advance of a forfeiture of the bank's charter, has been variously decided at nisi prius. The authorities holding the affirmative of this proposition are the following: Stephens v. Overstolz, 43 Fed. 771, 772; Bank v. Wade, 84 Fed. 10, 13, 14; 3 Thomp. Corp. §§ 4113, 4303. The cases which have taken a contrary view are the following: Welles v. Graves, 41 Fed. 459, 468; Hayden v. Thompson, 67 Fed. 273, 277; and Gerner v. Thompson, 74 Fed. 125, 131. The cases of Kennedy v. Gibson, 8 Wall. 498, and Conway v. Halsey, 44 N. J. Law, 462, which have occasionally been cited in support of the latter view, in reality have no immediate bearing on the point at issue, and are therefore neither important nor authoritative. Conway v. Halsey decides that an action at law cannot be maintained by a stockholder of a national bank against the president and directors for mismanagement of the corporate affairs, because the right of action for damages incident to such mismanagement is vested primarily in the corporation, while the case of Kennedy v. Gibson decides that the receiver of a national bank cannot, of his own volition, inaugurate a proceeding against stockholders to enforce their personal liability under section 5151, but must await the action and direction of the comptroller of the currency.



The argument in support of the contention that the directors of a national bank are not liable to be sued, either by the bank or its receiver, for damages occasioned by excessive loans, prior to a forfeiture of the bank's charter, seems to be founded to some extent on the assumption that the right to sue the directors of a national bank for negligent or excessive loans is a right which is created solely by the federal statute, that such a cause of action is purely statutory, and that, before a suit thereon can be maintained, all the conditions mentioned in section 5239, including a forfeiture of the bank's charter, must be shown to exist. This, however, is not a correct view of the scope and purpose of the statute, as was pointed out by Mr. Justice Miller in *Stephens v. Overstolz*, 43 Fed. 465, and as was declared, in substance, by Mr. Chief Justice Fuller in the case of *Briggs v. Spaulding*, 141 U. S. 132, 146, 11 Sup. Ct. 924. The concluding paragraph of section 5239, which declares, in effect, that the directors of a national bank shall be personally liable for damages resulting from violations of the national bank act, provided they participate therein or assent thereto, is nothing more than a recognition of a liability which the directors of such institutions would incur at common law in the absence of the statute. The directors of a bank or other corporation are, and always were, personally liable at common law for unauthorized acts, as well as for a failure to exercise proper care and diligence in the discharge of the duties of their office, when such acts of misfeasance or nonfeasance are productive of damage to the corporation. *Hodges v. Screw Co.*, 1 R. I. 312; *Sperling's Appeal*, 71 Pa. St. 11; *Hun v. Cary*, 82 N. Y. 65, 72, 73; *Brinckerhoff v. Bostwick*, 88 N. Y. 52, 58; *Mor. Priv. Corp.* §§ 551, 556, and cases there cited. Section 5200 of the Revised Statutes, which prohibits loans to any one person, firm, or corporation in excess of 10 per cent. of the capital stock of a national bank actually paid in, creates a fixed standard by which to determine, in many cases, whether loans which have been made to particular individuals or corporations are excessive, and for that reason indicative of negligence or bad faith, without remitting those questions to the decision of a jury or a chancellor, while section 5239 simply gives expression to a rule of the common law, that directors who have knowingly assented to such excessive and unauthorized loans shall be personally liable for all damages which the corporation thereby sustains. If loans in excess of 10 per cent. of the capital stock are made, the statute obviates the necessity of determining whether they were excessive, and of making any inquiry into the motives or conduct of the directors, other than the inquiry whether the loans were knowingly made or assented to. The result is that the statute, considered as a whole, prescribes a standard of duty, such as might be prescribed by a by-law of the corporation, without creating a new cause of action, or altering the foundation upon which the personal liability of directors for wrongful or negligent acts ultimately rests or depends. Viewing the case in this aspect, we are not able to concede that congress intended by section 5239 to declare that the directors of a national bank should only be subject to a suit for losses occasioned through excessive loans in those cases where the charter has first been forfeited at the instance of the comptroller of the cur-

rency. That interpretation of the statute, to the extent that it would prevent a national bank, while a going concern, from maintaining a suit against its directors for losses sustained by acts that were confessedly unlawful, places the directors of such institutions in a more favorable position than the directors of other banks which are not subject to the provisions of the national bank act. Such, we believe, was not the intent of the lawmaker. Cases may easily be supposed, and have doubtless occurred, where a national bank has sustained damage by reason of excessive loans made with the approval of its board of directors, and yet the losses incident to such wrongful acts were not so great as to impair the bank's capital, and render a forfeiture of its charter either necessary or expedient. It can scarcely be supposed that congress intended to frame a law which in a case of that kind would either compel the comptroller to forfeit the franchises of the corporation, or suffer its directors to escape liability for a plain violation of law; yet such would be the necessary result if the contention in behalf of the appellees is well founded. Without pursuing this branch of the case at greater length, we shall content ourselves with the statement that the forfeiture of a bank's franchises, in a suit brought by the comptroller for that purpose, is not, in our judgment, a condition precedent to the maintenance of a suit against its directors for excessive loans. The two proceedings last mentioned have no necessary relation to each other. The directors of a bank, being agents of the corporation, are bound by the law of agency to act within the scope of the bank's charter and by-laws, and to exercise at all times a reasonable degree of care and diligence in the discharge of the duties which they have been appointed to perform. If they are guilty of a culpable violation of this obligation, and the corporation thereby sustains damage, the directors are personally liable therefor to the corporation while it is a going concern, and to its receiver when it has become insolvent; and this without reference to the fact that the franchises of the corporation have not been forfeited.

Another important question which is raised by the demurrer, and was discussed at some length on the argument, is whether the wrongs complained of in the bill may be redressed in equity, or whether a court of law is alone competent to afford relief. In behalf of the appellees it is urged, in substance, that, as the directors of a corporation are not vested with the title to its property and effects, they are not trustees, but mere agents, of the corporation, and that an action brought against them by the corporation or its receiver to recover damages for mismanagement of the corporate affairs is necessarily one of legal cognizance, which can only be maintained at law. It may be conceded that directors are not, technically, trustees, because they are not vested with a title to the corporate property, and that their relation to the corporation which they represent is that of agents, and that for many acts of misfeasance and nonfeasance they can be sued at law. But it does not follow from this concession that the jurisdiction of courts of law over directors is so far exclusive as to prevent courts of equity, under all circumstances, from affording redress for similar wrongs. It is admitted, as we understand, even by those courts which have taken the most advanced ground in support of the juris-

diction at law, that cases may arise where the obstacles in the way of obtaining speedy and complete relief at law for illegal and negligent acts of directors are so great as to justify a resort to equity. *O'Brien v. Fitzgerald*, 143 N. Y. 377, 38 N. E. 371; *Id.* (Sup.) 39 N. Y. Supp. 707; *Id.*, 150 N. Y. 572, 44 N. E. 1126; *Dykman v. Keeney*, (N. Y. App.) 48 N. E. 895. In the case of *Hayden v. Thompson*, 36 U. S. App. 361, 17 C. C. A. 592, and 71 Fed. 60, this court upheld the right of a receiver of an insolvent national bank to maintain a bill in equity against the shareholders of the bank, collectively, to recover dividends which had been paid in violation of section 5204 of the Revised Statutes. The right to sue in equity was maintained on the ground of avoiding a multiplicity of actions; also, on the ground that the suit was one to redress a fraud and breaches of trust; and, generally, because the remedy at law was inadequate. Many other courts have entertained bills in equity, or have asserted their right to do so, for the purpose of compelling the directors of a corporation to make good losses which the corporation had sustained by reason of their unauthorized, negligent, or fraudulent acts. *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924; *Hornor v. Henning*, 93 U. S. 228; *Stone v. Chisolm*, 113 U. S. 302, 5 Sup. Ct. 497; *Robinson v. Hall*, 25 U. S. App. 48, 12 C. C. A. 674, and 63 Fed. 222; *Hodges v. Screw Co.*, 1 R. I. 312; *Ackerman v. Halsey*, 37 N. J. Eq. 356; *Williams v. McKay*, 40 N. J. Eq. 189; *Crown v. Brainerd*, 57 Vt. 625; *Swentzel v. Bank*, 147 Pa. St. 140, 23 Atl. 405, 415; *Brinckerhoff v. Bostwick*, 99 N. Y. 185, 1 N. E. 663; *Id.*, 105 N. Y. 567, 12 N. E. 58; *Schley v. Dixon*, 24 Ga. 273; *Bank v. Bosseux*, 3 Fed. 817; *Welles v. Graves*, 41 Fed. 459; *Bank v. Wade*, 84 Fed. 10; *Stephens v. Overstolz*, 43 Fed. 771, 773. Indeed, if there is any conflict of opinion touching the power of a court of chancery in this respect, it arises over the circumstances that shall be deemed sufficient to warrant its exercise. It is doubtless true that a stronger showing, by allegation and proof of the necessity for equitable relief, is required in some jurisdictions than in others; but the right of a court of equity to exercise jurisdiction in suits brought against directors, when the remedy at law is, for any reason, not fully adequate, cannot be successfully denied. The truth is that the office and functions of a director are so much akin to those of a trustee that in many cases no substantial reason can be given for exempting directors from that degree of control by a court of chancery which such courts ordinarily exercise over trustees. The doctrine is well settled in the federal courts that, in those cases where the right of a court of equity to afford redress for wrongful acts depends upon the inadequacy of the legal remedy, courts of equity may exercise jurisdiction, unless the legal remedy is "as plain, \* \* \* practical, and efficient to the ends of justice and its prompt administration as the remedy in equity." In determining whether a suitor should be permitted to sue in equity, the federal courts have always attached much importance to the fact that the remedy in the latter forum, as compared with the remedy at law, "will save time and expense and a multiplicity of suits, and settle finally the rights of all concerned in one litigation." In other words, the argument *ab inconvenienti* is never overlooked, but is given great weight. *Boyce's Ex'rs v. Grundy*, 3 Pet. 210, 213;

Oelrichs v. Spain, 15 Wall. 211, 228; Preteca v. Land-Grant Co., 4 U. S. App. 326, 330, 1 C. C. A. 607, and 50 Fed. 674; Hayden v. Thompson, 36 U. S. App. 361, 368, 17 C. C. A. 592, and 71 Fed. 60. If these tests are applied to the case in hand, we think it may be safely asserted that the receiver is entitled, on the showing made by the bill, to invoke the remedial powers and processes of a court of chancery to redress the wrongs of which he complains. The proceeding is brought against 16 directors, or their personal representatives, whose respective terms of service were not identical, except in four cases. If the receiver is compelled to sue at law, numerous actions must be brought; and very likely several separate actions would have to be brought against some of the directors, to comply strictly with the rules of procedure at law governing the joinder of parties. It is also fair to infer from what is stated in the bill that the excessive loans therein complained of were inaugurated by one set of directors, and either continued, renewed, or enlarged by another, so that a suit brought against any one of the directors would probably involve an inquiry into the proceedings of the board of directors, and into many of the financial transactions of the bank for the entire period during which its affairs are alleged to have been mismanaged. If the legal remedy is pursued, it is probable, therefore, that the receiver would find it necessary, in preparing his proof in numerous cases, to travel over much of the same ground in each case, while it is certain that the burden and expense of the litigation would be largely increased, and that the litigation itself would be needlessly prolonged and delayed. The right to sue in equity, however, does not depend altogether upon the considerations last mentioned. One charge contained in the bill is that the directors on several different occasions declared and appropriated dividends, in violation of section 5204 of the Revised Statutes. An investigation into the merits of this charge will necessarily involve a critical inquiry into the financial condition of the bank on each of said occasions; and as this court held in Hayden v. Thompson, 36 U. S. App. 361, 369, 17 C. C. A. 592, and 71 Fed. 60, that is an inquiry which is peculiarly appropriate to a court of chancery, since an account of any considerable length or intricacy cannot be stated before a jury with that degree of fairness and accuracy which is necessary, or at least desirable, in a judicial proceeding. We are led to the conclusion, therefore, that the legal remedy for the grievances alleged in the bill is neither as practical and efficient, nor as conducive to the speedy and correct administration of justice, as the remedy obtainable in equity. In the latter forum it will be possible in a single proceeding, and with much less labor and expense, to measure the responsibility of each director for the losses which the bank may have sustained in consequence of the alleged negligent and unauthorized acts of the directors, and at the same time to adjust all rights and equities of the directors, as between themselves, and as between them and the receiver, with reasonable accuracy, and with a close approximation to exact justice. In a case of this character such a result cannot be obtained at law. In conclusion, on this branch of the case, it is proper to add that for obvious reasons courts of equity are best adapted to adjust controversies such as usually arise between receivers of insolvent cor-

porations and the directors and managers of such concerns. The remedial processes of a court of chancery are of special utility in such cases, since it is usually found necessary, in the course of such proceedings, to unravel many irregular and intricate transactions, to the end that the responsibility for losses which have been sustained through the careless or fraudulent acts of directors or other managing officers may be located where it of right belongs. In a court of law there is always a greater probability that the guilty will escape detection, or that the innocent will be made to suffer for the wrongful acts of others. For this reason it seems evident that receivers and assignees of insolvent corporations will be embarrassed and delayed in the discharge of their duties, that the creditors of such concerns will in many cases sustain loss, and that equal and exact justice will not always be done, if the right of such officers to invoke the remedial powers of a court of chancery in aid of the administration of the trusts that have been committed to their charge is denied. The public interest therefore seems to demand that the right of such officers to sue in the forum of equity should neither be viewed with disfavor, nor denied on slight or technical grounds. It is sufficient to say that in the present case we have discovered no adequate reasons for denying the complainant's right to equitable relief.

This disposes of the fundamental objections to the bill on which the appellees seem to chiefly rely, and we deem it unnecessary to consider other objections thereto on the present occasion. The suit was dismissed by the lower court solely on the ground that it was barred by limitation, and even if it is true, as has been suggested, that some allegations are not sufficiently definite and certain, the appellant should have an opportunity to remedy such defects by amendment. It is made clear, we think, by the averments of the complaint, that the defendants, or some of them, were guilty of acts which entitle the receiver to recover the damages which were thereby sustained; and, that fact being apparent, we will not notice on the present appeal any technical defects of statement, which may be easily remedied by amendment. The decree of the circuit court is reversed, and the cause is remanded to that court for further proceedings not inconsistent with this opinion.

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BEARDSLEY v. BEARDSLEY.

(Circuit Court of Appeals, Eighth Circuit. February 14, 1893.)

No. 967.

1. TENDER—CONDITIONS—INTEREST.

Where a decree was rendered directing complainant to pay to defendant, or to the registry of the court, a certain sum, and defendant, on such payment, to deliver to complainant, or into the registry of the court, certain stock, from which decree defendant appealed to the supreme court, *held*, that a tender to defendant's solicitor of the amount of the decree, with interest, coupled with a demand for the immediate surrender of the stock, and involving a settlement of the pending appeal, was bad, as a conditional tender, and did not stop the running of interest. This would be so although nothing was said respecting the dismissal of the appeal, if the effect of acceptance of the tender would be to prejudice the prosecution of the appeal.

## 2. SAME—INTEREST.

In order that a tender shall stop the running of interest, the debtor must show that he has kept on hand, so as to be constantly ready and able to pay the amount of the tender in lawful money at any time the creditor should elect to take it.

### Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

On the 11th day of March, 1886, appellee, Paul F. Beardsley, began suit in equity against John D. Beardsley, appellant, and the Arkansas & Louisiana Railway Company, in the United States circuit court for the Eastern district of Arkansas, the general object of which was to obtain an accounting between the Beardsleys, and to compel the transfer to Paul F. Beardsley of certain shares of stock claimed by him in the said railway company. This litigation resulted in a decree, February 24, 1887, adjudging that said Paul F. Beardsley pay to John D. Beardsley the sum of \$7,756.29, with interest from December 24, 1886, at the rate of 8 per cent. per annum until paid. This decree provided that said sum of money could be paid to said John D. Beardsley, or into the registry of the court. It was also adjudged in said decree that said John D. Beardsley should, upon such payment, deliver to the complainant, or into the registry of the court, 1,704 shares, of the face value of \$100 each, of the full-paid stock of the said Arkansas & Louisiana Railway Company. The decree declared that said John D. Beardsley should have a lien on said stock for the payment of said sum of money, and, in default of such payment within 30 days from the date of the decree, that said stock be advertised and sold by the master therein named. From this decree, John D. Beardsley, in due form, took an appeal to the supreme court of the United States on the 30th day of March, 1887, and on the 6th day of April, 1887, gave a supersedeas bond therein, which was approved by the court on the 9th day of April, 1887. In this condition of the controversy, Paul F. Beardsley claims to have made on the 25th day of April, 1887, a tender to J. M. Moore, solicitor in said suit for John D. Beardsley, of the sum of \$7,968.30, the amount of principal, with interest on same, decreed to be paid by said Paul F. Beardsley to John D. Beardsley, which fact, and the legal effect thereof, are the principal matters in controversy in this suit.

On October 22, 1887, pending said appeal, Paul F. Beardsley filed a supplemental bill in said cause; making the St. Louis, Iron Mountain & Southern Railway Company and Jay Gould defendants. This supplemental bill, after reciting the proceedings and decree in the above-named original cause, set out an agreement hypothecating the bonds of the Arkansas & Louisiana Railway Company with the St. Louis, Iron Mountain & Southern Railway Company, by which the former company was to pay not less than \$12,000 per year of the net earnings of the road on the indebtedness owing to the St. Louis, Iron Mountain & Southern Railway Company, secured by said hypothecation. The bill alleged that the earnings of the Arkansas & Louisiana Railway Company for the year 1887 amounted to more than \$42,000, only \$2,000 of which had been paid on said indebtedness of the Arkansas & Louisiana Railway Company to the St. Louis, Iron Mountain & Southern Railway Company, and charged that John D. Beardsley had been permitted to receive and use, and was using, the net earnings and income of the said Arkansas Railway Company, and, in disregard of said decree, was appropriating to his own use the earnings of the road. The bill then prayed for the appointment of a receiver for the said Arkansas & Louisiana Railway Company, to take charge of and operate said road under the directions of the court, and to take possession of all its earnings, and, after paying the necessary operating expenses, to turn over the surplus to the St. Louis, Iron Mountain & Southern Railway Company, in accordance with said agreement between the said railroads; that said receiver be empowered and directed, until all the indebtedness of the Arkansas Railway Company to the St. Louis Railway Company be fully paid; that the said John D. Beardsley and the said Arkansas Railway Company and the said St. Louis Railway Company be enjoined from interfering with, or otherwise controlling, the said Arkansas Railway Company. It prayed that the master of the court be appointed to ascertain and report what part, and how much, of the earnings of the said Arkansas Railway Company had been taken by John D. Beardsley and applied to his use, or to purposes for-

elign to said Arkansas Railway Company, since the filing of said original bill in this case, and that said John D. Beardsley be compelled to pay to said receiver the amount so ascertained by such master, the same to be paid by such receiver upon the indebtedness aforesaid. The answer of John D. Beardsley therein, after denying the allegations of the bill, alleged that the railway company was indebted to him on certain accounts, and that the money received by him was in payment of said indebtedness. Jay Gould and the said railway company answered, setting up the contract between John D. Beardsley and the Arkansas Railway Company, by which 51 per cent. of the stock and bonds of the Arkansas Railway Company had been transferred to said Gould to secure an indebtedness of \$109,609.57, under a construction contract of date March 7, 1887. On December 3, 1887, the receiver was appointed, who, under the direction of the court, took possession of the said Arkansas Railway Company, with all its properties, of every description, then in the hands of said John D. Beardsley, with further directions that whenever the surplus earnings and revenues of the said Arkansas Railway Company, after paying the operating expenses and for repairs and materials, amount to \$1,000, the same shall be paid over by the receiver to the St. Louis Railway Company, on the debt due said company from the Arkansas company.

On July 25, 1889, the court referred the matter to C. B. Moore, master in chancery, with directions to state the account between said John D. Beardsley and the Arkansas Railway Company since August 20, 1886, in the case to which this proceeding is supplemental, and especially to ascertain what sums of money had been allowed or paid to John D. Beardsley by the directors of said railway company since the last-named date, or otherwise illegally allowed said defendant. On August 5, 1889, the master filed his report. And on May 9, 1891, the court rendered a decree therein, which, inter alia, adjudged that the Arkansas Railway Company recover from John D. Beardsley the sum of \$21,072.16, with interest from the 5th day of August, 1889, the date of the master's report; that upon the payment by said Arkansas Railway Company of its debt to the St. Louis Railway Company, for which certain of the bonds of the said Arkansas Railway Company are held and pledged, as per the settlement contract between said companies of June 11, 1885, and upon the payment by Paul F. Beardsley of his indebtedness to said John D. Beardsley, said John D. Beardsley, the Arkansas Railway Company, and the St. Louis Railway Company should deliver to said Paul F. Beardsley, or his solicitors, 80 of the 240 first mortgage bonds then held by the St. Louis Railway Company as collateral security as aforesaid. On the 9th day of May, 1891, on the application of Jones & Martin, solicitors of Paul F. Beardsley, the court made an order fixing a lien in favor of said Jones & Martin on said judgment for \$1,164.76, which lien was on the 11th day of August, 1891, transferred by Jones & Martin to Paul F. Beardsley; and on the 9th day of December, 1895, Paul F. Beardsley acknowledged satisfaction on the record of said decree in favor of Jones & Martin. On the margin of the record of the final decree rendered February 24, 1887, in the original cause, said Jones & Martin on June 2, 1891, made an entry reciting that June 2, 1891, they had filed their statement, claiming a lien in the original cause in their favor of \$5,000 each for their services as solicitors, and acknowledging full satisfaction thereof. On the 17th of July, 1895, another indorsement was made on the record of the decree in the supplemental cause, reciting that in pursuance of an agreement of February 23, 1892, between said Gould and John D. Beardsley, satisfaction of said judgment for \$21,072.16 was acknowledged, subject to the rights and interest in same belonging to Paul F. Beardsley by virtue of an agreement between said Gould and Paul F. Beardsley, and, subject to the lien in favor of the said Jones & Martin, one-third "of this judgment is hereby assigned to said Paul F. Beardsley, without recourse on the Arkansas & Louisiana Railway Company." And thereupon said Paul F. Beardsley acknowledged on the record satisfaction in full of one-third interest acquired by him in said decree under assignment thereof by the Arkansas Railway Company aforesaid. The decree in the original cause was affirmed on said appeal to the supreme court in 1891, and thereafter, on the 3d day of August, 1891, the said Paul F. Beardsley, acting through his solicitor, tendered the same amount originally tendered to said Moore, again requesting delivery of the said stock, to which Moore answered that he did not have the stock in his possession, but he would receive any money Paul F.

Beardsley had to pay, and credit it on the decree. After one or more of such interviews, finally, on August 7, 1891, Paul F. Beardsley's solicitor paid over to said Moore, without condition, the said sum of \$7,968.30, which was principal and interest due on the money judgment in favor of John D. Beardsley to April 25, 1887, and which was credited by said Moore, of that date, on said judgment. Shortly thereafter, on the application of said Jones & Martin, in their intervention claiming a lien on said shares of stock adjudged to Paul F. Beardsley, the court made an order directing said Gould and John D. Beardsley to turn over the same to the registry of the court, subject to its orders. The present contention between the Beardsleys is as to whether or not the tender of April 25, 1887, was sufficient to stop the running of interest thereafter; the said John D. Beardsley refusing to enter satisfaction of the debt due him under the original decree unless the interest accruing between the 25th day of April, 1887, and the 7th day of August, 1891, amounting to about \$2,657.80, was paid. Paul F. Beardsley instituted the present suit August 13, 1891, alleging the tender of April 25, 1887, with other allegations tending to show that John D. Beardsley was not entitled to demand further interest after April 25, 1887, praying for a decree enjoining him from a threatened advertisement and sale of said shares of stock to satisfy said interest, and for a decree compelling the satisfaction of said judgment. On the hearing of this bill the circuit court entered a decree as prayed for in the bill, to reverse which John D. Beardsley prosecutes this appeal.

J. W. House, for appellant.

John J. Joyce (Edward H. Murphy, on brief), for appellee.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

Had appellee in his bill disclosed on its face some of the positions taken in argument on this hearing, by his counsel, as to some matters of fact, the bill would have been quite vulnerable to attack for inconsistency and contradiction. While the pleader may allege any number of facts, all tending to show that in legal effect they entitle him to the relief sought, yet the facts pleaded must be consistent with each other. If one fact stated be immediately followed by another statement wholly contradictory of the other, the pleader would, in justice to the adversary, be compelled to elect upon which of the two allegations he would stand.

The first contention of counsel for appellee is that the tender of April 25, 1887, was not accompanied with a demand for delivery of the stock to him. He then argues his cause on the theory of such demand having been made. In the forum of conscience he ought to admit the fact of a conditional tender before being heard to base an argument thereon; for, if such be the actual fact, it is not true that he made a tender of the naked payment of \$7,968.30 without demanding a delivery of the stock. In the absence of any opinion in this record of the circuit court, we are not advised as to the particular ground upon which the decree was based. Because of the various and independent positions assumed in argument in justification of the decree, we cannot assume that the court found as a matter of fact that the tender of April 25, 1887, was made unconditionally. And, in view of all the evidence and circumstances, we are unable to perceive any reasonable escape from the conclusion that the offer to pay the money was made to depend upon the simultaneous delivery of the



stock found by the decree to belong of right to appellee. In the first place, it is indisputable that appellee, in order to provide money for this tender, arranged therefor with one Drexler, at San Francisco, on the understanding between them that said stock was to be turned over to him as collateral security. To this end, Drexler never put the money into appellee's hands, or subjected it to his absolute control, but protected himself by drawing a check for the amount on a New York bank, made payable to the bank at Little Rock, Ark., and sent it thereto, accompanied with a letter of special direction. So, when the money was drawn out of the bank to make a tender, it was not intrusted to the hands of appellee; but the clerk of the bank took it, and accompanied Mr. Martin, appellee's solicitor, to make the tender. And, when the tender as made was refused, the money was returned into the bank, and Drexler's check therefor was destroyed. Mr. Martin's version of what occurred between him and Mr. Moore, appellant's solicitor, at the time of the alleged tender, is substantially as follows:

"In the afternoon of that day he got C. T. Walker, clerk of the bank, to go, with the sum of \$7,968.30, in legal-tender money, with him, to Moore's office, and told Moore that, as the solicitor of Paul F. Beardsley, he had come to make him a tender of said money. Moore said he wanted to put his answer in writing, and that it would be, in substance, that he would accept the money, but could not deliver the stock. That he (Martin) then said to him that he made the tender of the amount under decree of the court; that he could take it, and deliver the stock. Moore wanted him to reduce his tender to writing, but he replied that no writing was necessary, as he brought the money, with Mr. Walker, as a witness to the transaction. Moore replied that he was willing to accept the money, and hold it pending the appeal to the supreme court."

Without at all questioning that Mr. Martin acted within the admissible lines of fidelity to his client, it must be said that there was some refined diplomacy in his approach to Mr. Moore. His ingenuity to obtain the advantage of an apparent unconditional tender, while being sure that his client was to have the stock on parting with the money, is palpable. That the matter of the delivery of the stock was not only discussed between them, but must have first been suggested by Martin, is evident from Martin's own statement, because he states that Moore said he would accept the money, "but could not deliver the stock." Why should Moore make this response, unless it was understood that the tender was made on demand of the delivery of the stock? That the apprehension of Mr. Moore was well founded, that the acceptance of the money was designed by Mr. Martin to imply a settlement of the pending appeal, is made manifest by the statement then made by Martin to Moore, "that he made tender of the amount under decree of the court." Mr. Moore, an astute and cautious lawyer, alive to the infirmity of human memory, and the liability to misconception of language employed in a verbal colloquy, suggested at the outset that he (Martin) put his tender in writing, and that he (Moore) would make his answer in writing. This reasonable and fair suggestion, Mr. Martin saw fit to decline. Mr. Moore, in order that his position might be made absolute, did at the time write out his answer, as follows:

"Messrs. Martin and Jones: In response to the tender here now made by you of the sum of \$7,966.57 in payment of the amount decreed to the defendant John D. Beardsley under the decree in said cause, I hereby agree to accept and hold the same without prejudice to the supersedeas granted under the appeal taken by John D. Beardsley in said cause to the supreme court.

"John M. Moore,

"Attorney for Defendant J. D. Beardsley.

"The above is my response to the tender in said cause. Mr. Martin demanded that I deliver the stock. I advised him I did not have it."

If, indeed, it was Mr. Martin's purpose to make an unconditional tender of the money, it would have been the simplest and frankest method of making that fact known, to have at once said to Mr. Moore, "I make you this tender, whether or not you or your client deliver the stock." More than this, if it was the purpose in good faith of Mr. Martin to pay over this money without more, the sure and certain way was afforded him by the decree of the court, which authorized the payment of the money into the court registry. Had he done this, all controversy would have been ended as to the character and effect of the tender. This opportunity and right, however, the appellee was unwilling to avail himself of, for the obvious reason that under his arrangement with Drexler he could not leave the money on deposit with the clerk of the court without putting up with Drexler, as collateral security therefor, the said shares of stock.

Unwilling to rest the decree upon the question of fact, that no demand was made for the delivery of the stock at the time of the tender of the money, counsel for appellee contends that, even if such demand was made, it was only such condition as the appellee had a right to insist on, as payment of the money and delivery of the stock were made by decree of the court interdependent or simultaneous acts, to be performed by the respective parties; citing in support the language of the court in *Halpin v. Insurance Co.*, 118 N. Y. 165-176, 23 N. E. 482, 485:

"That, where there is no dispute as to the amount of the debt, a tender may always be restricted by such conditions as by the terms of the contract are conditions precedent or simultaneous to the payment of the debt, or proper to be performed by the party to whom the tender is made."

As applied to the subject-matter under consideration by the court therein, the above quotation may be conceded to have expressed a proper rule. But as applied to the facts in this case it is very misleading. When this alleged tender was made on the 25th day of April, 1887, John D. Beardsley had taken an appeal from the decree to the supreme court. He had given therein a supersedeas bond, not only as evidence of his good faith in taking the appeal, but as ample security and protection to the appellee for any damage sustained by him in consequence of such appeal. The record shows that on such appeal he claimed an account against Paul F. Beardsley for over \$16,000, and he complained that the court in its decree cut off his claim by over one-half. He also controverted by his appeal the right of Paul F. Beardsley to the amount of stock awarded him by the decree of the circuit court. There is nothing presented in this record to justify this court in impugning the good faith of John D. Beards-

ley in prosecuting said appeal. He could not have accepted the money tendered on the 25th day of April, 1887, on the theory of appellee's counsel, that it carried with it, *ex vi termini*, a demand for the stock, and that its acceptance therefore would have been tantamount to a surrender of the stock, without abandoning the prosecution of his appeal. Mr. Moore was right in his contention that he should be required to accept the money on condition only that it should not prejudice the appeal, for the reason that the very moment the fact should have been brought to the attention of the supreme court that appellee had performed the decree on his part, and that appellant had accepted its performance, the court would have dismissed the appeal. The supreme court is rigid in its adherence to the rule of practice that whenever the matter appealed from has been adjusted between the parties, or the judgment of the lower court has been performed, the appeal thereafter presents only a moot case, and should be dismissed. *Little v. Bowers*, 134 U. S. 557, 10 Sup. Ct. 620, and cases cited. Therefore the tender made by appellee involved not only the immediate delivery of the stock in question to the appellee, but it involved a surrender of appellant's right to the opinion and judgment of the supreme court on the matter in controversy between the parties. Such a tender was in the worst form of a conditional tender, denounced by all the authorities as insufficient to stop the running of interest. It is the common learning of the books that the tender of a sum, even when the amount is not controverted, coupled with a demand that the other party perform some other act, or surrender some other right, as a condition of its acceptance, is bad, for the simple reason that the party making the tender "has no right to attach a penalty to the condition." *Henderson v. Cass Co. (Mo. Sup.)* 18 S. W. 992; *L'Hommiedieu v. Dayton*, 38 Fed. 926; *Brown v. Gilmore*, 8 Greenl. 107; *Roosevelt v. Bank*, 45 Barb. 579. Waiving the question as to whether or not the rule that a tender made *pendente lite*, in order to stop the running of interest, requires that the money should be paid into court, should be applied to the facts of this case, there is another rule firmly established in the law governing tenders,—that, in case of a tender in *pais*, to make it effectual to stop accruing interest, the money so tendered, or other like lawful money, should be kept on hand by the party pleading the tender, so that he would be ready and able to pay the same to the payee at any time the latter should elect to take it. The debtor in such case avoids the payment of interest upon the supposition that the creditor should have accepted the money, and that thereafter the debtor had set it apart for him, subject to his order, and the debtor has thus been deprived of its use, and any profit therefrom. In *Gyles v. Hall*, 2 P. Wms. 378, it is laid down that:

"To entitle the mortgagor to a discharge of the interest, it must appear that ever since the tender and refusal he has kept the money ready for the paying of the mortgage, and that no profit has been made of it. That the party making the tender must be at all times thereafter in readiness to pay does not appear to be anywhere questioned."

And so are all the authorities. *State v. Illinois Cent. R. Co.*, 33 Fed. 730; *Thayer v. Menkie*, 86 Ill. 474; *Shields v. Lozear*, 22 N. J.

Eq. 451; *Gray v. Angier*, 62 Ga. 597; *Park v. Wiley*, 67 Ala. 312; *Slack v. Price*, 1 Bibb, 274; *Roosevelt v. Bank*, 45 Barb. 579; *Bissell v. Heyward*, 95 U. S. 587. In *Park v. Wiley*, supra, the court said:

"In the present case it is apparent the tender was not kept open, nor did the vendee continue in readiness to pay. A part of the money had been borrowed, and it was immediately returned to the lender; the vendee deriving the benefit from its use. When a tender is relied on, the duty resting on the party making it is to keep the money safely,—not the identical coin or bank notes, but money of like kind,—so that he may produce it when required. The tender is then kept open, ready for the acceptance of the other party when he manifests a willingness to receive the money."

It is too clear to admit of reasonable debate that appellee, after the 25th day of April, 1887, to the 7th day of August, 1891, neither had on hand the identical money, nor any other like money. It is true, he stated in his deposition that he could have obtained the money at any time, but the controlling facts affirmatively appear that the check which represented the money tendered was destroyed; that he thereafter had no money in bank; and he does not show that he had any money anywhere. On the contrary, it appears that when the court made the order on the intervening application of his attorneys, impounding the shares of stock to enforce the lien thereon for the fees of Jones & Martin, he applied to the court for a modification of this order, on the ground, stated by him, that he could not raise the money with which to make the tender of August, 1891, without the use of this stock as collateral security. And, furthermore, the fact appears that when he obtained the money from Drexler to make the tender of August 7, 1891, he again pledged said stock as collateral security therefor.

The final contention of appellee is that between the 25th day of April, 1887, and the time of the payment of the money, in August, 1891, the appellant made use of the stock, which should have been turned over to appellee, and made a profit therefrom, while the appellee suffered a loss from not having the possession and control of this stock. This contention is predicated on the assumption that, to enable the appellant to obtain from Jay Gould \$51,000, he not only sold to Gould 51 per cent. of the stock of the Arkansas Railway Company, but pledged the remaining 49 per cent. of said stock, and that he got the benefit in said transaction of the shares of stock belonging to appellee. The case of *Cheney v. Bilby*, 36 U. S. App. 720, 20 C. C. A. 291, and 74 Fed. 52, is relied upon to support this contention. But we do not think that a fair analysis of the testimony touching this transaction bears out this contention. It is true that the entire stock in question was turned over to Gould's agent in said transaction, as at the time the said certificates of stock were not so divided up as to segregate 33 per cent. thereof from the mass; and, when it was so turned over, Gould distinctly understood that he had bought from John D. Beardsley, in fact, only 51 per cent. of said stock, while John D. Beardsley was entitled to 66⅔ per cent. Gould at the time understood that the stock was subject to the decree of the court awarding it to Paul F. Beardsley, and it was in no wise essential to the completion of the contract of the sale of 51 per cent. This fact is supported by

the testimony of Gould's own agents and representatives. On the contrary, the very reverse of this proposition is made to appear conclusively by the record in this case. In the supplemental proceedings, set out in the statement of facts by the decree of the court, the Arkansas Railway Company was awarded a recovery against John D. Beardsley for the sum of \$21,072.16, with interest from the 5th day of August, 1889, to the date of the filing of the master's report. This sum expressed the net earnings of the said Arkansas Railway Company from the original decree in the cause to the date of the appointment of the receiver in the supplemental cause,—December 3, 1887. Of this sum, Paul F. Beardsley was entitled to one-third, which, with interest to the date of payment, amounted to \$10,000; and this amount John D. Beardsley paid to him. This record further shows that from the period of the appointment of the receiver to the time of final payment, August 7, 1891, and until both the Beardsleys disposed of their interests in the Arkansas Railway Company, the receiver paid over to said St. Louis Railway Company the net earnings of the road, in discharge of a debt which the Arkansas Railway Company owed it. This payment was made in accordance with the request of the supplemental bill filed by Paul F. Beardsley. So that it does appear that Paul F. Beardsley in fact got the benefit of one-third of the net earnings, through the benefit to the Arkansas Railway Company, from the date of his purchase until August 7, 1891; and in this way he got, during the time his stock was withheld from him by the action of John D. Beardsley, the benefit thereof, for the simple reason that the liquidation, out of the earnings of the road, of the indebtedness of the Arkansas Railway Company to the St. Louis Railway Company enhanced to that extent the value of Paul F. Beardsley's shares of stock. Recurring to the case of *Cheney v. Bilby*, *supra*, it is well to observe that the facts of that case do not warrant the conclusion sought to be drawn therefrom by appellee, that unless it appears in this case that between April 25, 1887, and August 7, 1891, Paul F. Beardsley himself realized interest on the money tendered in April, 1887, no interest is allowable against him thereafter. An examination of the record in the Cheney Case shows that Wisherd, the debtor in that case, testified:

"I got the money at the First National Bank of Lincoln, Nebraska. The money was in gold. I arranged to have the money kept at that bank, and the bank was instructed to pay to Cheney at any time he might ask for it, and I so informed Russell & Holmes. On the day that the tender was made, the bank was instructed to pay the money to Cheney, or any one demanding it for him. My arrangement with the bank was to keep the money there for the use of Cheney at any time he might ask for it."

It was therefore in respect of this state of facts that the court held that no interest was chargeable against the debtor after the tender, for the reason that he had kept his tender good, and the money thereafter at all times was subject to the order of the creditor. As he had thereby lost the use of the money, it was inequitable to charge him with interest. Whereas in this case Paul F. Beardsley did not keep the money in bank subject to the order of John D. Beardsley. And while John D. Beardsley did not enjoy the use of the money because

it was tendered on condition that he could not accept without a surrender of the valuable right of appeal, and as during the time Paul F. Beardsley received the full benefit of the shares of stock, which were to be delivered to him on the payment of the money, that principle of justice which says that equality is equity demands that the appellant should have his interest. It results that the decree of the circuit court is reversed, and the cause is remanded, with directions to vacate its decree, dissolve the injunction granted therein, dismiss the bill, and tax the costs against the complainant.

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HALSEY v. GODDARD et al.

RUIZ et al. v. SAME.

(Circuit Court, D. Rhode Island. March 18, 1898.)

1. CONSTRUCTION OF TRUST—CONDITIONAL REMAINDER.

Testator left his estate in trust for his daughter during her life, the will providing that at her death the trustee should convey and pay over certain estates, and the one-half part of the residue of the estate then in their hands to his eldest son "if he shall have arrived at the age of twenty-one years, and have complied with the conditions hereinafter expressed." The conditions referred to were that he "shall, within five years after being notified of my decease, have his permanent residence in the United States, and adopt the name of H." The will further provided: "The other half part of all the rest, residue," etc., "then in the hands of said trustees, I hereby order and direct said trustees to pay over and convey in fee simple to the other children of my said daughter, living at the time of her decease." *Held*, that testator fixed the death of his daughter as the time for the division of his estate, and at that time a remainder will vest in her eldest son, contingent upon the previous performance of the conditions named, and a remainder will vest in the other children, absolutely without condition.

2. REMAINDERS—PERPETUITIES—EXECUTORY DEVISE.

Where, as to a devise over, a testator has expressed with clearness one limitation to take effect at a period far within the lawful limits, it will be held good as a remainder, though an alternative disposition be objectionable as an executory devise, on the ground of remoteness.

3. EQUITY PLEADINGS—ALTERNATIVE RELIEF—MULTIFARIOUSNESS.

A bill is not multifarious because it alleges two alternative grounds upon which complainants may be entitled to an estate; nor because some of the defendants may not be interested in all the questions that may arise in the suit.

Coudert Bros. and Edwards & Angell, for complainants.

Hayes, Wright, Ives, Tillinghast, Smith & Tillinghast, for defendants.

BROWN, District Judge. The various demurrers to these bills in equity have been argued together. The chief question is: Are the trusts declared by the will of Thomas Lloyd Halsey, under which the complainants claim a conveyance from the trustees, invalid for violation of the rule against perpetuities? The complainants rely upon the following provisions of the will:

"At the decease of my said daughter, Maria Louisa Andrea Del Valle (or De Valle), if she shall have left lawful male issue, I hereby order and direct said trustees to pay over and convey in fee simple to the eldest son of my said daughter living at the time of her decease, if he shall have arrived at the age of twenty-one years, and have complied with the conditions hereinafter expressed."

ty-one years, and have complied with the conditions hereinafter expressed, my said estate in Seekonk, called 'Hauterive,' my mansion estate in Providence, formerly the residence of my father, and one-half part of all the rest, residue, and remainder of the real estate and personal property then in their hands and possession as trustees." "But, if the eldest son of my said daughter living at the time of her decease shall not at that time have arrived at the age of twenty-one years, then so much of the rents, income, and profits of the said described estates and property shall be paid over to him during his minority, by said trustees, as they shall think proper for his support, and the estates and property, with the increase thereof, if any, be paid over and conveyed to him as aforesaid when he shall have arrived at the age of twenty-one years." "The other half part of all the rest, residue, and remainder of the real estate and personal property then in the hands and possession of said trustees I hereby order and direct said trustees to pay over and convey in fee simple to the other children of my said daughter, living at the time of her decease, to be divided among them equally, share and share alike."

The conditions with which the eldest son must comply, and upon which the respondents base their contention against the validity of the trusts, are found in the following clause of the will:

"Provided, however (as it is my earnest wish and intention that the eldest son or other child or children of my said daughter, to whom the said estate called 'Hauterive,' the mansion estate, and the one-half part of the remainder of the real estate and personal property shall be finally paid over and conveyed by said trustees, as aforesaid, shall reside in the United States, and adopt and use the name of Halsey), the said two estates and half part of remaining property shall not be finally paid over and conveyed by said trustees to the male or female issue of my said daughter as in this my will before provided, unless such child or children of my said daughter, to whom the same would be paid over and conveyed according to the provisions of this my will, shall, within five years after being duly notified of my decease, have his, her, or their permanent residence in the United States, and adopt and use the name of Halsey."

The bill of Pedro Del Valle Halsey alleges that the life estate of the testator's daughter, Maria Louisa Del Valle, terminated by her decease, on July 29, 1895; that the complainant is her eldest son, and was at her decease more than 21 years old; that the testator died in February, 1855; that within five years of notification of the death of the testator, to wit, in 1855, he established his permanent residence in the United States, and adopted the name of Halsey. It is thus apparent that the estate which the complainant, Pedro Del Valle Halsey, seeks to establish, vested in him, if at all, within the lawful limits, since his right must have existed immediately upon the decease of his mother. It is contended, however, by the respondents that the testator intended and provided by his will that the estate should remain in the hands of the trustees until the complete performance of the conditions; that the point of time when the conditions begin to run is that when the eldest son surviving Mrs. Del Valle "is duly notified" of the testator's decease; and that the notification is a condition that, by the terms of the will, need not necessarily be performed within the period of 21 years after the death of Mrs. Del Valle. It is further claimed that these conditions attach also to the gift of "the other half part" to the "other children," and that, in consequence, the sisters of Pedro, who by their bill claim the other half, have no title under the will.

We will, for convenience, consider first whether any condition attaches to the gift to the "other" or the second half of the residue. The argument upon this branch of the case is that the "other children"

cannot be ascertained, or may not be ascertained, until it is determined who shall receive the first half; in short, that the words "other children" mean the children other than the one who shall receive the first half of the residue. This is an assumption and a clear perversion of the language of the will. It attributes to the testator, not the intention that he has clearly expressed, but an intention that contradicts his expression. The "other children" are the children other than the eldest son living at her decease. This must be ascertained at the moment of her death. The conditions as to change of residence and name relate exclusively by their express terms to the estates known as "Hauterive" and the "Mansion Estate," and to the first half of the residue. The gift to the children other than the eldest son is absolutely without conditions, and vested immediately upon the decease of their mother.

The next question is, does the limitation to the eldest son violate the rule against perpetuities? The language of the limitation is used with precision and clearness. The gift to him is at the decease of his mother "if he shall have arrived at the age of twenty-one years, and have complied with the conditions." Furthermore, we find later the description of the property, one-half of which to be conveyed is the residue "then in their hands and possession as trustees." The word then relates, undoubtedly, to the time of the decease of the mother. We find also that the other half of the property, which is to be conveyed to the other children (by which, as we have said, is clearly meant children other than the eldest son living at the mother's decease), is to be conveyed to them immediately upon the decease of their mother. The testator has thus fixed the death of his daughter as the time for the division of his estate; for at that time it will necessarily be determined who are the children other than the eldest living son, and a remainder will at once vest in these children. A like remainder will vest in the eldest son, contingent, however, by the express terms of the will, upon the previous performance of the conditions as to residence and change of name.

It is argued that the eldest son may be entitled to claim the estate upon compliance with the conditions within 5 years of the receipt by him of notification of the testator's death, though such compliance occur more than 21 years after his mother's decease. If, upon a proper construction of the will, such an intention can be attributed to the testator, which is at least doubtful, it would not follow that the express limitation contained in the clause above quoted would be nullified. If we found that the testator so intended, it would simply result in holding that the testator had provided a further and distinctive alternative upon which the eldest son might take. The invalidity of this subsequent provision would not attach to a previous, distinct, separable, independent, and lawful limitation. When a devise over includes two contingencies, which are in their nature divisible, and one of which can operate as a remainder, they may be divided, even though included in one expression. *Evers v. Challis*, 7 H. L. Cas. 405.

In the present case, however, the testator has expressed with clearness one limitation, to take effect at a period far within the lawful limits. This must be held good as a remainder, though an alterna-



tive disposition might be objectionable as an executory devise on the ground of remoteness. Furthermore, we may adopt the language of the complainant's brief:

"The words are not 'if he shall comply,' or 'when he complies,' but 'if he shall have complied.' By thus using the future perfect instead of the future tense, the testator has indicated in the plainest manner that he intended no interval to elapse between the estate to the mother and the estate to the eldest son. To construe these conditions in such manner as to allow such an interval would be to violate the elementary principle that a limitation which can be construed as a contingent remainder must be so construed, and not as an executory devise. 'The law will not construe a limitation in a will into an executory devise when it can take effect as a remainder.' Per Swayne, J., *Doe v. Considine*, 6 Wall. 458 (see page 475). Where the contingent estate may, in the nature of its original limitation, take effect during or by the time of the determination of the particular estate (supposing that particular estate to take place), the possibility or probability of its not doing so, in the common course of things, or from its relation to other limitations interposed by the testator, will not take it out of the general rule that denies the construction of an executory devise to a limitation that may take effect as a remainder." "Therefore the first limitation to the eldest son of Mrs. Del Valle, contained in this paragraph of the will, is a contingent remainder, so limited that it must vest, if at all, at the instant of the death of the life tenant. And, in the event which happened,—the death of the life tenant, leaving an eldest son, who had then attained the age of twenty-one years, and complied with the conditions of the will,—it did so vest."

Looking at the practical situation resulting from the foregoing conclusions as to the validity of the trusts, we find that the bill of Pedro Del Valle Halsey, assuming, as we must on demurrer, the truth of the allegations as to his performance of the conditions as to name and residence, asserts a valid title to Hauterive, the Mansion estate, and the first half of the residue, with the accumulations; that the bill of Silvio Mones Ruiz et al. asserts a valid title to the other half part of the residue, with accumulations. This last bill, however, does not aver that Pedro Del Valle Halsey performed the conditions, but requires proof thereof. The prayers for alternative relief, therefore, are, of consequence, only in case Pedro Del Valle Halsey shall fail to establish his performance of the conditions. We will consider, however, the effect of the allegations that the complainants are heirs at law, and their prayers for alternative relief.

It seems clear that a bill may state the facts, and properly ask relief in the alternative, according to the conclusions of law that the court may draw. *Fost. Fed. Prac.* (2d Ed.) § 70; *Shields v. Barrow*, 17 How. 130. Furthermore, in *Stephens v. McCargo*, 9 Wheat. 502, Chief Justice Marshall said: "But we know of no principle which shall prevent a person claiming the same property by different titles from asserting all his titles in the same bill." See, also, *Gaines v. Chew*, 2 How. 619. There is certainly no inconsistency in the allegations that Pedro Del Valle Halsey is the person named in the will; that he took up his residence and changed his name in accordance with the conditions of the will; and the further allegation that he and his sisters are heirs at law of the testator. The truth of one of these allegations of fact does not in the least tend to establish the falsity of the others. Surely, if one is both sole devisee and sole heir at law, he may assert both titles against one who asserts a claim as heir at law adversely to the will. "It is no objection to a bill in equity that it has what is called a double

aspect; that is, asking one relief, and failing that, upon the facts stated, another relief." *Chaffin v. Hull*, 39 Fed. 887.

It seems clear that the bills are not multifarious for the reason that they allege two alternative grounds upon which the complainants may be entitled; nor because some of the defendants may not be interested in all the questions that may arise in the suit. All of the demurrers have raised the substantial questions as to the validity of the trusts, and none of the parties has sought to be relieved of the trial of these questions; but, on the contrary, the briefs have urged that "it will be thus seen that the court on these demurrers must decide the validity of the trusts." Upon the defendants' brief it is stated:

"The bills will therefore be considered in the light of the one ground of relief distinctly averred by the complainants; and the ground of relief only hypothetically stated will be disregarded. The case well stated in each bill rests on the validity of the trusts of the will of Mr. Thomas Lloyd Halsey; and, those trusts being void, the demurrers resting on that ground cover the entire bill in each case."

The demurring parties having thus asserted their interest in the question of the validity of the trusts, they must be held to have a like interest in the question of whether Pedro Del Valle Halsey has performed the conditions as to name and residence, and, if he fail to establish this, in the further question as to whether the subsequent limitations in favor of the female issue are valid (a decision of which question is reserved), and also in the question as to whether the children of the testator's daughter, Maria Louisa Andrea Del Valle, are the testator's heirs at law, as well as in the other questions in the case. If there is inconsistency, it arises, not from the complainants' allegations of alternative titles, but because the defendants have treated the bills as sufficiently stating the defendants' interest in the question of the validity of the trusts, and as insufficiently stating their interest in the question whether the complainants are heirs at law. If interested in the first aspect of the bills, they are obviously also interested in the second aspect. Considering the large number of persons concerned in the questions still remaining in the case, the adverse titles set up in the cross bills and answers, and the multiplicity of suits that would arise if these complainants and the trustees were compelled to litigate this matter piecemeal with the various claimants, also the fact that the substantial questions are few, and the further fact that no defendant whose interest was sufficient to lead him to contest the validity of the trusts could now be benefited by a division of the controversy, I am of the opinion that the scope of the bills is entirely proper and in accordance with the principles of equitable relief.

As was said by Brewer, J., in *Hyman v. Wheeler*, 33 Fed. 629, 631:

"Neither can it be said that there is no equity in the bill. Equity discounts a multiplicity of suits. That is one of the grounds of its jurisdiction. And it aims, by restraining a multiplicity of suits, to give to the owner of the property the beneficial enjoyment of it, and to enable him to get the benefit of its ownership, rather than waste it in many and diverse suits. \* \* \* In all equity cases we ought to go to the substance of things as far as possible."

Justice Harlan, in *Sheldon v. Packet Co.*, 8 Fed. 769, said:

"As a general rule, the court will not compel parties to incur the expense, vexation, and delay of several suits, where the transactions constituting the sub-

jects of the litigation, or out of which the litigation arises, are so connected by their circumstances as to render it proper and convenient that they should be examined in the same suit, and full relief given by one comprehensive decree. A different rule would often prove to be both oppressive and mischievous, and could result in no possible benefit to any litigant, whose object was not simply to harass his adversary, but to ascertain what were his just legal rights."

Looking at the substance of this case, it is obvious that the rights of all the parties can most conveniently be tried in one litigation, and that the alleged inconveniences of so doing are largely fictitious, and of no practical importance.

The demurrers will be overruled.

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LONDON & SAN FRANCISCO BANK, Limited, v. CITY OF OAKLAND et al.  
(Circuit Court, N. D. California. March 14, 1898.)

No. 12,190.

**1. DEDICATION OF STREET—FILING OF MAP—ORDINANCE OF ACCEPTANCE.**

A map of a town in California was sworn to by the owners of the land August 3, 1853. A deed of partition among the owners was executed August 15th, making express reference to the map; and an ordinance was passed August 27th, declaring the streets laid down and described on the map public streets and highways. The map was filed for record September 2d following. *Held*, that the acceptance took effect and the dedication became complete immediately on the filing of the map.

**2. SAME—ADVERSE POSSESSION—NONUSER.**

That only a portion of a street which has been dedicated and accepted as a public street is opened up does not divest or impair the right of the public to open and use the remaining parts whenever the exigencies of public travel and wants require it.

**3. SAME.**

It being a rule of property in California that title cannot be acquired to public property by adverse possession, the right of a city to open up a street once dedicated and accepted is not impaired by the fact that it has been fenced for about 40 years, and occupied as a residence the greater part of the time, and that valuable buildings have been erected upon it.

Suit in equity to enjoin the city of Oakland and its officers from entering upon the lands of the complainant, and from using, or attempting to use, the same as a public street, and to quiet the title of the complainant to the land as against the defendants. Upon the filing of the bill, an order to show cause was issued, and a temporary restraining order granted, which was subsequently continued until the final disposition of the case.

Page, McCutchen & Eells, for complainant.

J. K. Piersol and W. A. Dow, for defendants.

MORROW, Circuit Judge. This is a suit in equity, brought to enjoin the city of Oakland and its officers from entering upon the land of the complainant, and from using, or attempting to use, the same as a public street, and to quiet the title of the complainant to the said land as against the defendants. Upon the filing of the bill, an order to show cause was issued, and a temporary restraining order granted. The order, upon the hearing, was continued in force by consent until

the final disposition of the suit. The defendants interposed a sworn answer, to which the complainant filed its replication. The principal facts in controversy have been stipulated between the parties. Some additional testimony was, however, introduced on behalf of the defendants. The stipulation of facts is as follows:

"That complainant was incorporated, as averred in its bill. That the map mentioned in respondents' answer was filed and recorded by the persons from whom complainant derails title, and who were the owners in common of a tract of land embracing the land in controversy and the other lands shown on said map, on September 2, 1853; and that the copy attached to the answer, and marked 'Exhibit A,' is a full, true, and correct copy of said map. That the Rancho De San Antonio was granted by the Spanish governor of California in 1820, to one Luis Peralta, who divided it among his sons, to one of whom, Vicente Peralta, he allotted the land bounded on the west by the Bay of San Francisco, on the south and east by the Estuary of San Antonio (designated on the Kellersberger map as 'Bay of Contra Costa' and 'Bayou'), and on the north by a line extending from the Bay of San Francisco to said estuary, and lying north of the most northern tier of blocks shown on said Kellersberger's map. That the claim of Vicente Peralta to said land was confirmed in 1854 by the board of commissioners appointed by act of congress to inquire into California land grants of Spanish or Mexican origin; and, on appeal to the United States district court, said confirmation was affirmed in 1855, and the supreme court of the United States, in U. S. v. Peralta, 19 How. 343, affirmed said decision, and patent accordingly has issued from the United States conveying and confirming said lands to the successors in interest of Vicente Peralta. That, at the date of filing said Kellersberger map, the owners signing the same (who have succeeded to all the rights of Vicente Peralta in all said lands so allotted to him) owned a tract of land embracing all the lands laid off in blocks by the Kellersberger map, and all the land surrounding the portion so subdivided into blocks, and extending therefrom to said exterior boundaries of the Vicente Peralta allotment. That said exterior strip or margin was not partitioned by said partition deed, but remained in undivided and common ownership for upward of ten years thereafter, unless the court shall hold that the premises in controversy were dedicated by said map to the public as a portion of Fallon street. That said map was made by said owners for the purpose of a partition and allotment of the blocks thereon laid down amongst themselves; and on the said 15th day of August, 1853, simultaneously with the filing of said map for record, said owners made partition of said blocks, allotting the same amongst themselves by the numbers and designations of the various blocks thereof as laid down, numbered and designated upon said map, and executed amongst themselves reciprocally a deed of partition whereby block 166 (but not the lands in controversy) was allotted and conveyed in severalty to John C. Hays and John Caperton, two of said owners; and the title of the complainant in this suit to the land in controversy is derived from said tenants in common by conveyances executed by them subsequently to said partition deed. The title to said block 166 is vested in other persons, not parties to this action, who hold the same under conveyances executed by said Hays and Caperton. That, after said partition was made, the respective parties thereto sold and conveyed the lands in their respective allotments to various persons, and from time to time describing the parcels in the conveyances executed by them by the numbers and descriptions thereof as shown upon said map, and referring to said map by its title of 'Kellersberger's Map of Oakland' for particularity of description. That about the year 1855, and at all times since, the land in controversy in this action was and is inclosed by substantial fence, and since 1858 it has been occupied as a residence. That the land claimed by respondents' answer to be a portion of Fallon street adjacent to complainant's property has never been actually opened or used as a street, but that other portions of Fallon street, to wit, from Sixth street to Eighth street, inclusive, have been for many years so opened and used by the public under the dedication made by the deed of partition and the said map. That the premises are now improved as stated in complainant's complaint, and are of the value therein stated. That the board of trustees of the town of Oakland, on the 27th day of August, 1853, passed and adopted an ordi-

nance of which a copy is hereto annexed, marked 'Exhibit B.' That the streets running north and south, as laid down on said map, including Fallon street, are 80 feet wide; but the complainant does not admit the respondents' contention that by the facts hereinbefore set forth, or by any other facts, Fallon street extends further north than Tenth street."

The ordinance declaring the streets in the town of Oakland public highways reads as follows:

"The board of trustees of the town of Oakland do ordain and resolve as follows:

"Section 1. The following streets in the town of Oakland, as laid down and described on Kellersberger's map of Oakland, are hereby declared public streets and highways, to wit: West street, Brush street, Castro street, Grove street, Jefferson street, Clay street, Washington street, Broadway, Franklin street, Webster street, Harrison street, Allice street, Jackson street, Julia street & Oak street. Said streets are 80 feet wide, except Broadway, which is one hundred and ten feet wide, and all run in direct line from high-water mark to a line two hundred feet north of the northern line of 13th street; \* \* \* also so much of First or Front street and so much of Fallon street as are above high-water mark.

"Sec. 2. It shall not be lawful for any person to fence across said streets, or to erect buildings therein, or in any way to obstruct the free passage of said streets, or of any one of them. Any violation of this ordinance shall be punished by fine of," etc.

"Sec. 3. It shall be the duty of the marshal to remove any and all obstructions placed in the streets contrary to the provisions of this ordinance, and for this purpose he may proceed without warrant or process to remove the same.

"Passed August 27th, 1853.

"[Signed]

A. W. Barrell, President of Board of Trustees.

"[Signed]

A. S. Hurlbutt, Clerk of the Board of Trustees."

The map known and designated as the "Kellersberger Map of Oakland" was introduced in evidence. As stated in the stipulation of facts, it was filed and recorded on September 2, 1853, and it was testified at the hearing that it had always been considered as the official map of Oakland. It shows blocks and streets regularly laid out, the blocks being systematically numbered, and the streets properly named and designated. The deed of partition executed August 15, 1853, makes express reference to this map; and, as the stipulation shows, "said map was made by said owners for the purpose of a partition and allotment of the blocks thereon laid down amongst themselves." That the filing and recording of this map amounted to a dedication of the streets laid out and designated on the map, and that this dedication became irrevocable when accepted by the proper public authorities, is well settled. *Irwin v. Dixon*, 9 How. 12; *City of Cincinnati v. White*, 6 Pet. 431; *Barclay v. Howell*, Id. 498; *New Orleans v. U. S.*, 10 Pet. 662, 714; *Grogan v. Town of Hayward*, 4 Fed. 161; *Simplot v. Railway Co.*, 16 Fed. 350; *Gregory v. City of Lincoln*, 13 Neb. 352, 14 N. W. 423; *Hurley v. Boom Co.*, 34 Minn. 143, 24 N. W. 917; *Hanson v. Eastman*, 21 Minn. 509; *Warden v. Blakley*, 32 Wis. 690; *Rowan's Ex'rs v. Town of Portland*, 8 B. Mon. 232, 238; *Yates v. Judd*, 18 Wis. 126; *People v. Reed*, 81 Cal. 70, 22 Pac. 474, and cases there cited; 2 Dill. Mun. Corp. (2d Ed.) p. 606, and cases there cited; *Elliott, Roads & S.* p. 111 et seq.; 5 Am. & Eng. Enc. Law, p. 407, and cases there collated.

It is objected that there was no valid acceptance, for the reason that the ordinance of August 27, 1853, declaring the streets laid down and

described on the Kellersberger map of Oakland as public streets and highways, is not sufficiently specific. This objection is clearly untenable. A comparison of the streets as laid down and described on the map referred to will be found to agree exactly with the streets named and designated in the ordinance.

It is further contended that the fact that the ordinance was passed on August 27, 1853, while the map itself was not filed and recorded until September 2, 1853, some five days subsequent, is a fatal defect to a valid acceptance. This objection also is untenable. The deed of partition, which made express reference to the Kellersberger map, was executed and filed for record on August 15, 1853. The map had evidently been made previously, for it was sworn to on August 3, 1853. The map was therefore in existence when the deed of partition was filed for record. It was actually filed for record in the county recorder's office on September 2, 1853, only five days after the resolution declaring the streets laid down in the map to be public streets was passed. The moment the map was filed for record, the dedication became complete, and the acceptance took effect. That the complainant was not prejudiced in any rights then held by it to the land in question by this order of the proceedings is plain.

The property in dispute is situated on what is claimed by the city of Oakland to be the continuation of Fallon street. Generally described, it may be said to be that portion of Fallon street opposite the north half of block 166. It is more particularly described in the bill as beginning at a point on the southeasterly line of Twelfth street distant thereon 300 feet easterly from the southeast corner of Twelfth street and Oak street; running thence easterly, along said southerly line of Twelfth street, 85 feet; thence, at a right angle, southerly 100 feet; thence, at a right angle, westerly 85 feet; and thence, at a right angle, northerly 100 feet, to the point of beginning. It is contended by the city of Oakland that this land, excepting about 5 feet of the easterly part thereof fronting on Twelfth street, and extending of equal width southerly 100 feet, was dedicated to the public use as being a part of Fallon street, and was accepted as such by the resolution contained in the ordinance of August 27, 1853. It will be observed from a reading of the resolution that "so much of Fallon street" as is "above high-water mark" is declared to be a public street. An examination of the Kellersberger map shows that Fallon street is the highway nearest or next to the creek designated on the map by the name of "Bayou"; hence the wording of the resolution declaring it a public street. That the property in controversy was and is now above high-water mark is abundantly established by the testimony of the witnesses introduced on the part of the defendants, as well as by the fact that the bill itself shows that the land is 85 feet wide, and contains a house and other improvements. The width of the streets, as fixed by the ordinance, is 80 feet, with the exception of Broadway, which is fixed at 110 feet. The stipulation of facts also shows that Fallon street from Sixth to Eighth streets has been used for many years as a public street. It is conceded by the complainant, in the stipulation of facts, that Fallon street extends to Tenth street. The property in dispute lies between Eleventh and Twelfth streets. It further appears

that the land in controversy had never been opened up or used as a public street, but that it was fenced in about 1855, and has been occupied as a residence since 1858. The buildings and other improvements are claimed to be of the present value of at least \$2,500.

The fact that, by the stipulation, it is admitted that a portion of Fallon street was opened up and actually used as a public street, militates, in my opinion, very strongly against the claim of the complainant that the land in controversy, which, as the map shows, lies in the direct line of a continuation of Fallon street, was never dedicated as a public street. The fact that only a portion of Fallon street was opened up and used as a public street does not divest or impair the right of the public to open up and use the remaining portion of the land, dedicated and accepted as a public street, whenever the exigencies of the public travel and wants require it. *Barclay v. Howell*, 6 Pet. 498, 505; *City of Boston v. Lecraw*, 17 How. 431; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 684, 3 Sup. Ct. 445, and 4 Sup. Ct. 15; *Coffin v. City of Portland*, 27 Fed. 412, 420; *Coffin v. City of Portland (Or.)* 17 Pac. 580; *Rowan's Ex'rs v. Town of Portland*, *supra*; *Grogan v. Town of Hayward*, *supra*; *Town of Derby v. Alling*, 40 Conn. 410; *Heitz v. City of St. Louis (Mo. Sup.)* 19 S. W. 735. As was said by Judge Deady in *Coffin v. City of Portland*, *supra*: "The right to the use, once admitted, is not affected by it."

An examination of the map itself shows the necessity of an unobstructed highway to Twelfth street. Almost at the junction of Fallon and Twelfth streets, assuming that Fallon street were fully opened up, is the Twelfth Street Bridge, which affords the means of crossing the "Bayou," so called, at that time. This bridge was in existence in 1853, when the partition of the land was made and the Kellersberger map filed for record. Opening up Fallon street between Eleventh and Twelfth streets, thereby passing over the land in dispute, would give the public traveling up (northward) on Fallon street a direct access to this bridge; otherwise, it would be necessary to go up Oak street, one block further away. As the land in controversy is a part of Fallon street, as the same is delineated on the Kellersberger map, and I find it has been dedicated and accepted as such, it follows that the complainant is a mere trespasser, and has no remedy or redress against the threatened acts of the public officials of the city of Oakland in removing the improvements thereon, and clearing the land for a public street, unless it may be that the public is estopped, by some act or failure to act, from asserting its title, held in trust for public purposes, to the land. As shown by the stipulation of facts, the complainant derails its title from the several tenants in common, who partitioned the land with express reference to the Kellersberger map. When title was acquired to this particular piece of land does not clearly appear; but it does appear that no attempt was made by the public authorities to open up and use the land as a public street until 1894, when a notice was sent by the public officials of the city of Oakland to clear the land, and remove the buildings and improvements thereon. As stated, the land was dedicated in 1853, and the first attempt, so far as the evidence shows, to open up and use as a street the land in controversy, was made in 1894, some 41 years later. In view of the fact that the land was fenced in about 1855, and that it has been

occupied as a residence since 1858, buildings and improvements of considerable value having been meanwhile erected, a strong equity would seem to arise in favor of the complainant, and give weight to the view that the city of Oakland had lost its right to the land by the adverse possession of the complainant. But, whatever may be the rule of decision in other states on this feature of the case, it is the well-settled law of the state of California, repeatedly so declared by its supreme court, that a title cannot be acquired to public property by adverse possession. *Hoadley v. San Francisco*, 50 Cal. 265; *People v. Pope*, 53 Cal. 437; *City of Visalia v. Jacob*, 65 Cal. 434, 4 Pac. 433; *San Leandro v. Le Breton*, 72 Cal. 170, 13 Pac. 405. These decisions, declaring, as they do, a settled rule of property in this state, are conclusive on this court. *Grogan v. Town of Hayward*, supra; *Kowalski v. Railway Co.*, 84 Fed. 586. See, also, *Elliott, Roads & S.* p. 660.

On the whole of the case, I conclude that, while the equity in favor of the complainant's right to the land in controversy may be very strong by virtue of the long nonuser by the city of Oakland of it for public purposes, still it is not sufficiently potent to justify this court in overruling the well-settled rules of property declared by the supreme court of this state. The complainant's position may be an unfortunate one, but the stability and security of the public rights are deserving of no less consideration. The bill will therefore be dismissed, with costs in favor of the defendants, and the restraining order will be discharged; and it is so ordered.

# **CENTRAL TRUST CO. OF NEW YORK v. WORCESTER CYCLE MFG. CO.**

(Circuit Court, D. Connecticut. March 15, 1898.)

## **1. MORTGAGE FORECLOSURES—INVENTIONS—MORTGAGOR'S TRUSTEE IN INSOLVENCY.**

A trustee in insolvency of a mortgagor corporation, who is appointed after institution of foreclosure proceedings and after the corporation has answered admitting the allegations of the bill, is not entitled to intervene and file an answer except in the place of the corporation and as representing its rights alone; nor can he apply for the removal of a receiver appointed in the foreclosure proceedings except in the right of the defendant company.

## **2. SAME—APPLICATION FOR POSSESSION OF PROPERTY.**

Such a trustee, if he claims a surrender of personal or mixed property held by a receiver appointed in the foreclosure proceedings, to whom it was voluntarily surrendered by the mortgagor, can assert no greater right to possession thereof than he would have had as against the mortgagee in possession if the property had been surrendered to him instead of to the receiver. For the purposes of such an application, the receiver's possession is the possession of the mortgagee.

## **3. SAME—RIGHTS OF CREDITORS.**

Creditors of an insolvent mortgagor company which has surrendered personal property to a receiver appointed in foreclosure proceedings cannot intervene and become parties in order to assert superior rights thereto, but may be heard at the proper time on the question of superior right.

C. Walter Artz, for receiver.

Butler, Notman, Joline & Mynderse and Michael H. Cardozo, for complainant.

Parkins & Jackson, for Nash and others, intervening creditors.

Seymour C. Loomis, for Goodrich and others, intervening creditors.

A. L. Teele, for Gilliam Mfg. Co. and others, intervening creditors.



TOWNSEND, District Judge. This is a suit to foreclose a mortgage made by the Worcester Cycle Company, a Connecticut corporation, to the Central Trust Company of New York, as trustee, to secure an issue of bonds, the mortgage purporting to cover real estate and personal property situated in Massachusetts and Connecticut. The mortgage trustee and the mortgagor company are the only parties to the bill. The bill was filed in June, 1897, and thereupon, on motion of the complainant, and with the consent of the defendant, the court appointed a receiver of the mortgaged property. The defendant company answered admitting the allegations of the bill to be true. On November 15, 1897, Charles C. Goodrich, trustee, filed his petition showing that on November 5, 1897, he was appointed trustee in insolvency of the defendant company and had qualified as such; showing, also, facts upon which he claims the mortgage to be invalid with respect to personal property as against creditors. The petitioner also claims that the mortgage was not ripe for foreclosure when the suit was begun. He prays that the order appointing the receiver be wholly vacated and set aside, in so far as the same applies to personal and mixed property at Middletown; that the receiver be directed to account to the petitioner for the said personal and mixed property; that the petitioner be permitted to intervene in this suit and make and file his answer; and that, pending the joinder of issue with him, the complainant be enjoined from applying for a judgment or decree of sale herein. Upon this petition, with which was also filed a copy of petitioner's proposed answer, an order was made that the parties and the receiver show cause why the prayer of the petitioner should not be granted, and the petitioner have such other and further relief as might be just; and it was therein ordered that, pending an order upon said petition, complainant be stayed from applying for judgment. The motion upon said order to show cause has been heard, and is now to be disposed of.

The petitioner has not, I think, shown any reason for being permitted to file an answer to the complainant's bill. He may be entitled to be heard in the suit in the stead of the mortgagor company, with such rights in the cause as the mortgagor company would have had if no such appointment had been made; but I do not think he is entitled to intervene in any other way or as representing any other rights than those of the defendant company. The purpose of the suit is to foreclose the equity of redemption of the defendant, the mortgagor company. If there are any persons not parties to the suit having rights in the property described in the mortgage, which are superior to the rights of the mortgagee, they cannot, against the complainant's objection, force themselves into the suit. *Woodworth v. Blair*, 112 U. S. 8, 5 Sup. Ct. 6.

The question whether the mortgage as to personal property is good as against creditors does not, I think, affect the question of the right of the complainant to a decree of foreclosure; and this seems to me sufficient reason for denying the application of the petitioner to intervene, except to succeed to the position of the mortgagor company as it was at the time of his appointment. This exception does not, I think, give him the right to interpose the answer which has

been filed with his petition. At the time of his appointment the mortgagor company stood in court, having by its answer admitted the allegations of the bill. The petitioner, by his petition, gives the court no ground for believing that any of the allegations of the complaint material to the right to a decree of foreclosure are untrue, as the defendant company admitted them to be. It does not go at all in this direction to assert that the petitioner does not know whether some of the allegations are true or not. He does not show upon what evidence he is led to deny, upon information and belief, some of the allegations of the bill. What he says in his affidavit as to the issue of the bonds goes only to part of the bonds, and is quite general. If some of the bonds were validly issued, question as to the others would not defeat complainant's right to a decree. There appears, therefore, to be no ground for permitting the issues in the cause to be opened. The petitioner may be permitted to be heard upon application for decree, and may then, if he sees fit, urge that the allegations of the bill are insufficient to entitle the complainant to a decree and be heard as to the provisions of the decree if granted. I think that the complainant, upon the allegations of the bill, is entitled to a decree of foreclosure; but it is not necessary finally to pass upon this question at this time.

With reference to the application of the petitioner for the vacation of the order appointing the receiver, it is enough to say that no such application should be granted save at the instance of a party to the cause; and that, so far as the application is considered as made in the right of the defendant company, no reason is shown for doubt as to the propriety of the order as against it. In no other respect, for the reasons before stated, is the petitioner entitled to speak as a party to the cause. The order appointing the receiver will not be vacated.

The petitioner asks also that personal and mixed property in Middletown be delivered over to him. It may possibly be that property has been taken by the receiver which, by reason of the superior title of outsiders, ought not to have been so taken. It is a recognized practice to allow persons not parties to a suit in which a receiver is appointed to apply by petition to the court for an order that such property be surrendered. Although this application does not seem to have been shaped upon this idea, but to be primarily a petition to be allowed to intervene as a party to the cause, yet, as the demand for surrender of this property has been so fully argued, it will be treated as such on application. I am satisfied that the trustee in insolvency can assert no rights with respect to this personal and mixed property which he could not have asserted if, when the receiver took possession, the property had instead been put into the possession of the mortgagee. The possession of the receiver is for this purpose to be regarded as the possession of the mortgagee. The property was thereby taken from the mortgagor, and by its consent, and it was taken primarily for the benefit of the mortgagee, provided it should succeed in its suit. A court of equity taking possession of property by a receiver holds it, it is true, for the benefit of the parties to the cause, or, rather, for the party ultimately decided to be

entitled to its possession. Until final decree, it remains in doubt for whose benefit such holding is. But, in such a case as this, if the complainant is ultimately found to be entitled to the decree asked for, and so to the benefits accruing from the possession during the pendency of the suit, the possession is then established to have been from the outset the possession, substantially, of the complainant. The receiver holds "for the benefit of the party ultimately proved to be entitled." *Union Nat. Bank of Chicago v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013; *Wiswall v. Sampson*, 14 How. 52.

It is to be noticed that the mortgage in suit covered rents, issues, and profits. The lien thereon could be effective only upon possession taken. Possession taken by a court through its receiver, at the instance of a mortgagee, is recognized by the courts as equivalent to the mortgagee's taking possession for this purpose. True, the court holds generally for the parties until what appears at the outset is determined by decree, but, if the decree follows, it determines the character of the possession from the beginning. *Allen v. Railroad Co.*, 3 Woods, 316, Fed. Cas. No. 221; *United States Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 287, 14 Sup. Ct. 86; *Dow v. Railroad Co.*, 124 U. S. 654, 8 Sup. Ct. 673; *Ames v. Railway Co.*, 73 Fed. 49, 57.

Furthermore, the mortgagor, giving up possession to a receiver at the suit of the mortgagee, gives notice of the mortgagee's rights as fully as if it gave possession to the mortgagee itself. The receiver got possession of this personal property July 15, 1897. Hence it appears that the rights of the mortgagee became complete, by possession surrendered, much more than 60 days before the proceedings in insolvency, and are therefore superior to the rights of the trustee. The receiver will not be directed, at present at least, to surrender any property to the trustee.

Certain creditors who attached personal property, and at whose instance such property was held by the sheriff when the receiver was appointed herein, have also applied for leave to intervene and answer the bill. They make no case for permission to answer for substantially the same reason as in the case of the trustee.

In view of the surrender of the property held by the sheriff under the order herein made July 15, 1897, with the consent of the attaching creditors, those creditors will, of course, be permitted to be heard at the proper time as to whether their rights or those of the mortgagee are superior with respect to this property. They have submitted to the jurisdiction of the court in this respect, and are entitled to be heard accordingly. But this does not require that they be allowed to answer the bill.

## KILGOUR v. SCOTT et al.

(Circuit Court, S. D. New York. March 19, 1898.)

## 1. MORTGAGES—REAL ESTATE HELD AS COLLATERAL.

In an agreement between a debtor and his creditor, the amount of the indebtedness was stated, and the debtor agreed to pay the same in installments at fixed times, and it was provided that upon such payment real and personal property which had been previously owned by him, and of which he had or was to have possession, was to be reconveyed to him. In a suit brought by him after paying some of the installments, and while in default as to the residue, for relief against the strictness of the agreement, *held*, that the transaction amounted in substance to a mortgage, which might be redeemed, though the law day had passed.

## 2. COMPROMISE AND SETTLEMENT—ACCOUNTING.

It was contended by defendants that the agreement was a compromise, and was conclusive as to the amount due. It appeared, however, that its itemized statement of the debt was made up substantially according to the defendants' figures, about which they had, and plaintiff had not, knowledge in detail, and it did not appear that any substantial compromise had been effected. *Held*, that the case should go to a master to ascertain various claims necessary to fix the sum due in equity.

This was a suit in equity by John F. Kilgour against William E. Scott and the National Bank of Port Jervis.

William S. Bennett, for plaintiff.

Lewis E. Carr and David Wilcox, for defendants.

WHEELER, District Judge. On December 14, 1894, the parties entered into a written agreement by the terms of which the indebtedness of the plaintiff to the bank was stated in gross at \$61,936, and by schedule, in items, amounting to the same sum, which he agreed to pay in installments at fixed times, and upon such payment a large amount of real and personal property, most of which had been previously owned by him, and of which he had or was to have possession, was to be reconveyed to him. He has paid some of the installments, and is in default as to a large amount of the residue. This suit is brought for relief against the strictness of the agreement. The transaction included a continuing debt, and the holding of the legal title to the property for security; and had the characteristics of, and, upon familiar principles of equity as administered in the courts of the United States in all the states, amounted to, a mortgage, which may be redeemed, although the law day has passed. The principal difficulty relates to the sum due in equity, about which the defendants insist that the agreement was a compromise, and is conclusive. There does not appear, however, to have been much, if any, compromise about the debt. It was stated substantially according to the defendants' figures, about which they had, and the plaintiff had not, knowledge in detail. Releases in form were executed, but the defendants do not appear to have so yielded claims for debts against the plaintiff that he should be held to have given up just claims against them, and especially not those of which they had superior knowledge. Scott was cashier of the bank. He has held title to secure debts due to the bank on some of which he had been holden, and his relations and interests in re-

spect to some of the property and liabilities and those of the bank were and are similar and mutual. He had held title to Shohola Glen property as trustee for the plaintiff, and as security. It was sold in judicial proceedings, and bid in by him, and accounted for at \$28,000, the amount of the bid. He appears to have sold it again for at least \$30,000, and the plaintiff's evidence tends to show for \$40,000. According to the evidence produced, this could be made more definite by other evidence, not produced nor accounted for. Some debts secured by collateral obligations may have been duplicated by including both. Whether they have or not may be made more clear than the evidence now makes it. The case should go to a master to ascertain these claims and others necessary to fixing the sum due in equity. When that sum is ascertained, the plaintiff seems to be entitled to a decree for redemption. Costs cannot be properly decreed until the result of the accounting upon these and other disputed items, if any, shall appear.

Decree for plaintiff for an account of sum actually due in equity, and for redemption, with all questions of costs reserved.

## SCHWAB v. BEAM et al.

(Circuit Court, D. Colorado. March 30, 1898.)

## 1. WATERS AND WATER COURSES—ABANDONMENT OF WATER RIGHTS.

A placer location *ex vi termini* imports an appropriation of all waters covered by it, so far as such waters are necessary for working the claim, especially when the location covers both banks of the stream, and there can be no abandonment of the water as distinguished from the land or of the land as distinguished from the water.

## 2. SAME.

Where a patent issues for a mining claim, if the owner finds mining unprofitable, and holds the property for sale as a mill site, or a site for an electric power plant or some manufacturing establishment, he does not thereby lose the water right which he had as a miner.

## 3. SAME.

Article 16, § 6, Const. Colo., which provides that "the right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied," applies only to unappropriated waters, and not to a case where, by the location of a placer claim, the water has been appropriated.

## 4. SAME.

Nothing in the constitution of Colorado, or in the law relating to irrigation, modifies or changes the rule of common law that for manufacturing, mining, or mechanical purposes each riparian owner may use the waters of running streams on his own premises, allowing such waters to go down to subjacent owners in their natural channel.

Rogers, Cuthbert & Ellis, for complainant.

Patterson, Richardson & Hawkins, for defendants.

HALLETT, District Judge. Complainant is the owner of seven placer-mining claims on the north fork of the San Miguel river, in the county of San Miguel, called "Boston," "Keystone," "Keystone Extension," "Washington," "Colorado," "Pekin," and "San Miguel." All of the claims are traversed by the river, excepting the Keystone Extension, to which water from the river is conducted by means of a flume. The several claims were located prior to the year 1882, and patents were issued in that year to complainant's grantors. Some of the claims were worked as placers, and the waters of the river were used for that purpose prior to the year 1889. In that year the waters of the river were diverted near the east end of the Keystone placer for the purpose of hydraulic mining upon several of the claims, and work was carried on extensively in the years 1889 to 1892. From 1892 to 1897 but little was done in the way of mining, but there was always an agent in charge, and some effort was made to keep up the flume, and to use water therefrom at different times. The testimony as to what was done upon the property in those years is highly conflicting, and leads to the result that complainant and his grantors were in actual possession, and that work was not done with a view to profit or development. In the month of August, 1897, respondents located the Yukon placer in the valley of the San Miguel river, at a point somewhat south of the Pekin placer, owned by complainant. The south fork of the river unites with the north fork on the Pekin placer. The Yukon placer may touch the south fork of the river, but it does not extend to the united streams, or to the north fork, which traverses the Pekin placer from end to end. Afterwards, and in

the month of September following, respondents located a flume and water right on the north fork of the San Miguel river, about  $1\frac{1}{2}$  miles east of the Yukon location, and near the northeast corner of complainant's Boston claim. The head of the flume is on the Denver placer, which is probably owned by respondents. From thence the line of the flume is laid in a westerly direction on the mountain side, slightly above complainant's flume, and in the course of the San Miguel river, to a point about 1,150 feet east of the west end of the Pekin placer, and thence across the Pekin placer and the San Miguel river to the Yukon placer. In its course from east to west it traverses the Keystone and the Keystone Extension placers, belonging to complainant, for a distance of about 2,500 feet. In its southerly course across the Pekin placer its length is about 1,200 feet. Thus it appears that the proposed diversion of the waters of the San Miguel river which the complainant seeks to restrain is at the highest point on the course of the river to which complainant's property extends. From thence the water is to be carried outside of the channel of the river, and on the north side of the channel, over two of complainant's locations, and north of three or more of them and across one of them to a point on the Yukon placer south of the Pekin placer. Whether the water liberated at that point on the Yukon placer would be available for use on complainant's San Miguel placer, which is furthest west of his locations, was not stated at the bar, and may not be disclosed in the record. Sufficient appears to show that the effect of respondents' diversion would be to deprive complainant of water in the channel of the river on six of his locations during some part of the year. Respondents' appropriation is 20,000 miners' inches, which the testimony shows would be all the water in the channel of the river at certain seasons of the year, although at other times there is much more flowing in the channel. The purpose for which the water is to be used on the Yukon placer is for making electric power and lights, although it is said that some mining has been done by respondents in that locality. Many witnesses were examined to show the nature and extent of the diversion of the waters of the San Miguel river in the year 1889, and subsequently by complainant's grantors, and whether the use of the flume and ditch then constructed on the property was continued by complainant after the year 1892. Respondents' counsel declared in argument that the flume and ditch were abandoned after 1892 by complainant's grantors and himself, and that the waters of the river were subject to a new appropriation in August, 1897. The court is of the opinion that the matter of the diversion of the waters of the river by complainant's grantors in the year 1889 is not controlling; although, if it were necessary to determine the fact, the court would be inclined to find that the waters of the river were fully appropriated at that time, and that there is no satisfactory evidence of abandonment at any time afterwards. A placer location *ex vi termini* imports an appropriation of all waters covered by it, in so far as such waters are necessary for working the claim. This is true especially when the location covers both banks of the stream, because there is a reasonable presumption that the locator intends to work the channel and the banks, wherever he may find pay dirt. A placer

claim cannot be worked without water. Where water is scarce, a small stream may be made to suffice. Every one who is in any way familiar with the subject knows that the miner always prefers to have a copious supply. Where, as in this instance, the work is carried on by hydraulic force, the volume of water must be large. No doubt is entertained that the locators of the several claims now owned by complainant intended to appropriate the waters flowing in the channel of the river as well as the channel, the banks, and all territory embraced within the locations to the business of mining, and the title to the water is the same as the title to the land. There can be no abandonment of the water as distinguished from the land, nor of the land as distinguished from the water. Each is without value when separated from the other, and therefore they cannot be legally divorced. It is said, however, that complainant, having found the business of mining to be unprofitable, no longer intends to work his claims, and now holds them for sale as a mill site, or as a site for an electric power plant or some manufacturing establishment. Be it so; the government has issued patents for the claims, and the title of complainant is now absolute for any purpose to which they may be put. A patent for agricultural land does not limit the use of the patentee to tilling the soil which may be conveyed by the patent. No more is a patent for mineral land, whether lode or placer, restrictive of the use of the territory which may be conveyed. A placer claim has been used as a town site apparently with the approval of the supreme court of the United States. *Smelting Co. v. Kemp*, 104 U. S. 636. All other uses to which land may be put must be equally open to the grantee after title has passed from the government.

Respondents rely very much on section 6, art. 16, of the constitution of the state of Colorado, which declares: "The right to divert unappropriated waters of any natural stream for beneficial uses shall never be denied." This language, it will be observed, is applicable to the unappropriated waters of a natural stream. If, as we assume, the location of complainant's placer claims on the San Miguel river was an appropriation of the waters of that river so far as it runs through the several claims, this section cannot control the question under consideration. The waters were appropriated when the claims were located, and the owner of the claims is entitled to have them ut currere solebat, without diminution, subject to the reasonable use of other riparian owners higher up on the course of the stream. No question arises under the last clause of section 6 of the constitution of the state, cited above, because complainant and respondents are each of the manufacturing class, within the meaning of that section. Counsel for respondents suggested in argument that electric lights were to be classed as a domestic use, but he was unable to say much in support of that construction. Clearly enough, the business of making electric lights and power is a sort of manufacture, and of the same class as mining, or other use of water power. Therefore the parties are upon an equal footing in respect to the use which they intend to make of the waters of the San Miguel river. In this connection it may be observed that washing gravel by hydrostatic press-



ure from the channel or bank of a river is not very far removed from running a stamp mill by water power, or running dynamos for making electricity. There is some difference in the machinery and appliances of the several kinds of work, but the power is the same. The use of the water of the San Miguel river, in 1889, for hydraulic mining, was an exercise of water power very similar to that which respondents now demand for operating a power plant. Both parties stand upon placer locations, and the doctrine of first appropriation seems to support complainant's locations, as they are many years older than respondents' locations, made in 1897.

Many authorities cited by counsel expound the law relating to the irrigation of agricultural lands in arid regions. An early advocate of the right to appropriate water for irrigating lands, as always understood and maintained in this state, the author of this opinion desires to recognize and enforce the principle on which it stands in every case to which it may be applicable. It is believed that the chief purpose of article 16 of the constitution of the state of Colorado is to maintain and establish the wise principle of appropriation and continual use, which was fully understood by the makers of that instrument. But nothing in the constitution of the state or in the law relating to irrigation in any way modifies or changes the rules of the common law in respect to the diversion of streams for manufacturing, mining, or mechanical purposes. In Colorado, as elsewhere in the United States, the law is now, as it has been at all times, that for such purposes each riparian owner may use the waters of running streams on his own premises, allowing such waters to go down to subjacent owners in their natural channel. The injunction will be allowed according to the prayer of the bill.

## STATE NAT. BANK OF CLEVELAND, OHIO, v. SAYWARD et al.

(Circuit Court, D. Massachusetts. March 8, 1898.)

No. 756.

**1. JURISDICTION—FOREIGN CORPORATION—ACTION AGAINST STOCKHOLDER.**

A suit in equity may be maintained by a creditor of a corporation against a stockholder only in the courts of the state in which the corporation is created.

**2. ACTION AGAINST STOCKHOLDER—DEMURRER.**

In an action by a creditor of an insolvent Ohio corporation against a stockholder to enforce his liability under the laws of Ohio, the corporation is a necessary party defendant, and a demurrer on that ground will be sustained.

This was a bill in equity by the State National Bank of Cleveland, Ohio, against Samuel Sayward and others, to enforce the stockholders' liability.

Russell & Putnam, for complainant.

W. B. French, for defendant Geo. Linder.

Chas. A. Drew, for defendant John F. Annable.

Chas. D. Adams, for defendant Geo. F. Reed.

**COLT**, Circuit Judge. This bill is brought by a creditor of an Ohio corporation against certain stockholders, residents of Massachusetts, praying that said stockholders may be ordered to pay to the complainant a sum equal to the par value of their stock, or so much thereof as may be necessary to satisfy the claim of the complainant, in accordance with the provisions of the statutes of Ohio. A bill in equity cannot be maintained by a creditor to enforce the liability of a stockholder in a corporation organized under the laws of another state. In *Post v. Railroad Co.*, 144 Mass. 341, 345, 11 N. E. 546, Chief Justice Field said:

"This court does not take jurisdiction of a suit to enforce the liability of stockholders in a foreign corporation, not because it would be a suit to enforce a penalty, or a suit opposed to the policy of our laws, but because it is a suit against a foreign corporation which involves the relation between it and its stockholders, and in which complete justice can only be done by the courts of the jurisdiction where the corporation was created. \* \* \* If an assessment is to be laid upon the members or stockholders, or a contribution enforced from them, according to the law of the state under which the corporation is created, the courts of that state alone can afford complete and effectual judicial relief."

There is another ground upon which the demurrer in this case is well taken, namely, that the Ohio corporation is a necessary party. The supreme court of Ohio has held that in suits of this character the corporation "ought to have been made a party." *Umstead v. Buskirk*, 17 Ohio St. 113, 118. Demurrers sustained.

## TILLINGHAST v. BAILEY et al.

(Circuit Court, S. D. Ohio, W. D. November 29, 1897.)

No. 4,940.

## 1. NATIONAL BANKS—INCREASE OF STOCK—CONCLUSIVENESS OF COMPTROLLER'S CERTIFICATE.

The certificate of the comptroller of the currency, approving an increase of the capital stock of a national bank, is conclusive of the existence of the facts authorizing such certificate, and a subscriber to the stock cannot question its validity.

## 2. SAME—STOCKHOLDERS—ESTOPPEL TO QUESTION VALIDITY OF STOCK.

Subscribers to a duly-authorized increased issue of stock by a national bank, who accept certificates therefor, vote the stock by proxy, and take dividends thereon, cannot question the validity of such stock, as against the receiver, after the bank has become insolvent.

Bill by Phillip Tillinghast, receiver, against Samuel Bailey, Jr., and others, as stockholders in a national bank.

John W. Herron and Wm. C. Herron, for complainant.

J. C. Harper, F. B. James, and Oscar F. Davisson, for respondents.

CLARK, District Judge. In the view I take of this case, I do not deem it necessary to discuss the various phases of this evidence. To do so would require much time and space. As counsel in the case are perfectly familiar with the issues, and with the evidence so far as it affects the questions to be determined, it would be of no service to do more than to state in the most general way my conclusions upon the facts disclosed by the record, and the law applicable to such facts. Two propositions are mainly relied on for the complainant, either of which, if sustained, will dispose of the case without entering at large upon the facts in the case. It is insisted for the plaintiff—First, that the certificate of the comptroller of the currency authorizing the increase of stock to which the defendants were subscribers, except two, was the final act necessary to make the increase valid, and that this certificate is conclusive on the defendants, and that they cannot, as a matter of law, go behind the certificate for the purpose of making any question as to whether the facts on which the comptroller was by law authorized to give his certificate existed; and, second, that, upon the facts of the case, the defendants are as to creditors of the banking association, in whose interest this suit is prosecuted, precluded by estoppel from making any question on the regularity and validity of the increase of stock certified to by the comptroller. The second proposition would, of course, require an examination into the truth of the facts alleged as constituting the true ground of the estoppel claimed. I turn, then, for a moment to the contention that the certificate of the comptroller is conclusive of the facts necessary to be ascertained and to authorize his certificate. It is now well settled that the action of the comptroller in determining that such facts and conditions exist as authorize the appointment of a receiver for a national banking association is conclusive in all subsequent legal proceedings based upon his action and decision in that respect. So, too, his determination that it is

necessary to make a call on the stockholders of a bank for the payment of debts, and of the amount which must be paid, whether the full amount of the par value of the stock or less, is conclusive, and no question can be made or litigated in regard to whether there exist such facts as authorize his decision in this regard. In like manner, his determination that the facts necessary to authorize the original formation of a banking association, and that the conditions which justify his certificate exist, are facts which become conclusively established when he issues his certificate approving the formation of the bank and authorizing it to proceed to transact business. The existence of the facts which authorize the comptroller to declare the formation of the corporation complete cannot thereafter be called in question. These several propositions are no longer open to question. *Kennedy v. Gibson*, 8 Wall. 498; *Casey v. Galli*, 94 U. S. 673; *Bushnell v. Leland*, 164 U. S. 685, 17 Sup. Ct. 209.

Now, after study of this question, and the reasoning on which the decisions in the cases just referred to proceeded, I am constrained to say that I am unable to distinguish this case from those cases, and am unable to perceive on what ground it could be held in a case like this that the certificate of the comptroller is not conclusive, and I think the principle announced in the cases referred to controls the question here presented. Every reason of public policy on which the decisions in those cases rest extends equally to this case and the questions here made. It seems to me that the certificate of the comptroller approving the original formation of the association with a fixed capital stock, and his certificate approving an increase of stock, cannot be distinguished. I do not believe that any just distinction in principle exists, and a decision which undertakes to make such distinction is, in my opinion, not sustained by sound reason. The facts which are left to the determination of the comptroller in certifying to the original formation of the association are vastly more important in every direction, both in kind and magnitude, than the facts which he finds, and to which he certifies, in the case of a mere increase of stock in an association already formed. If a shareholder of the increased stock may go behind the comptroller's certificate, and make the question that the stock in his hands is void because the facts do not exist which authorize the certificate of the comptroller, I must confess that I see no reason why a shareholder of the original stock may not equally go behind the certificate issued, declaring the association duly formed and authorized to do business, and cause the original stock to be declared invalid because of the non-existence of the facts which the comptroller was required to ascertain before making his certificate. Further than this, I am of opinion, after careful consideration, that I cannot do otherwise than hold that these defendants are estopped now to make the question that the stock held by them is invalid. Without going more at length into particulars, certain uncontroverted facts may be mentioned; at least, such facts as are not open to serious contention. Among these facts may be mentioned that these defendants undoubtedly understood themselves as subscribing for shares in the

increased stock of the association. Certificates were issued to them plainly showing this fact, and the defendants unquestionably understood themselves to be stockholders during the entire time after payments by them on their subscriptions to this increased stock, and practically they never made any question that this was so until after the insolvency of the bank became publicly known, when it was placed in the hands of a receiver, and their liability to the assessments to pay debts asserted. They were paid dividends on the stock, and unquestionably understood and accepted the same as dividends, and not as interest. In addition to this, they, by proxies duly executed, clothed designated persons with full general authority to act for them and vote the stock, which was obviously equivalent to an assertion that they were stockholders and entitled to enjoy their rights as such. It does not relieve this feature of the case for the defendants to say that they only gave general authority, and were not aware of what the persons designated to act for them were doing. They are not permitted to confer general authority to act, and then, as occasion may seem to require, repudiate the authority, and thereby disappoint the public creditors. In authorizing a representative to act for them, they have virtually, through such representative, sanctioned much of which they now complain. If the defendants were unfortunate in thus holding out persons as authorized to act for them, it raised merely a question whether the defendants must be affected by the conduct of their representatives, or whether the public must be disappointed; and I think there is no difficulty in saying that, as between the innocent creditors of this bank and the defendants who have thus enabled persons with apparent authority to deceive such creditors, the result must fall on the defendants. Nor is it any answer to say that the plaintiff in the case does not show that any particular creditor relied on the increased stock and the payments made thereon by these defendants, and was deceived thereby. The public, in dealing with these banking associations, do not rely except upon public known facts in regard to the association, and the public are not supposed to be familiar with or rely on the facts of a particular case as between a shareholder and the bank. A rule which exacted any such condition as this would practically deprive innocent creditors of any remedy. These defendants have appeared regularly on the books of the association as subscribers to the increased stock, with their subscriptions all paid in, and this condition of things has been carried in the published statement of the bank intended for public information. This character of information is what the creditors of the bank rely on, and particularly the amount of capital stock of the bank. The defendants were still aware that the stock thus subscribed and paid in, although not certified, was subject to be certified and approved by the comptroller at any time. The defendants have never sought, by any step or proceeding, to stop the method in which they were thus held out to the public, or to change their relation from that of a shareholder to creditor, until the event which made it apparent that it would be to their advantage to shift

their position in this respect. There is apparent conflict in the decisions on the circuit in relation to both of the propositions on which the plaintiff's case here proceeds. Fortunately, I am not called upon to undertake the task of reconciling these decisions, and my duty is discharged when I choose between the opinions of these courts of equally high authority and equally entitled to the greatest respect. I think the correct doctrine upon this subject was announced in the case of *Latimer v. Bard*, 76 Fed. 536. I think, too, in principle, the cases of *Upton v. Tribilcock*, 91 U. S. 45, *Sanger v. Upton*, 91 U. S. 64, and *Louisville Trust Co. v. Louisville, N. A. & C. Ry. Co.*, 43 U. S. App. 551, 22 C. C. A. 378, and 75 Fed. 433, are applicable. I do not think the position of the Gronewegs, two of the defendants in the case, is different or that the case as to them authorizes a different ruling from that made as to the other defendants. It has not been pointed out that their status is specially different by reason of having original instead of increased stock. On the contrary, it is evident that it would not be different, so far as their relation to the question now made is concerned. They must have been informed by the face of their certificates of stock that it was original instead of increased stock, and it is not in the least likely that their conduct would have been at all different from what it has been if they had been expressly informed that they were furnished with original instead of increased stock. So, without giving the case a more particular discussion, I hold that the plaintiff is entitled to recover upon both grounds indicated herein, and decree will go accordingly.

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NORTHERN PAC. RY. CO. v. SODERBERG.

(Circuit Court, D. Washington, N. D. March 14, 1898.)

1. **PUBLIC LANDS—RAILROAD GRANTS—DETERMINATION OF CHARACTER OF LAND.**  
In a suit to enjoin the removal of stone from unsurveyed lands which would fall within the odd sections of a railroad grant, the court will not undertake to determine, in advance of a decision by the land department, the question as to whether the land is mineral or nonmineral.
2. **SAME—WASTE BEFORE TITLE DETERMINED—INJUNCTION.**  
A railroad company has an interest in the odd-numbered sections within its grant, and, before the question of the mineral or nonmineral character of such land has been determined by the land department, the commission of waste thereon calculated to work irreparable injury to the land itself will be restrained, the court retaining the case for further consideration after such question shall have been determined.
3. **SAME—INJUNCTION TO RESTRAIN REMOVAL OF STONE—ADVERSE ENTRY AFTER SUIT.**  
A suit to restrain the removal of stone from an odd-numbered section within a railroad grant, before the mineral or nonmineral character of the land has been determined, cannot be defended on the ground of an entry, made by defendant after the suit was commenced, under Act Aug. 4, 1892, authorizing the entry of land chiefly valuable for building stone, where such entry was not put in issue by proper plea.

This was a suit in equity by the Northern Pacific Railway Company against J. A. Soderberg, to enjoin him from working a granite quarry on certain lands claimed by the complainant.

Fred M. Dudley, for complainant.  
Geo. H. Fortson, for defendant.

HANFORD, District Judge. This is a suit for an injunction to restrain the defendant from working a granite quarry in unsurveyed land, which, when surveyed, will be within the lines of an odd-numbered section within the place limits of the Northern Pacific Railroad Company's land grant, and to prevent the defendant from removing and selling building stone taken from said quarry. The main question upon which the parties have joined issue is whether the particular subdivision of land within which the quarry is situated is mineral or nonmineral, within the intent and meaning of the act of congress granting lands to the Northern Pacific Railroad Company to aid in the construction of its main and branch lines. The decisions of the supreme court establish the rule that, where lands of a particular class or description have been granted by an act of congress, without making other particular provision as to the manner in which the same are to be identified, questions as to the character of lands within the limits of the grant, which are claimed under it, are to be decided in the first instance by the officers of the land department, and that decisions of such questions made in the land department are conclusive, unless impeached for fraud, or overruled by the courts on the ground of error in the interpretation or application of the law. *Steel v. Refining Co.*, 106 U. S. 447-457, 1 Sup. Ct. 389; *Heath v. Wallace*, 138 U. S. 573-587, 11 Sup. Ct. 380; *Barden v. Railroad Co.*, 154 U. S. 288-349, 14 Sup. Ct. 1030; *Rogers Locomotive Machine Works v. American Emigrant Co.*, 164 U. S. 559-577, 17 Sup. Ct. 188. In the case of *Barden v. Railroad Co.* the supreme court of the United States, having under consideration this identical land grant, ruled that the law places under the supervision of the interior department and its subordinate officers acting under its direction the control of all matters affecting the disposition of public lands of the United States, and that the officers of said department are especially authorized to determine whether lands claimed under any particular law or congressional grant, are swamp lands, timber lands, agricultural lands, or mineral lands, and to so designate them in the patents which it issues. The decision is direct and positive to the point that the land department has power to determine the question as to the mineral or nonmineral character of any particular tract claimed under the grant, and that its decision of such question must be accepted by the courts as conclusive. In the opinion of the court by Mr. Justice Field, the rule is laid down as follows:

"There are undoubtedly many cases arising before the land department in the disposition of public lands where it will be a matter of much difficulty on the part of its officers to ascertain with accuracy whether the lands to be disposed of are to be deemed mineral lands or agricultural lands, and in such cases the rule adopted that they will be considered mineral or agricultural as they are more valuable in the one class or the other, may be sound. The officers will be governed by the knowledge of the lands obtained at the time as to their real character. The determination of the fact by those officers that they are one or the other will be considered as conclusive."

This suit has reference to unsurveyed land, the mineral or nonmineral character of which has not yet been determined. This court therefore will not, at this time, offer advice to the land department by deciding the question in advance. However, the complainant has an interest in the odd-numbered sections within its grant, entitling it, while questions as to its title are in abeyance, to preventive relief by an injunction to restrain the commission of waste, as by the cutting or destruction of timber, the mining and extracting of coal, the quarrying and removing of building stone, or the destruction of native grass giving value to lands for grazing purposes, or other like acts calculated to work irreparable injury to the land itself. *Erhardt v. Boaro*, 113 U. S. 537-539, 5 Sup. Ct. 565; *Lanier v. Alison*, 31 Fed. 100; *Railroad Co. v. Hussey*, 9 C. C. A. 463, 61 Fed. 231.

In his argument, counsel for the defendant makes the point that the testimony shows that the defendant is holding possession of the land in controversy in pursuance of an entry which he has made thereon under the act of congress approved August 4, 1892, providing that lands which are chiefly valuable for building stone may be entered, and title thereto acquired, under the laws of the United States relating to placer mineral claims. 2 Supp. Rev. St. p. 65. I hold, however, that the defendant has no right to defend on this ground, for the reason that he does not, in his answer, plead any such right, and the testimony shows that the notice of his claim posted on the land was dated a long time after this suit was commenced. He cannot prevail by virtue of a right initiated after the suit was commenced, and not put in issue by an answer or plea. A decree will be entered granting an injunction as prayed for, with a proviso at the foot of the decree retaining the case for further consideration; and when the question as to the mineral or nonmineral character of the land shall have been determined by the land department, supplemental pleadings may be filed by either party, and the injunction will then be made perpetual, or the case dismissed, as the right of the parties shall then be made to appear.

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MANN et al. v. KEENE GUARANTY SAV. BANK OF KEENE, N. H., et al.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 977.

1. APPEAL AND ERROR—FINDING OF FACT.

Where the trial court has considered conflicting evidence, and made its finding and decree thereon, they must be taken to be presumptively correct, and, unless an obvious error has intervened in the application of the law or an important mistake has been made in the consideration of the evidence, the decree should be permitted to stand.

2. DEEDS—MENTAL CAPACITY.

In determining a question of mental capacity to execute a deed, the question is not whether the grantor's mental powers were impaired, or whether she had ordinary capacity to do business, but whether she had any—the smallest—capacity to understand what she was doing, and to decide intelligently whether or not she would do it.



**3. SAME—EVIDENCE.**

A woman was paralyzed for eight years prior to her death, and during that time was unable to sign her name, but it was signed by her daughter or other person, and her acknowledgments taken to 34 conveyances of real estate. Her husband and children treated her as though she was competent to make deeds, 10 different magistrates took her acknowledgments to conveyances, and all who knew her treated her as sane. A decree of foreclosure of a mortgage was resisted on the ground that she was mentally incapable of understanding or executing it. Many witnesses testify that her mental capacity was not greater than that of a child three or four years old, and that she could not transact any business whatever. *Held*, that the legal presumption being that she was sane and capable, and all who knew her having so treated her, the decree of the court that she was mentally capable simply gives legal effect, after her death, to the existence of a fact which all seem to have conceded during her life, and such decree should not be disturbed.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

N. W. Norton (W. G. Weatherford and J. M. Prewett, on brief), for appellants.

John McClure (Morris M. Cohn, on brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

**SANBORN, Circuit Judge.** This is an appeal from a decree of foreclosure of three trust deeds made by John Parham and Anna W. Parham, his wife, dated on December 29, 1886, May 28, 1888, and July 1, 1889, respectively. The right side of Anna W. Parham was paralyzed on August 21, 1884, and she died on December 31, 1892. During the intervening time her physical and mental powers were impaired, but she was able at times to walk about her room with the aid of a crutch, and she could talk, and understand conversation about her flowers and her physical wants. Her husband was dealing in real estate. She was unable to sign her name to conveyances on account of the paralysis of her right hand, but her name was signed by her daughter, or some other person, and her acknowledgments were certified to 34 conveyances of real estate, including trust deeds and mortgages, while she was suffering from this paralysis. When the trust deeds in suit were made she was the owner of 320 acres of land which are described in them. The appellants are her heirs at law, and their defense to this suit was that when her name was signed to the trust deeds, and when her acknowledgments of their execution were certified, she was mentally incapable of understanding or executing them. The evidence upon the issue presented by this defense was conflicting. Many witnesses testified that Mrs. Parham's mental capacity was not greater than that of a child three or four years old, that she could not carry on a connected conversation on any subject, and that she could not understand or transact any business whatever during the time in which she was suffering from paralysis. On the other hand, her husband and children treated her as though she was competent to make trust deeds and mortgages during all this time. Her husband delivered conveyances to which his daughter had affixed his wife's

name and upon which magistrates had certified her acknowledgments. One of her daughters signed her name to these various conveyances, and allowed them to be delivered without objection or protest. Her son-in-law, acting as guardian for a minor child, accepted a mortgage which she executed in 1889 as security for \$3,000 of his ward's money. Between 1886 and 1890 one of her sons, acting as a notary public, certified her acknowledgments to five deeds. Ten different magistrates took and certified her acknowledgments of the execution of conveyances while she was suffering from this disease. Actions frequently speak louder and more truthfully than words, and it is difficult to contemplate the treatment accorded to Mrs. Parham by the members of her family and the magistrates of her vicinity without great doubt whether she was so incapable of conducting simple business transactions as some of the witnesses for the appellants now testify. The question is not whether her mental powers were impaired. It is not whether or not she had ordinary capacity to do business. It is whether she had any—the smallest—capacity to understand what she was doing and to decide intelligently whether or not she would do it. *Rugan v. Sabin*, 10 U. S. App. 519, 3 C. C. A. 578, and 53 Fed. 415, 421; *Stewart v. Lisenard*, 26 Wend. 303; *Ex parte Barnsley*, 3 Atk. 168; *Hill v. Nash*, 41 Me. 586; *Jackson v. King*, 4 Cow. 216; *Dennett v. Dennett*, 44 N. H. 531. Perhaps this rule and the reason for it have never been better expressed than by Senator Verplanck in *Stewart v. Lisenard*, *supra*, when he said:

"To establish any standard of intellect or information beyond the possession of reason in its lowest degree, as in itself essential to legal capacity, would create endless uncertainty, difficulty, and litigation, would shake the security of property, and wrest from the aged and infirm that authority over their earnings or savings which is often their best security against injury and neglect."

In view of the testimony to which we have adverted, we are unwilling to hold that the court below committed any error in the application of the law or made any mistake in the consideration of the evidence when it concluded that the legal incapacity of Mrs. Parham was not clearly established. Where the trial court has considered conflicting evidence, and made its finding and decree thereon, they must be taken to be presumptively correct, and, unless an obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand. *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Furrer v. Ferris*, 145 U. S. 132, 134, 12 Sup. Ct. 821; *Warren v. Burt*, 12 U. S. App. 591, 7 C. C. A. 105, and 58 Fed. 101; *Plow Co. v. Carson*, 36 U. S. App. 456, 18 C. C. A. 606, and 72 Fed. 387; *Farmers' Loan & Trust Co. v. McClure*, 49 U. S. App. 43, 24 C. C. A. 66, and 78 Fed. 209, 210.

The legal presumption was that Mrs. Parham was sane and capable. All who knew her so treated her while she lived. The decree of the court simply gives legal effect after her death to the existence of a fact which all seem to have conceded during her life. It ought not to be disturbed. A motion was made to dismiss this appeal,

but a careful consideration of the merits of the case has led us to the same result as would a granting of the motion. For this reason we have given it no consideration. The decree below is affirmed, with costs.

**HOWARTH v. ELLWANGER. SAME v. KENT. SAME v. WOODWORTH.**

(Circuit Court, N. D. New York. March 31, 1898.)

Nos. 3,211-3,213.

**1. BANKS AND BANKING—LIABILITY OF STOCKHOLDERS—SUIT BY RECEIVER.**

Under the constitution and statutes of Washington, which provide: "That each stockholder of any banking \* \* \* association shall be individually and personally liable, equally and ratably, and not one for another, for all the contracts, debts and engagements of such corporation or association accruing while they remain stockholders to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares,"—an action to enforce such liability may be maintained by a receiver.

**2. SAME—LEVY OF ASSESSMENT.**

The orders and decrees of the superior court of Washington in appointing a receiver of an insolvent state bank, ascertaining the deficiency, and directing an assessment on the stockholders, are binding on stockholders who are not parties to the proceedings.

**At Law. Tried by the court.**

These actions are brought against the defendants who were stockholders of the Traders' Bank of Tacoma, Wash., to enforce a liability created by the law of that state making them individually responsible equally and ratably to the extent of their stock for all debts of the bank while they remained stockholders. The plaintiff is a citizen of Washington residing at Tacoma. The defendants are citizens of New York residing at Rochester. On the 19th day of May, 1894, the plaintiff was appointed receiver of the Traders' Bank by an order of the superior court of Washington made in an action commenced against said bank by Henry Hewett, Jr., and George Browne in which it was adjudged that the bank had suspended business and was insolvent. The plaintiff duly qualified as receiver and has since acted as such. On the 12th of September, 1894, the court made an order in said action permitting certain stockholders to intervene for the benefit of themselves and all other stockholders of the bank. On the 20th of October all the defendants, except Chauncey B. Woodworth, were by order of the court upon their own petition made parties to the said action. After applying all the property of the bank to the payment of its debts there remained a deficiency, which, on March 17, 1897, was adjusted and adjudged by the court to be the sum of \$131,670. The plaintiff was thereupon directed by the court to levy upon the stockholders an assessment of 26.34 per cent. and bring suit against those stockholders who, after demand, refused to pay. The amounts assessed against the defendants respectively were duly demanded and payment thereof refused.

P. M. French, for plaintiff.

Charles M. Williams, for defendant Ellwanger.

M. H. McMath, for defendant Kent.

William F. Cogswell, for defendant Woodworth.

COXE, District Judge. It is not disputed that the defendants were stockholders of the Traders' Bank, that the bank became insolvent, that the plaintiff was appointed receiver, that a large deficiency was ascertained, that an assessment was levied by the receiver upon

the defendants and that all this was done under and pursuant to the constitution and laws of Washington and in conformity to the orders and decrees of the superior court of that state.

The first proposition argued by the defendants is that the plaintiff, as receiver, is not entitled to maintain the action. The constitution and statutes of Washington (Const. art. 12, § 11) provide:

"That each stockholder of any banking \* \* \* association shall be individually and personally liable, equally and ratably, and not one for another, for all the contracts, debts and engagements of such corporation or association accruing while they remain stockholders to the extent of the amount of their stock therein, at the par value thereof, in addition to the amount invested in such shares."

The courts of Washington have decided that this liability can only be enforced by a receiver under the direction of the court. *Cole v. Railroad Co.*, 9 Wash. 487, 37 Pac. 700; *Wilson v. Book*, 13 Wash. 676, 43 Pac. 939; *Hardin v. Sweeney*, 14 Wash. 129, 44 Pac. 138; *Waterson v. Masterson*, 15 Wash. 511, 46 Pac. 1041. The practical effect of a ruling that a receiver cannot maintain the suit would be to render the law nugatory as to all but resident stockholders. The Washington courts having ruled that a receiver only can bring the suit, it is manifest, should the federal courts and other state courts hold that he cannot maintain the action, that the defendants not only but all stockholders beyond the jurisdiction of the Washington courts will escape a liability intended to be uniform and for the benefit of all the creditors. The precise question was involved in *Sheafe v. Larimer*, 79 Fed. 921, and was answered adversely to the defendants' contention. The case arose under the same law, and, upon the facts, was almost identical with the case in hand. See, also, *Schultz v. Insurance Co.*, 77 Fed. 375, 387; *Avery v. Trust Co.*, 72 Fed. 700; *Failey v. Talbee*, 55 Fed. 892.

Again it is argued that the orders and decrees of the Washington court were not binding upon the defendants, and in support of this view various alleged defects in the proceedings are pointed out. The defendants Kent and Ellwanger were parties to the Washington action and are therefore in no position to attack the judgment of the court in a collateral proceeding. The defendant Woodworth was not a party. But whether parties or not the law seems clear that the stockholders are bound by the order making the assessment. *Hawkins v. Glenn*, 131 U. S. 319, 9 Sup. Ct. 739. In *Sheafe v. Larimer*, supra, the court says:

"In this case it must be held that it is not open to the defendant to question the validity of the assessment order, on the ground that the stockholders were not personally notified of the application for the order, or for the reason that the stockholders should not have been assessed until the other assets of the corporation had been wholly exhausted."

The actions are not barred by the statute of limitations for the reason that the cause of action did not accrue to the receiver prior to the assessment and that was not made until March 17, 1897. The actions were commenced two months thereafter.

It follows that the plaintiff is entitled to judgment as demanded in the complaints, respectively, with interest at the rate of 6 per cent. per annum from May 18, 1897, and costs.

## SMITH v. NEWELL et al.

(Circuit Court, D. Utah. March 21, 1898.)

No. 191.

## 1. MINERAL CLAIM—LOCATION MARKS—SUFFICIENCY.

Location of a mineral claim, parallelogram in shape, was marked upon the ground by placing at each corner stakes about 4 feet high, and similar stakes at the discovery point, and at points upon the side lines. On the discovery stake, and upon a tree about 20 feet therefrom, were placed notices of location, containing the name of the claim and its description, date of location, and the names of the locators. *Held*, that the claim was sufficiently indicated upon the ground, though all of the stakes were not marked with the name of the claim.

## 2. SAME—OBLITERATION OF MARKS.

When a mineral claim is once properly marked upon the ground, the rights of the locators are not affected by the subsequent obliteration of the marks, or the removal of the notice without their fault.

## 3. SAME—RECORD—SUFFICIENCY OF DESCRIPTION.

A recorded notice of location, in its description of a claim, erroneously referred to the "southeasterly" end of another claim, when the claim had no such boundary, and described a distance of 400 feet as "4," and gave the courses of a certain boundary line as "northerly" and "southerly," when the courses of such line were not true north and south. The notice correctly described the location with reference to a well-established line of another claim, and with the aid of the location stakes the lines of the claim could be easily ascertained, by applying the description of the record to the stakes and monuments. *Held*, that the recorded description was sufficient.

## 4. SAME—PRIOR LOCATION—PRESUMPTION OF DISCOVERY.

Proof of a record of a prior location, and the marking of it on the ground, will not defeat a subsequent location, in the absence of proof of a discovery by the prior locators. The record and the marking are not sufficient to authorize the court to presume a discovery.

Booth, Lee & Gray and Morris L. Ritchie, for plaintiff.

Brown & Henderson and D. C. McLaughlin, for defendants.

MARSHALL, District Judge. This suit is brought in pursuance of an adverse claim filed in the land office under section 2326 of the Revised Statutes of the United States, by the plaintiff, who claims to own the Alta Belle mining claim, against the application of the defendants for a patent for the Dutchman lode. The plaintiff's claim was located on May 25, 1894; the defendants', on January 1, 1889. It is not contended that the Dutchman lode was abandoned, or subject to forfeiture for failure to do the required annual work thereon; but the right of the plaintiff to recover depends on the establishment of the original invalidity of the Dutchman location. That no valid location of the Dutchman was made is claimed on three grounds: (1) That the claim was not marked on the ground, so that its boundaries could be readily traced; (2) that the record of the claim did not contain such a description of it as to identify it; (3) that at the time of the location of the Dutchman the premises were not subject to the location, but constituted a part of the Black Rock No. 1 and the Black Rock No. 2 claims. These objections will be considered in their order.

1. The evidence shows that on January 1, 1889, the locators of the Dutchman placed at each corner of the claim substantial stakes, about

4 feet high and 4 inches in diameter. Similar stakes were also placed at the discovery point of the claim, and at a point on the north-west side line, and a point on the southeast side line thereof. The shape of the claim, as marked, was approximately a parallelogram. On the discovery stake, and on a tree about 20 feet therefrom, were nailed notices of location, written on paper which contained the name of the claim, the date of location, the names of the locators, and an attempted description of the claim. The claim was on a ridge, and, while there were some trees on it, the evidence does not show that they were thick, or that there was any difficulty in seeing the corner stakes. It is said that the stakes should have been marked with the name of the claim. This was not necessary, unless the boundaries could not have been readily traced without it. The relative positions of the stakes showed their connection, and indicated a parallelogram. The location notice, nailed on the discovery stake, and placed within this parallelogram, gave all of the information that marks on corner stakes would have given. I think the claim was sufficiently marked on the ground, within the most exacting decisions on the subject. *Book v. Mining Co.*, 58 Fed. 106-113; *Southern Cross Gold & Silver Min. Co. v. Europa Min. Co.*, 15 Nev. 383; *Warnock v. De Witt*, 11 Utah, 324, 40 Pac. 205. Having been once so marked, the right of the locators thereto would not be affected by the obliteration of the marks, or the removal of the notice without their fault. *Jupiter Min. Co. v. Bodie Consol. Min. Co.*, 11 Fed. 666; *Book v. Mining Co.*, 58 Fed. 106-114.

2. A more serious question is presented by the second objection to the location. The location was made while Utah was a territory, but there was no statute of the territory governing the locating or manner of recording. Under the authority given them by section 2324 of the Revised Statutes of the United States, the miners of Uintah mining district had made regulations on the subject, article 5 of which was as follows:

"In order to locate a claim of a ledge, lead, lode, or deposit of rock or ore supposed to contain mineral, the locator shall first conform to the United States laws regarding mineral lands, passed May 10, 1872, and shall place a written or printed notice of the same upon the ground so claimed, a true copy of which shall be filed for record with the recorder of this district within ten (10) days of the date of such location, or such location shall be deemed void and of no effect."

On January 1, 1889, the locators filed with the recorder of the district a true copy of the written notice of location placed by them on the ground located, and which was as follows:

"Notice is hereby given that the undersigned, having complied with the requirements of section 2324 of the Revised Statutes of the United States, and the local rules, customs, and regulations of this district, has located 1,500 feet in length by four hundred feet in width on this, the Dutchman lode, vein, or deposit, bearing gold, silver, and other precious metals, situated in the Uintah mining district, Summit county, Utah, the location being described and marked on the ground as follows, to wit: Commencing at the discovery, which is 100 feet southerly of the southeasterly end line and center of Toronto location, and 100 feet southerly of said discovery is placed post No. 1; thence 1,400 feet, to post No. 2; thence 4, to post No. 3; thence 1,400 feet in a northerly, to post No. 4; thence 100 feet northerly, to post No. 5; thence 400 feet southerly, joining with the southwesterly end line of the Toronto, to post No. 6; thence

100 feet, southwesterly, to post No. 1, the place of beginning. The mining claim above described shall be known as the 'Dutchman.' Located this first day of January, 1889. Names of locators: D. C. McLaughlin, 375 feet; John Kennedy, 375 feet; Frank James, 375 feet; Henry Newell, 375 feet."

The description of the claim as contained in the notice was incorrect in the following particulars: There was no southeasterly end line of the Toronto location, and the discovery was situated S., 44 deg. 21 min. W., 222.8 feet distant from the center point of the southwesterly end line of the Toronto location, instead of 100 feet southerly therefrom, as called for. From post 2 to post 3 was approximately 400 feet, while the call was "4." From post 3 to post 4, and from post 4 to post 5, the call was "northerly"; the true course, N., 56 deg. E. From post 5 to post 6, the call was "southerly, joining with the southwesterly end line of the Toronto"; the true course was S., 32 deg. E., joining with said southwesterly end line. The last call, from post 6 to post 1, was southwesterly; the true course was S., 56 deg. W.

It will be seen that the description, as recorded, called for both the southeasterly and southwesterly end line of the Toronto lode, and that it is apparent from the calls in the notice that the one or the other is an error. When it is sought to apply the description to the ground, and it is ascertained that the Toronto claim has no southeasterly end line, the true call is at once known. The error in the call of "4," instead of "400 feet," is also shown by the notice itself. It is stated therein that the location made was 1,500 feet in length by 400 feet in width. What was intended is apparent. It is true that the courses called for vary more or less from the correct courses. In the absence of monuments, and in a deed, "southerly" would mean due south. But it is not usual for miners to locate claims with a compass, and no construction should be given the acts of congress or the regulations of the miners which would invalidate a location because of an error in the call for a course. *Book v. Mining Co.*, 58 Fed. 115.

The regulation of the miners in question provided for the record of a true copy of the notice of location as posted on the claim; and, even if the 10 days is given in which to cure any defects in the original notice, it would still be often impossible, within that time, to survey the claim or to describe it by metes and bounds with absolute accuracy. The ordinary principle, that courses and distances give way to fixed monuments, applies to such descriptions, and the record is sufficient when it contains directions which, taken in connection with the marking of the claim on the ground, will enable a person of ordinary intelligence to distinguish the premises located from the public mineral land open to exploration. *Book v. Mining Co.*, 58 Fed. 106-115; *Pollard v. Shively*, 5 Colo. 309; *Brady v. Husby*, 21 Nev. 453, 33 Pac. 801; *Gamer v. Glenn*, 8 Mont. 371, 20 Pac. 654; *Upton v. Larkin*, 7 Mont. 449, 17 Pac. 728.

The act of congress does not itself require a record, nor does it prescribe its effect when it is required by a regulation of the miners as in this case. But, to have any effect, it must contain the matters specified in section 2324 of the Revised Statutes, and therefore must contain "such a description of the claim or claims located by reference to some natural object or permanent monument as

will identify the claim." In this case, the regulation of the miners required a record as an act of location, and declared invalid any location of which no record was made. In the record of the Dutchman lode, not only were the stakes of the claim called for, but the call from post No. 5 to post No. 6 was for a line "joining with the southwesterly end line of the Toronto" mine. This was a reference to a permanent monument sufficient to identify the claim.

In *Hammer v. Milling Co.*, 130 U. S. 291-298, 9 Sup. Ct. 548, the record of the claim described it with reference to its own stakes, and stated it to be "about 1,500 feet south of Vaughan's Little Jennie Mine." The objection was made that the record did not refer to such a natural object or permanent monument as would identify the claim. The court, speaking by Mr. Justice Field, said:

"Mining lode claims are frequently found where there are no permanent monuments or natural objects, other than rocks or neighboring hills. Stakes driven into the ground are in such cases the most certain means of identification. Such stakes were placed here, with a description of the premises by metes; and, to comply with the requirements of the statute so far as possible, the location of the lode is also indicated by stating its distance south of 'Vaughan's Little Jennie Mine,'—probably the best known and most easily defined object in the vicinity. We agree with the court below that the Little Jennie Mine will be presumed to be a well-known natural object or permanent monument until the contrary appears, where a location is described as in this notice, and it is further described 'as being 1,500 feet south from a well-known quartz location, and there is nothing in the evidence to contradict such a description, distance, and direction.'"

In the case at bar it affirmatively appears that the call for the southwesterly end line of the Toronto lode was correct, and that at least three of the corner stakes of the Dutchman lode were still in place several months after the location of the plaintiff's claim. Under these circumstances I am of the opinion that the ground located as the Dutchman could have been ascertained by a person of ordinary intelligence in attempting to apply the description in the record of the claim to the stakes and monuments called for.

3. The last objection urged is that when the Dutchman was located the ground was covered by prior subsisting locations. In support of this objection the plaintiff has introduced in evidence certified copies of the recorded notices of location of the Black Rock No. 1 and the Black Rock No. 2 mining claims, claiming that such locations were made January 1, 1886. The evidence also shows that said claims, long prior to January 1, 1889, had been so staked as to include the premises in controversy, and that, while no work was done thereon during the year 1888, yet that two men, acting for the person claiming to own them, entered on the claims December 31, 1888, spent the night in a tunnel on one of them, and commenced to work thereon January 2, 1889, after the location of the Dutchman. It is not necessary to decide whether the entry of the original owner with intent to do the required annual work, but without any actual resumption of such work prior to relocation, prevents such relocation, for the plaintiff has failed to show any valid location of the Black Rock claims. There is no evidence of any discovery of a vein or lode therein prior to the discovery of



the Dutchman, nor is there any evidence that the owners of the Black Rocks ever knew of any vein or indication of a vein there. It is not shown that the locators of the Black Rock claims are dead or absent, nor is it suggested that it was difficult to prove the fact of discovery, if it existed. On this point, the plaintiff's case rests on the theory that, a record of a location and the marking of it on the ground being shown, the court should presume a discovery of a vein. I do not think such a presumption should be made.

There will be a decree for the defendants, quieting their title against the plaintiff's adverse claim to the premises in controversy.

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TRAVELERS' PROTECTIVE ASS'N OF AMERICA v. LANGHOLZ.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1898.)

No. 618.

INSURANCE—INTENTIONAL INJURY.

Where a policy of insurance provides, "The member hereby agrees that the Travelers' Protective Association shall not be liable for death when caused by intentional injuries inflicted by the member or any other person," and the proof shows the insured was murdered, his death was caused by intentional injuries, and no recovery can be had.

In Error to the Circuit Court of the United States for the Western District of Texas.

Henry T. Kent, for plaintiff in error.

Houston & Houston, for defendant in error

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge. This was a suit brought by the defendant in error, Matilda Langholz, in the district court, Forty-Fifth district, of Bexar county, Tex., on March 20, 1896, and removed by the plaintiff in error to the United States circuit court for the Western district of Texas on the 22d of May, 1896. The action is upon a policy of life and accident insurance issued by the plaintiff in error corporation to Charles J. Langholz. The petition upon which the cause went to trial alleges that the plaintiff below was a feme sole; that the defendant below is a corporation of the state of Missouri; that the said Charles J. Langholz was the son of the plaintiff below, and became a member of the said corporation defendant, and became entitled to have said defendant issue to him a certain policy of insurance upon his life, the benefits of which, in case of death, were payable to the plaintiff below, by which policy she would be entitled to \$5,000. She then set out the policy of insurance or certificate of membership in *hæc verba*, with the indorsements upon the back thereof. She further alleges that her said son, Charles J. Langholz, on or about the 9th day of June, 1895, came to his death by accident, within the meaning and provisions of the said certificate of membership or policy of insurance: and she further alleges in this connection that her said son was murdered on said date, in the state of Texas, by one John Taylor, being

shot through the head with a Winchester rifle, from which his death resulted immediately; and she further alleges full compliance by her said son with all the requirements and conditions of said policy of insurance, and all of the rules indorsed thereon, which latter are as follows:

"The member hereby agrees that the following rules shall be observed: That the Travelers' Protective Association of America shall not be liable for injuries incurred by a member in occupation more hazardous than specified in his application for membership, or in case of injuries, fatal or otherwise, wantonly or intentionally inflicted upon himself while sane or insane, or in case of disappearance, or injuries of which there is no visible mark upon the body (the body itself not being deemed such a mark in case of death), or in case of injury, disability, or death happening to the member while intoxicated, or in consequence of his having been under the influence of any narcotic or intoxicant, or death or disability when caused wholly or in part by any bodily or mental infirmity or disease, dueling, fighting, wrestling, war or riot, injury resulting from an altercation or quarrel, unnecessary lifting, voluntary exertion (unless in a humane effort to save human life), voluntary or unnecessary exposure to danger, or to obvious risk of injury, or by intentional injuries inflicted by the member, or any other person, injury received either while avoiding or resisting arrest, while violating the law or violating the ordinary rules of safety of transportation companies, or riding on a locomotive, or to cases of injury caused by the diseases of epilepsy, paralysis, apoplexy, sunstroke, freezing, orchitis, hernia, fits, lumbago, vertigo, or by sleepwalking, voluntary inhalation of any gas or vapor, injury fatal or otherwise, resulting from any poison or infection, or from anything accidentally or otherwise taken, administered, absorbed, or inhaled, disease, death, or disability resulting from surgical treatment (operation made necessary by the particular injury for which claim is made, and occurring within three calendar months from the date of the accident, excepted)."

Due proof of death was presented, and claim was made on defendant below for \$5,000. She also claimed the sum of 12 per cent. statutory damages, and \$1,500 as reasonable attorney's fees, to which the defendant below filed a general demurrer, and also a special demurrer to the claim of 12 per cent. damages and attorney's fee. At the same time it filed the following answer:

"The defendant further excepts specially to the allegation in the said amended petition that the death of Charles J. Langholz was not caused by 'intentional injuries inflicted by himself or any other person, received either while avoiding or resisting arrest, while violating the law, or violating the ordinary rules of safety of transportation companies,' as alleged in the fifth page of said amended petition, because said allegations are immaterial and irrelevant, under the rules indorsed on the back of the certificate of insurance, as shown on the third page of said amended petition. Of this the defendant prays the judgment of the court."

The special demurrer was sustained by the court, but the general demurrer was overruled, to which the defendant below excepted, when, upon an agreed state of facts, and the jury having been waived, the cause was submitted to the court below, which found in favor of the plaintiff for \$5,000, with interest from September 22, 1895, and entered judgment accordingly, from which the defendant below appeals, and brings the cause here upon the following assignments of error:

"First. The court erred in overruling the defendant's general demurrer to the plaintiff's first amended original petition, because said amended original petition showed no cause of action on its face, in this: That it is alleged that Charles J. Langholz came to his death by intentional injuries inflicted upon him by another, and the certificate of insurance, insuring the said Charles J. Langholz, which was fully set out in the said amended original petition, showed that the defend-

ant was not liable in case of death so occurring, which error is set out in defendant's bill of exception No. 1. Second. The court erred in giving judgment for the plaintiff and against the defendant, because the special findings of fact made by the court show that said Charles J. Langholz was intentionally murdered by one John Taylor, and that the certificate of insurance set out in said special findings exempted the defendant from liability from death so occurring; and that the judgment should have been given to the defendant upon the said special findings, which error is set out in defendant's bill of exception No. 2."

It is evident from the rules set out on the back of the policy, as well as from the wording in the body thereof, it was issued as an accident policy only; hence the many conditions or causes of death or injury named in which the company should not be liable. One of these, reading as required by the grammatical construction of the paragraph, and omitting that part not pertinent to this case, is as follows:

"The member hereby agrees that the Travelers' Protective Association of America shall not be liable for \* \* \* death, \* \* \* when caused by intentional injuries inflicted by the member or any other person."

The statement of facts in this case agreed on, and the findings of the court, show the insured to have been murdered (that is, intentionally injured by another person); and under the construction put upon identically the same language in *Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360, the plaintiff cannot recover. In that case Justice Harlan, speaking for the court, said:

"We are, however, of the opinion that the instructions of the jury were radically wrong in one particular. The policy expressly provides that no claim shall be made under it when the death of the insured was caused by intentional injuries inflicted by the insured or any other person. If he was murdered, then his death was caused by intentional injuries inflicted by another person. Nevertheless, the instructions to the jury were so worded as to convey the idea that, if the insured was murdered, the plaintiff was entitled to recover; in other words, even if the death was caused by wholly intentional injuries inflicted upon the insured by another person, the means used were 'accidental' as to him, and therefore the company was liable."

This is the only case cited bearing upon the question at bar from the supreme court. It is controlling here, and, as we fully agree with and follow it, we must reverse and remand this case, with instructions to the court below to enter judgment for defendant below.

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#### SMITH v. DAY et al.

(Circuit Court, D. Oregon. March 23, 1898.)

No. 2,307.

#### 1. NEGLIGENCE—CONTRACTORS FOR RIVER IMPROVEMENTS—BLASTING ON GOVERNMENT LANDS.

Contractors making rock excavations on government property for river improvements are to be considered, so far as regards their duty to avoid injuring third persons, as owners of the premises, and are not required to use extraordinary care, such as covering their blasts, but only ordinary care. Passengers on river steamboats, which are permitted to land near the place where the blasting is carried on, with the express understanding that the boat owner must assume all responsibility, are to be regarded as there by mere permission or sufferance, and at their own peril, if ordinary care is used.

**2. SAME—ASSUMPTION OF RISKS.**

One who goes, voluntarily, in the prosecution of his own business, on public lands, where improvements are being made by contractors, knowing that blasting is going on there, assumes the risks incident to the prosecution of the work with ordinary care, though he is there by the sufferance or permission of the contractors.

This was an action at law by Henry Smith against J. G. & I. N. Day and the Dalles, Portland & Astoria Navigation Company to recover damages for personal injuries. The jury returned a verdict for defendants, and the plaintiff now moves for a new trial.

A. S. Bennett and G. W. Allen, for plaintiff.

John M. Gearin and Stott, Boise & Stout, for defendants.

**BELLINGER**, District Judge. This is an action for damages resulting from an injury received by the plaintiff under the following circumstances: The plaintiff was a passenger on board the navigation company's boat, from the Dalles to Portland. At the Cascade Locks the defendants J. G. & I. N. Day were engaged, as contractors for the government, in making rock excavations for the locks then in course of construction at that point. Their work was being carried on within what is known as the "Government Reserve," being lands reserved by the government for the purposes of the work under construction. A large force of men were being employed, and the practice was to fire off blasts at the noon hour, after the workmen had left their work for their dinners, and in the evening, after the time for quitting work. This blasting had been conducted regularly for a considerable period of time at this point, during the short season in which the stage of water would permit that kind of work. The plaintiff, being a passenger as aforesaid, upon arriving at the locks, got on the portage railway, and rode down to the lower wharf, being a point on the reserve near where the work of blasting was being done. He went along with a number of other passengers. Upon reaching the lower wharf, he went on board the boat of the navigation company at that point, where he remained for some time, during which blasts were being fired. When he got to the lower boat, he heard blasting, and understood that blasting was being done. He went upon the boat, and was occupied for some 15 minutes in playing a game of cards, after which he talked to the steward for a few minutes, and then sat down in the forward part of the boat, and, becoming sleepy, either went to sleep, or dozed off in a state of partial sleep. In this situation he was struck by a rock thrown by one of the blasts, which broke through the upper deck of the boat, striking him on the head or back of the neck, causing the injury complained of. The jury found for the defendants.

The grounds of the motion for a new trial are:

(1) Error of the court in instructing the jury as follows:

"In determining the question of negligence in the prosecution of the work of blasting by the defendants, you must take into consideration the nature of the work being done, the time within which it was to be completed, the place where it was to be done, and the necessity of firing blasts at certain hours of the day, in order that the work might be completed within the contract time."

(2) Error of the court in submitting to the jury the question of contributory negligence, the contention of plaintiff being that there was no evidence tending to prove such negligence.

(3) Error of the court in refusing to instruct the jury, as requested by plaintiff, that if there was an arrangement between the navigation company and the defendants, by which the former had permission to use the landing where the accident occurred, at its peril, this would not bind plaintiff.

The negligence complained of, and upon which plaintiff relied as the ground of his recovery, consists (1) in the failure of the defendants to cover their blasts before firing the same; (2) in their failure to give reasonable notice, or any notice, to the passengers that blasts were about to be fired; (3) in not delaying the firing of such blasts until such time as the boat had departed from the wharf, and was out of danger.

It is argued that the instruction that the jury might take into consideration the nature of the work being done, the time within which it was to be completed, the place where the work was being done, and the necessity of firing blasts at certain times of the day in order that the work might be done within the contract time, makes the case turn upon the question of the necessity the defendants were under of doing the work as it was being done in order to complete it as they had contracted to do; that a party has no more right to be careless or reckless of human life by a contract with the government than by a contract with an individual; that a party cannot relieve himself from his duty to adopt measures of safety and protection by accepting such conditions in his contract as are inconsistent with any measure of prudence necessary to the safety of third persons. The principle thus stated cannot be gainsaid. A party who owes a duty in that regard cannot excuse himself for a failure to exercise ordinary care and skill, whereby another has been injured, by urging the necessities of his own situation at the time. But the term "ordinary care" is a relative term, always dependent on relationship and circumstances. 16 Am. & Eng. Enc. Law, 398. The term "negligence" has different meanings in relation to different causes of action. In some cases it means a very slight absence of care and prudence; in others, the absence of reasonable care; and, again, such want of care as makes gross negligence. *Railroad Co. v. Woodruff*, 59 Am. Dec. 72. Care is, undoubtedly, a relative term, or, rather, conveys a relative idea as to the degree necessary to be observed under circumstances. *Railroad Co. v. Ogier*, 35 Pa. St. 60. Want of ordinary care means nothing more than the failure to use those precautions which a just regard to the persons and property of others demands should be used under the circumstances of the particular case. *The Farmer v. McCraw*, 26 Ala. 189. And it has accordingly been held that it is the duty of a railroad company to exercise more caution and a higher degree of care when running their cars through a village or city than in the open country. *Beisiegel v. Railroad Co.*, 34 N. Y. 622. "Ordinary care" depends upon the performance of a duty which one of the parties owes to the other, and this duty "arises out of the various relationships of life and varies in obligation

under different circumstances. In one case the duty is high and imperative; in another it is of imperfect obligation. Thus, it may be dependent on a mere license to enter upon land or the bare obligation to avoid inflicting a willful injury upon a trespasser; while, upon the other hand, it may be a duty to care for the safety of a specially invited guest or of a passenger for hire." 16 Am. & Eng. Enc. Law, 412. "So, a licensee who enters on premises by permission only, without any enticement, allurement, or inducement being held out to him by the owner or occupant, cannot recover damages for injuries caused by obstructions or pitfalls. He goes there at his own risk, and enjoys the license subject to its concomitant perils. No duty is imposed by law on the owner or occupant to keep his premises in a suitable condition for those who come there solely for their own convenience or pleasure, and who are not either expressly invited to enter or induced to come upon them by the purpose for which the premises are appropriated and occupied, or by some preparation or adaptation of the place for use by customers or passengers, which might naturally and reasonably lead them to suppose that they might properly and safely enter thereon." *Sweeny v. Railroad Co.*, 87 Am. Dec. 647. Where one who, without invitation and as a licensee, only crossed the lands of another, where he and others had often crossed, and fell into an unprotected pit, and was injured, held that the owner of the premises was not liable. *Morgan v. Railroad Co.*, 19 Blatchf. 239, 7 Fed. 78.

This principle is applied in *Eisenberg v. Railway Co.*, 33 Mo. App. 91, where it is held that mere licensees, in the use of a road across private property, in making use of the license, necessarily assume all patent and obvious risks. It is also applied in the case of *Transit Co. v. Rourke*, 10 Ill. App. 478. In the latter case there was an uncovered pit on defendant's land, from which the accident and consequent damages claimed resulted. The deceased was upon the defendant's land, without any invitation from the defendant. The facts, as stated in the opinion, appeared to be that many other persons "were in the habit of passing over said land, of their own motion, and for their own convenience," without objection on defendant's part; "but these facts," the court says, "at the utmost, only raise an implication of a license to the deceased to do the same thing, but gave him no right beyond that of a mere licensee." And in *Railroad Co. v. Griffin*, 100 Ind. 223, the court say:

"The owner of premises is under no legal duty to keep them free from pitfalls or obstructions for the accommodation of persons who go upon or over them merely for their own convenience or pleasure, even where this is done with his permission. In such case the licensee goes there at his own risk, and, as has often before been said, enjoys the risk with its concomitant perils."

In this case there was no invitation by the defendants to the plaintiff or to the navigation company to go upon the premises in question. The latter's passengers went upon these premises for their own convenience, and by the implied permission of defendants. Plaintiff contends that the premises were a highway; that the river has this character; and that it was the right of all persons to pass up and down at this point; and that the defendants were obliged, at whatever inconvenience to themselves, to adopt all necessary precautions for the safety

of plaintiff and his fellow passengers, even if in consequence thereof they became unable to comply with their contract in the completion of the improvement in which they were engaged. Such is the rule governing the enjoyment of property by one owner with reference to the rights of adjacent owners or of passengers on the highway. But it does not apply in the case of mere licensees on the property of another. And, for the purposes of this case, the defendants must be held to be for the time being the owners of the premises where the injury occurred. The right to use the highway is necessarily subordinate to the right to improve the highway for use. The public authority may tear up a street, remove a bridge, or obstruct a road, and to this end exclude all travel, for the purposes of an improvement. The defendants were placed by the government in the possession of the premises where this work was being done. The character of the work was necessarily hazardous. The testimony shows that passengers were allowed to pass over the premises for their own convenience, by permission or sufferance; the only permission that was given being that given to the navigation company, accompanied by the statement that the company must assume all risks.

The plaintiff had frequently made trips over this route before his injury. He testifies that he had gone "up and down there before," "several times a year." How long this work had been carried on does not appear. It appeared, however, that the work at that point was one of magnitude, and that it could only be prosecuted during the short season of extreme low water, beginning about November 1st, and ending early in January. Plaintiff says that, in passing there theretofore, he had never heard blasting. Nevertheless, he must have known, if not from observation, from common knowledge, that blasting was being done along the line of that work. It is common knowledge that this work, necessarily involving more or less blasting, had been going on for years. If plaintiff could, by any possibility, have been ignorant of this, he was so under circumstances that have the consequences of knowledge; and, in passing over these premises, he assumed the risk incident to the work as it was being conducted. He was not a trespasser, and his case was submitted to the jury on the assumption that he was rightfully where he was; but, in determining the "care" required of defendants, it was left to the jury to determine the measure of defendants' obligation to the plaintiff by the circumstances of the case. It does not follow from the statement that plaintiff was rightfully at the place where he was injured; that an imperative duty was imposed upon defendants to look out for his safety, as would be the case if plaintiff had been upon his own premises or upon a public highway open to travel. He was rightfully there in the sense that he was there by sufferance, and was therefore not a trespasser, in which case defendants would only be liable for willful negligence. If plaintiff was rightfully there upon the implied consent of defendants, it was with the implied risk on his part of such dangers as were incident to the work defendants were engaged in, conducted in the manner usual, with the care ordinarily exercised under such circumstances.

The instruction complained of, by which the jury were allowed to take into consideration the magnitude of the work, etc., was with ref-

erence to the contention of plaintiff that defendants were in duty bound to cover their blasts, or to await the departure of the boat before firing them; and, since the jury was allowed to find negligence as to these matters, the instruction was upon a theory of the case favorable to plaintiff. But there is nothing in the case tending to support the contention that there was any obligation on the part of the defendants to adopt either of these precautions. This case differs widely from those cited in support of this motion, where the matter complained of constituted a nuisance, or otherwise involved a breach of duty arising out of circumstances which made that duty a high and imperative one. There was no testimony tending to show that blasts were ever covered except in cities or towns, or in proximity to buildings liable to injury therefrom; and it would be unreasonable to require the defendants, because of the permission granted by them to those who wished to travel by the river route for their own convenience or profit, to so involve themselves in unusual precautions as to make a compliance with their contract impossible or more difficult.

I am of the opinion that the court erred in submitting the matter to the jury at all. There was nothing to authorize a finding of duty on the part of defendants to forego their usual work in their usual method. The covering of blasts was not required by ordinary care. It would have been extraordinary care, and so extraordinary as to be impracticable. And so of the failure of defendants to delay their blasts until after the departure of the boat. It appears that the time when the boat would leave was uncertain. It sometimes happened that, arriving before 12 o'clock, she would not leave until after 2 o'clock, or until shortly before 3 o'clock. The defendants could not reasonably be expected to delay their work awaiting the uncertain movements of the company's boats. The navigation company's boat could, with small loss of time to herself and passengers, have remained down the river until these blasts were fired. It was usually about noon when she arrived at the locks, and she frequently arrived after that time, and probably after the firing was over. The rights of the boat and her passengers were, as we have seen, subordinate to those of the contractors. The boat never left for Portland until after 1 o'clock, and generally it was much later than that. If the down-river passengers did not care to take any risks from the blasts that were uniformly fired shortly after 12 o'clock, they could, with but slight if any inconvenience, have remained at the upper locks until after the blasts were fired. But, without this, the ordinary risks from this danger were assumed by them. They had no right to rely upon any such precautions as it is now contended defendants should have provided. There was no question of negligence as to the matters covered by the instruction complained of that the jury could properly consider, and the plaintiff cannot complain that the court submitted such question to them.

The plaintiff cites a number of cases in support of his motion, bearing upon the question under consideration, among them *Beauchamp v. Mining Co.*, 50 Mich. 163, 15 N. W. 65, where it was left to the jury to find whether ordinary prudence and caution would have required the defendant to cover and protect the place from which blasts were to be fired, the case being one of injury from a mining blast. This was



assigned as error, upon the ground that such a requirement would be so expensive that mining could not be carried on profitably, and was therefore impracticable. But the court said:

"In none of these cases where negligence is alleged and proved could the answer be admitted that the profits of the business carried on would not justify the extra expense. It is not the matter of profit or loss that determines or enters into the question of care or negligence, but rather that of danger to the public or third persons. Were it otherwise, an insolvent corporation would be comparatively safe, and an almost worthless mine might be carried on with an utter disregard of the rights and safety of others. If mining at a particular place cannot be profitably carried on, and at the same time the rights of third parties be respected and protected, then it must be carried on at a loss or abandoned."

It will be noticed that the question is treated by the court as an attempt to excuse proved negligence on the ground of expense; but the real question was whether a failure to cover the blasts, under the circumstances of the case, was negligence or tended to prove it. The case was one where the defendant company and another company, the Stephenson Company, worked adjacent mines. Each company gave to its employes permission to erect and occupy dwellings on their respective lands. The plaintiff, who was working for the Stephenson Company, had erected a dwelling upon its lands. With its permission, a store was also maintained on its lands. The plaintiff's son was injured by a blast from the defendant company's mine, while going from the store to his home. The case was therefore one where an injury results to a third person, on his own premises, from the work of an adjoining owner; and it belongs in the category with those cases which hold that the act of throwing missiles on the land of another is clearly wrongful, and imposes upon the party the obligation of seeing to it that no injury results therefrom.

The case of *St. Peter v. Denison*, 58 N. Y. 416, relied upon by plaintiff, is a case where a contractor of the state, in blasting for a canal, threw frozen dirt upon the land of plaintiff, where the latter was in the enjoyment of his property, and without warning of the blast, whereby plaintiff was injured. It was held that the throwing of debris by blasting in this way was an intrusion upon plaintiff's land, and that this is equally as wrongful as a permanent appropriation of the land would be, and that, having no right, it is no matter whether or no defendant made his invasion without negligence; that the defendant was bound either to adopt such precautions as would prevent such missiles from reaching the place where the plaintiff then was, or to give him personal and timely notice of the setting off of such blast; that "the plaintiff was of lawful right where he was, and had the right to assume, until personal notice or knowledge of the contrary, that others would not unlawfully intrude upon him." The case cited is not one of negligence, but of unlawful intrusion upon the premises of another. The duty resting upon the defendant to guard against injury from his wrongful intrusion was absolute. It was not a case of reasonable care in blasting or in giving notice. The act of throwing missiles upon the land of the adjacent owner was in itself wrongful, and it imposed upon the defendant the obligation of seeing to it that no injury resulted therefrom. Reasonable precaution as to notice, or reasonable

care in that respect, was not enough. Timely and personal notice is required,—such notice as would make the plaintiff's conduct thereafter, in exposing himself to the threatened danger, reckless or willful. The case involves an entirely different principle from that applicable in this case, where the plaintiff, for his own convenience, by the sufferance or implied license of defendants, goes upon premises where, and at a time when, blasting is being regularly done, and who, if the circumstances do not imply knowledge beforehand, at least knew some time before he was injured that blasts were being fired.

Another case relied upon in support of this motion is that of *Wright v. Compton*, 53 Ind. 337. But that case, like the one just considered, did not involve any question of negligence. It was a case of blasting near a public highway, whereby a person traveling on the highway was injured. The court says:

"The question involved is not one of negligence on the part of the defendants. The act charged against them is in itself unlawful; not the act of blasting and quarrying rock, but the act of casting fragments of rock upon the plaintiff, to his injury."

The court lays down the rule that "the public travel must not be endangered to accommodate the private rights of an individual." The question is considered in this case as one involving an unlawful use of the defendants' property, to the injury of third persons in the enjoyment of their property. It is put upon the grounds of the decision in *St. Peter v. Denison*, that what is complained of is a nuisance,—an unlawful intrusion upon the property of others. And so the court, quoting from *Hay v. Cohoes Co.*, 2 N. Y. 159, says:

"A man may prosecute such business as he chooses upon his premises, but he cannot erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of a lawful trade. He may excavate a canal, but he cannot cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he cannot construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all the damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner."

And the conclusion is reached that:

"If the defendants cannot work their stone quarry without endangering the safety of travelers on the highway, they must abandon it, or answer in damages for the injuries thus done."

So, too, of the case of *Colton v. Onderdonk*, 69 Cal. 156, 10 Pac. 395, also cited in support of the motion. In that case the owner of a lot situated in a large city, contiguous to the dwelling of another, blasted out rocks on his lot, to the injury of his neighbor. It was held that such a use of property is unreasonable, unusual, and unnatural, and no care or skill exercised in the use will excuse the owner from liability for the resulting damage.

In all these cases the obligation to make compensation is an absolute one. The law declares that one man shall not improve his own property by the employment of dangerous agencies, to the injury of his neighbor; and, whether he exercises the utmost care, the result is the same. Admitting that the same rule applies where the government is a party, yet it cannot be invoked when the injured party

voluntarily, in the prosecution of his own business, goes upon the premises where the improvement is being made, although he has permission to do so. Such person cannot say: "I am here by your permission, and with knowledge of the work you are prosecuting, and you must see to it that I am not injured, even if it becomes necessary to abandon the improvement you are making." Such an application of the rule of these cases would be unreasonable. The plaintiff and his fellow passengers went upon the premises where the blasting was being done with their eyes open. Their right there, whether it was a right by sufferance or license, implied or otherwise, was subordinate to the right of the defendants to prosecute the work in which they were engaged. These passengers assumed all risks necessarily incident to such work prosecuted with skill and reasonable care,—such care as is usually employed under like circumstances. They had a right to expect, and are presumed to have relied upon, this degree of care; but they had no right to expect, and are not presumed to have expected, that the manner of carrying on this work would be changed, and precautions, unheard of under the circumstances, adopted, or that the work would be delayed or possibly abandoned because of the indulgence granted to them. It follows that the refusal of the court to instruct the jury that the permission of defendants to the navigation company to use the landing at its peril would not be binding upon passengers on the boats of the company was not erroneous. The instructions given were inconsistent with the conclusion that any peril assumed by the company involved the plaintiff. It was fully explained to the jury that defendants were bound to exercise ordinary care under the circumstances. These circumstances were enumerated, and did not include that of risk impliedly assumed by the navigation company. I am of the opinion that the plaintiff did assume all risk attendant upon the work, if not as it was usually conducted, at least such risk as was necessary to the work conducted with ordinary care, as determined by the circumstances which surrounded it. When the jury are instructed to this effect, there is no presumption that they may have found that defendants were not liable upon the ground of an understanding with the navigation company that it acted at its peril.

It is contended that the jury should not have been permitted to consider whether there was contributory negligence on plaintiff's part; that there was nothing tending to prove such negligence. I am of the opinion that there was such testimony in the case. From what has already been said, enough appears to authorize a finding that plaintiff knew, from previous acquaintance, the nature of the work done at the locks and the risks attending it; that he knew that blasting was being done there, and the manner of such blasting; and that he knew that the boat did not leave the wharf until after such blasting at the noon hour. But, without this, it appears that plaintiff was warned of the blasting by the noise of the blasts, and by information which he had. He testifies that, when he got to the boat "at the time of the hubbub of the people getting off the boat, there was blasting at that time," so he "understood"; that he "heard some noise," and went in and sat down; that then, after the passengers going up stream

had got off the boat, he sat down with others, and played a game of cards, "for about fifteen minutes." Then he sat down, and talked to the steward for a few minutes, after which he succumbed to the rocking motion of the boat, and dozed, when he was struck and injured. On cross-examination plaintiff says that as soon as he got on the boat, and after he went upstairs, he heard some noise like blasting, and he "thought they were blasting," and that thereafter he played a game of cards. So, according to his testimony, he "understood" they were blasting at the time, and he heard some noise like blasting, and thought they were blasting, and thereafter he played cards for some 15 minutes, and followed that by talking with the steward "for a few minutes," after which he dozed in his seat for a time, the length of which he is unable to give. He was therefore fully warned of the blasting, and his instinct, if not his previous experience, should have enabled him to know there was danger. His conduct warrants the inference that he had become so accustomed to blasting, from previous journeys down the river, that it had ceased to excite any interest or concern in him. Between the time when he heard the noise of blasting and understood there was blasting, and his injury, there was ample time to have taken the utmost precautions for his own safety that any personal warning would have given him. He testifies that he had not on previous trips heard blasting, but does not testify that he was ignorant of the fact that blasting was being done regularly at that place and time; and, as already stated, there is enough to authorize the inference that he did know it, and that, with such knowledge, he was guilty of contributory negligence in going upon the boat, and, furthermore, that his subsequent conduct, after hearing the blasting, is enough to sustain a further finding of negligence on his part.

In addition to these considerations, I am of the opinion that there is nothing in the case tending to prove negligence on the part of defendants, contributing to the injury; that there is nothing to warrant the conclusion that the blasts should have been covered, or that defendants should have postponed their work of blasting until the navigation company's boat left on its trip; and that the question of a warning cry that blasts were to be fired is immaterial, since the plaintiff was otherwise warned, and had knowledge. The feeling of security which his conduct manifests was certainly not due to lack of notice, but appears to have been due to his indifference to what was taking place. The motion for a new trial is denied.

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UNITED STATES v. SIMONS et al.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1898.)

No. 441.

INDIAN AGENCIES—ACTION BY UNITED STATES—ALLOWANCE OF CREDITS.

In an action on the bond of an Indian agent, where the agent died near the close of the quarter, credit may be allowed for vouchers which have not been presented to the accounting officers of the treasury; the death of the agent bringing such vouchers within the last clause of Rev. St. U. S. § 951, relating to vouchers not presented by reason of "absence from the United States or some unavoidable accident."

In Error to the District Court of the United States for the District of Montana.

Preston H. Leslie, for the United States.

McConnell & McConnell, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. Archer O. Simons was the agent for the Indians at Ft. Belknap Agency, Mont., under a commission bearing date February 4, 1890. On April 1, 1890, he took the oath of office, and entered upon the discharge of his duties. On December 21, 1892, he died. An action was brought by the United States against his administrator and his bondsmen to recover \$858.42, with interest thereon from December 21, 1892, which sum, it was alleged in the complaint, the agent had appropriated and converted to his own use. Defendants denied their liability for any sum. They also pleaded a set-off of \$334.20 for unpaid salary due the deceased. There was a verdict for the defendants, and judgment accordingly.

It is assigned as error that the court permitted the witness Rainsford to testify orally concerning the disposition of certain articles referred to in vouchers No. 3 and No. 5, and that he was permitted to testify orally that \$30 disbursed by the agent for vaccine virus was used in vaccinating the Indian children, and that he was permitted to testify orally that certain paint brushes with which the agent was charged had been worn out under his direction in painting the rooms of the agency buildings. It is said that this oral testimony was inadmissible under section 951 of the Revised Statutes, which provides as follows:

"In suits brought by the United States against individuals, no claim for a credit shall be admitted, upon trial, except such as appear to have been presented to the accounting officers of the treasury, for their examination, and to have been by them disallowed, in whole or in part, unless it is proved to the satisfaction of the court that the defendant is, at the time of the trial, in possession of vouchers not before in his power to procure, and that he was prevented from exhibiting a claim for such credit at the treasury by absence from the United States or by some unavoidable accident."

The total amount involved upon the writ of error is \$243.43. Voucher No. 3 accounts for the disposition of certain flannel sheeting, linsey, etc., which, according to the voucher, were used by the pupils of the Indian school; voucher No. 5, for some lumber, amounting to \$22.44, purchased and used for the agency. There is nothing whatever in the record to inform us that proper vouchers for all of these items had not been duly forwarded to the proper accounting officers. But, assuming that they were not, we find no error in the admission of oral testimony. All the transactions concerning which such testimony was taken belong to the last quarter of the year 1892. The death of the agent occurring a few days before the end of that quarter, it was manifestly impossible for him to have submitted the vouchers. The case comes clearly within the exceptions named in the statute. If the death of the agent was not an absence from the United States, it certainly was

an unavoidable accident. It was shown that the Indian commissioner had written forbidding the administrator to sign or verify vouchers. The vouchers that were admitted in evidence were signed,—the one by the superintendent of the Indian schools, the other by the administrator of the decedent. There was competent and undisputed evidence that the vaccine virus had been used in vaccinating the Indian children, and that the paint brushes were worn out in painting the agency buildings. Upon the evidence offered on the trial, the defendants were entitled to a verdict irrespective of the set-off. We search the record in vain for a justification of the harsh charge that the agent appropriated and converted to his own use the moneys of the United States. Nor can we see that the ends of justice have been subserved by burdening his estate with the expense of this writ of error. The judgment of the circuit court will be affirmed.

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CLEVELAND, C. & S. RY. CO. v. KNICKERBOCKER TRUST CO. OF  
NEW YORK et al.

(Circuit Court, N. D. Ohio, E. D. April 12, 1898.)

No. 5,156.

1. RAILROADS—MECHANIC'S LIEN—OHIO RAILROAD LIEN LAW—BRIDGES.

A lien upon a railroad bridge in Ohio for work performed and material furnished cannot be obtained under the mechanic's lien law, but must be obtained under the act of April 10, 1884, known as the "Railroad Lien Law," under which the lien must be filed within 40 days after the account is closed.

2. SAME.

A railroad bridge becomes a part of the permanent structure of a railroad, and a mechanic's lien cannot be maintained for work performed and material furnished for a bridge as against liens created by prior mortgages on the railroad.

3. SAME—PRIORITY OF CLAIM FOR NECESSARY REPAIRS.

Where a railroad bridge became so defective that it was unsafe to run trains over it, and repairs were necessary to keep the railroad a going concern, those who performed the work and furnished the material necessary in repairing the bridge are entitled, on the insolvency of the company and the appointment of a receiver, to priority over the mortgage bonds, without showing any diversion of income, and such priority may be allowed, though more than six months elapsed between the time the work was done and the appointment of a receiver.

4. SAME.

Such priority is allowed as against liens created by mortgages placed on different branches of the consolidated road when they were independent corporations.

5. SAME—ORIGINAL CONSTRUCTION.

The term "original construction" (as distinguished from repairs) has a technical meaning, and is that construction of bridges, grades, culverts, rails, ties, docks, etc., that is necessary to be done before the road can be opened, not such structures as are intended to replace old and worn out counterparts.

Baldwin & Shields, for complainant.

C. E. Pennewell, Amos Denison, and F. A. Durhan, for interveners,  
T. B. Townsend Brick & Contracting Co.

**RICKS, District Judge.** The intervener seeks to obtain a preferential lien for work done and performed and material furnished for the Cleveland, Canton & Southern Railroad Company upon the pier and abutments of the Independence street bridge over the Cuyahoga river, in the city of Cleveland, and, with that end in view, sets up three grounds for recovery: (1) A mechanic's lien is asserted. (2) It is asserted that at least a portion of its claim is preferred under the order of the court appointing the receiver, in which six months' claims for material, supplies, and labor are to be paid out of the net income of the road in the hands of the receivers. (3) That the labor performed and material furnished were necessary to keep the road a going concern, and that, in equity, they are entitled to payment out of the corpus.

In my opinion, the mechanic's lien placed upon the bridge upon which the work was performed and material furnished is ineffectual to charge the railroad company, for the reason that a claim against a railroad cannot be obtained under the general mechanic's lien law, but must be obtained under the act of April 10, 1884, and known as the "Railroad Lien Law." According to the provisions of that law, the lien must be filed within 40 days after the account is closed. The lien upon which reliance is placed in this case was not filed until after the expiration of 40 days. The last work was done June 20, 1893, and the affidavit was not filed until August 16th thereafter. The Townsend Company also failed to serve notice of its alleged lien within 10 days after the filing thereof on the secretary or other officer of the company, as provided by the act referred to. See *Commissioners v. Tommey*, 115 U. S. 122, 5 Sup. Ct. 626, 1186; *Industrial & Mining Guaranty Co. v. Electrical Supply Co.*, 16 U. S. App. 196, 7 C. C. A. 471, and 58 Fed. 732. Then, too, the mechanic's lien relied upon includes the Independence street bridge only as the property affected. The United States supreme court in the case of *Porter v. Steel Co.*, 122 U. S. 267, 7 Sup. Ct. 1206, held that:

"The bridges become a part of the permanent structure of the railroad as much so as the rails laid upon the bridges or upon the railroad outside of the bridges." "Whatever is the rule applicable to locomotives and cars, and loose property susceptible of separate ownership and of separate liens, and to real estate not used for railroad purposes, as to their being unaffected by a prior mortgage given by a railroad company, covering after-acquired property, it is well settled in the decisions of this court that rails and other articles, which become affixed and a part of a railroad covered by a prior mortgage, will be held by the lien of such mortgage in favor of bona fide creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contracts in the present case."

If a specific contract made by the company giving a lien upon a bridge cannot be maintained as against mortgage lienors, certainly a mechanic's lien cannot be made more effectual for that purpose. Even if this lien can be maintained, it would be subordinate to all the mortgages executed by the company, and set up in the proceedings affecting the property of the railroad company in this court, because of their prior date.

2. The clause authorizing the payment of certain items of indebtedness by the receivers reads as follows:

"And the said receivers are hereby authorized to pay and discharge out of the net income of said railroad all unpaid traffic balances and the indebtedness of said company to its servants and employes, and for materials and supplies accruing within six months last past, and also the unpaid coupons, amounting in all to \$4,000, due July 1, 1893, on the Coshocton & Southern Railroad line, and mentioned in the said bill of complaint."

The master found that, of the amount due for work and materials claimed in this case, the sum of \$6,072 accrued within six months prior to the appointment of the receivers. It is suggested that this amount is inaccurate, and that the amount due within six months is not so much as found by the master. This claim is not founded upon proof, but upon the assumption that only one-half the estimate for March (\$2,496) should be allowed. In the absence of anything definite, the court will adopt the master's findings of facts.

If the character of this contract was such that the order of the court preferring labor and material men applies to it, only the sum of \$6,072 could be paid by the receivers, and then it could only be paid out of the net income in their hands. The evidence does not establish the fact that there is a net income in his hands applicable to the payment of said sum of \$6,072 so reported by the master. If it can be shown that there is sufficient net income in the hands of the receiver to pay this sum, I am of the opinion that the nature and character of the work done by the intervening creditor would entitle it to payment out of such income. But there is nothing in that order which would entitle it to payment out of the corpus of the property, to the prejudice of the rights of mortgage creditors. If the claim of priority is justified, it must be on the grounds of superior equity.

The International Trust Company, representing certain of the bonds secured by mortgage on the property of the railroad company, by its solicitors, alleges that the contract under which the labor was performed and material furnished was a contract for original construction made in April, 1892, about 18 months before the receivers were appointed, and more than two-thirds of the work done under it more than 6 months before the receivers were appointed,—a contract made with full knowledge of the existence of the bonds and mortgages upon the property,—and that no equity arises as against these mortgages; and it asserts that the Hamilton Case, 134 U. S. 296, 10 Sup. Ct. 546, and other cases cited, are conclusive upon this point. If the work of the intervener was original construction, within the view of the Hamilton Case, then there can be no priority. The agreed statement of facts in this case is as follows:

"The old bridge at Independence street was built in 1880, and was a wooden structure. In 1886 it was re-enforced by overhead trusses. Later, it was necessary to support it by piling. In 1892, because of the age and worn-out condition of the bridge, it became necessary, in order to safely operate the road, to replace the old bridge with a new one. On application to the city for permission to put a new bridge over the river, the city required a draw to be put in the new bridge, and refused to permit the old bridge to be replaced by anything but a drawbridge, and thereupon the new bridge for which the pier was built by the intervener was constructed and took the place of the old one."

In my opinion, the replacement of the old bridge, whether the work was done by "force" work of the company or by contract with other



persons, was in all essentials necessary repairs, and not original construction. This agreement states that the old bridge had been reinforced by overhead trusses. Later it was supported by piling. In 1892, because of the age and worn-out condition of the bridge, it became necessary, in order to safely operate the road, to replace the bridge with a new one. The city authorities required a swing bridge. But the new bridge was built to repair or replace the old one.

It is the history of all first-class roads that year after year the cheaper structures are replaced by better and more expensive structures; and the road gradually develops from a very inferior, improvised affair into the first-class, safe, and desirable road that is essential to the safety of passengers and economy of general traffic. The magnificent stone and iron bridges we see are not usually original structures, but are the outgrowth of constant improvements and repairs upon the original road. The term "original construction" has a technical meaning. It is that construction of bridges, grades, culverts, rails, ties, docks, etc., that is necessary to be done before the road can be opened, or before they can be occupied or used, not such structures as are intended to replace old and worn-out counterparts. It is contended, by way of further defense to this claim, that, even if it be shown that the work done by the intervenor was a part of the necessary operating expense of the road, only so much of the account as accrued within six months prior to the appointment of the receivers can be made a charge against the corpus, and payable out of the proceeds of the sale, before the mortgage creditors are to be paid, and then only upon proof that there has been a diversion of the income of the road with the consent of the bondholders, either express or implied. On the other hand, the interveners insist that the subject of their account was necessary to keep the road a going concern, and that it is entitled, on the insolvency of the company and the appointment of a receiver, to priority over the mortgage bonds, without showing any diversion of income, and that such priority may be allowed, though much more than six months elapsed between the time the work was done and the appointment of the receivers.

The first matter to be determined is whether this work was necessary to keep the road a going concern. The Cleveland, Canton & Southern Railroad is composed of several constituent lines. These branch lines are feeders of the main line, which has its principal terminus at Cleveland. Both its passenger and freight stations are located north of the Independence street bridge. It is there that its principal connecting lines are met, and its principal traffic, both passenger and freight, is dependent upon this terminus.

If the Independence street bridge had become so defective that it was unsafe to run trains over it, all the traffic that would naturally go to or come from Cleveland would have been cut off. The agreed statements of facts in this case show that in 1892, because of the age and worn-out condition of the bridge, it became necessary, in order to safely operate the road, to replace the old bridge, and the city authorities would not permit the building of a common bridge, but required that it should be a drawbridge. There cannot

be a draw without a pier to support the draw span. The repairs on the abutments became necessary by reason of the circumstances. No matter whether the Townsend Company did this work, or some one else did it, it was absolutely necessary, in my opinion, to the operation of the road, to preserve the property, to protect its franchises, and discharge its duties to the public.

It appears from the record that, by consent of the mortgage creditors, receiver's certificates have been issued to pay the bridge company for the iron superstructure of this bridge. The court, and the mortgagees, by their consent, recognized the fact that the bridge company had a superior equity. It would not be contended that the foundation for this bridge was less essential than the bridge-work proper. If the mortgagees had taken possession of the road, they would have had the right to make such expenditures as were necessary to conserve and preserve the property, and such expenditures would be a charge against the corpus of the property. If the mortgagees can do this, the officers of the company, who, for the purposes of the bondholders, are the trustees and agents, can also do it, and even in duty bound to do it.

It being determined that this work was necessary to keep the property a going concern, we are to decide whether lack of proof of diversion, and the fact that more than six months expired between completion and the appointment of receivers, precludes recovery. I think not. This view is held in the case of *New York Guaranty & Indemnity Co. v. Tacoma Ry. & Motor Co.*, 27 C. C. A. 550, 83 Fed. 365; *Central Trust Co. v. East Tennessee, V. & G. R. Co.*, 26 C. C. A. 30, 80 Fed. 624 (in which Judge Lurton delivered the opinion); *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. 182-189; *Miltenerberger v. Railroad Co.*, 106 U. S. 286, 1 Sup. Ct. 140; *Union Trust Co. v. Illinois M. Ry. Co.*, 117 U. S. 434, 6 Sup. Ct. 809; *Atlantic Trust Co. v. Woodbridge C. & I. Co.*, 79 Fed. 39; *Burnham v. Bowen*, 111 U. S. 776, 4 Sup. Ct. 675; *Trust Co. v. Morrison*, 125 U. S. 591, 8 Sup. Ct. 1004; *Hale v. Frost*, 99 U. S. 389.

The principle upon which such preferences are allowed is very thoroughly discussed in the case of *New York Guaranty & Indemnity Co. v. Tacoma Ry. & Motor Co.*, *supra*. In this case, and the others cited, the application of the general rules as to preferential claims enunciated by the federal courts depends to a large degree upon the circumstances of the case. While the fact that the labor performed and the material furnished in the case at bar resulted in lasting and valuable improvements to the property of the company, and so increased the security of the mortgagees, is not of itself sufficient ground for giving the claim a preference, it is an element and one of the circumstances which entitle the claimants, in my opinion, to priority over the mortgagees. It is urged that in this administration suit the court has no power to make any claim not incurred in the operation of the property by the receivers a lien upon the property itself, or to give such priority over the mortgages. If the court has no such power, it is because in this suit no mortgagee or underlying lienor asks for a sale of the prop-

erty. The supreme court, in the case of *Railroad Co. v. Humphreys*, 12 Sup. Ct. 787, did not pass upon "the action of the court in making the appointment of receivers on the application of the mortgagor," because that question was not before it; but the theory that an insolvent railroad corporation may, in the public interest, and for the benefit of all its creditors, surrender its property to a court of equity, to be preserved and kept in operation until it can be disposed of according to the several private rights concerned, was not disapproved in that case. And in the cases of *Farmers' Loan & Trust Co. v. Kansas City, W. & N. W. R. Co.*, 53 Fed. 182, and *Central Trust Co. v. Wabash St. L. & P. Ry. Co.*, 30 Fed. 332, there was a substantial approval of such a proceeding.

The right of the court to prefer the claim of the Townsend Company in this proceeding, so far as the equities are concerned, is not determined by an order of the court at the instance of the mortgagor railroad company, but rests upon the broad ground of superior equity, and such a preference may be given whether a so-called six-months claim order is made or not. In the case of *New York Guaranty & Indemnity Co. v. Tacoma Ry. & Motor Co.*, 27 C. C. A. 550, 83 Fed. 365, no such order is made, and the preferred creditor did not file his intervening petition until after the sale was made and confirmed, and yet his claim was allowed. It is a well-recognized principle that the court has jurisdiction of a fund as long as it is in the custody of the court.

It is suggested that the divisional mortgagees cannot be subjected to loss of priority because brought into association with others by the bill. Referring to the fact that the Cleveland, Canton & Southern Railroad Company bought up the various branches or divisions which were theretofore independent corporations, and against which the several mortgagee debts set out in the bill obtained, it is said: All the debts, outstanding and unsecured, and debts of the present company, and the mortgages, except the last two, are superior to any right of the present company. It could create no lien on any of this property that would not be inferior to the prior mortgages. With the uniting of these properties by purchase, in the name of the present company, these mortgagees had nothing to do,—no power to prevent or promote it. Upon what principle, then, can the contracts of this company, in the operation of its entire system, or its purchases of material, or contracts for construction, become of better right or prior lien than these mortgages? Are the contracts for the operation or improvement of the Coshocton Branch, for instance, to be charged as a prior lien on the Waynesburg Branch, in whole or in part, and so on? That objection was raised in the case of *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, supra, but the court overruled the objection, and say:

"For a clear understanding of these questions, it will be necessary to go back to the inception of this receivership. At that time there was a single corporation,—the Wabash, St. Louis & Pacific. It was a corporation made up by the consolidation, in 1879, of various minor corporations. After the consolidation by which the Wabash, St. Louis & Pacific was brought into being, it absorbed

still other roads by consolidation, and took possession of others by lease. It was an insolvent corporation, and it came into court pleading its insolvency, and asking the court to take possession of its entire property, and administer it for the benefit of all concerned. There was then but a single corporation, owning many pieces of property, having possession of others by lease, which separate pieces of property were, many of them, covered by underlying mortgages. As a single corporation, it was also in debt to an amount exceeding \$3,000,000 of floating indebtedness, and yet of that character of indebtedness which, by the decision of the supreme court, was preferred to all mortgages. Thus the preferential debts of three millions and over were a prior lien upon all the roads belonging to the Wabash,—not a lien upon one division, and no lien upon another, but a lien upon each and all of them, prior in right to every mortgage, general or local, junior or senior. It made no difference where those obligations were incurred,—whether in the operation of one line or another. They were obligations of the single debtor, and enforceable in law against every part of its property. In a case of a complicated railroad system like this Wabash, not only were they at law the obligations of one debtor enforceable against all its property, but in equity also they were chargeable upon all its property."

Until proceedings are had, either in this case or in a consolidated cause wherein an order shall be made for the sale of the property, and out of which a fund shall arise, the court cannot give this intervening claimant such relief as will discharge his claim; but, having recognized an equitable priority in his favor, the court will exercise such jurisdiction as may be necessary in a proper case.

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UNITED STATES v. DILL.

(Circuit Court of Appeals, Third Circuit. March 18, 1898.)

No. 2.

1. UNITED STATES MARSHALS—FEES—ATTENDANCE BEFORE COMMISSIONER.

A marshal is entitled to fees for attendance by deputy at examinations before a commissioner, though the deputy was paid for attendance on the same day on the district or circuit courts. 78 Fed. 614, affirmed.

2. SAME—RETURNS OF NIHIL HABET.

A marshal having made a charge of 40 cents each for returns of nihil habet, and it appearing that in the state practice two such returns were treated as equal to a service, *held*, that the charge should be allowed. 78 Fed. 614, affirmed.

3. SAME—ATTENDANCE ON SUNDAY.

The marshal is entitled to a fee for necessary attendance on court on Sunday, though the judge was not actually present. 78 Fed. 614, affirmed.

4. SAME—COMPENSATION FOR GUARDS.

The marshal is entitled to be reimbursed, as a contingent expense, for money actually paid for guards for prisoners attending court. 78 Fed. 614, affirmed.

5. SAME—MILEAGE.

The marshal is not entitled to mileage in going to serve warrants of removal and commitment, where he has been paid 10 cents per mile for transportation of the prisoner on the same warrant at the same time. 78 Fed. 614, reversed.

6. SAME—SERVING WARRANTS OF COMMITMENT.

The marshal is not entitled to fees for serving warrants of commitment. 78 Fed. 614, reversed.

In Error to the District Court of the United States for the Eastern District of Pennsylvania.

This was a petition by Catharine S. Dill, sole executrix of the last will and testament of Andrew H. Dill, deceased, praying judgment against the United States for the sum of \$758.16, claimed as due to her for services rendered by Andrew H. Dill as a marshal of the United States for the Eastern district of Pennsylvania. In the circuit court judgment was given for plaintiff in the sum of \$754.86, with costs. 78 Fed. 618. The United States thereupon sued out this writ of error. In the court below counsel for the respective parties submitted the following statement:

It is agreed that the charges for mileage, expenses, and rendition of services set forth in the petition filed are correct; that the expenses were actually paid, and the said services were actually rendered. It is further agreed that all the items in the petition filed, both for expenses incurred and fees earned, were embodied in the various accounts of the said Andrew H. Dill, deceased, during the years mentioned in the said petition, which said accounts were examined and passed upon by the then United States district attorney, and formally approved by this court. The various items of claim set forth in the said petition are grouped in the schedule hereto attached:

(1) Amount earned, and not received, for attending by deputy at examinations before a commissioner during years 1887 and 1888, \$328. A United States marshal is entitled to charge for the attendance of himself and his deputies before United States commissioners on the same days on which circuit or district courts are in session, and fees for attendance on these courts are charged and paid. *Saunders v. U. S.*, 73 Fed. 792; *U. S. v. Kerns*. Counsel for the United States contends that said deputies were not entitled to said pay, for the reason that, on the days for which they charge for attendance before United States commissioners, they were actually paid attendance upon the district and circuit courts as bailiffs; that duplicate per diems are not authorized; and, further, that the treasury department has disallowed the charges embraced in this particular item of claim. It is, however, admitted that similar charges for attendance of deputy marshals under the same circumstances were subsequently allowed to Marshal Dill during the years 1889 and 1890, and have been allowed by the treasury department up to the present time.

(2) Amount earned, and not received, for travel in going only to serve warrants of removal and warrants of commitment during the years 1887, 1888, 1889, and 1890, \$141.18. This charge is authorized by paragraph 25, § 829, Rev. St., viz.: "For travel in going to serve any process warrant, attachment or other writs six cents a mile to be computed," etc. If the disallowance is because a charge has been made for transportation of the prisoner, this is not a valid reason. Paragraph 20 of section 829 provides, "for transporting criminals ten cents a mile for himself and for each prisoner and necessary guard." In the case of *Tanner v. U. S.* (decided in the court of claims in 1889) 25 Ct. Cl. 68 (a case in point), Judge Davis said: "It appears that for fifteen years the accounting officers consistently construed the statute as authorizing the payment to the marshal of the two fees,—one for travel in the service of a warrant of commitment; the other for transporting the criminal named in the warrant. The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons." The court found as conclusions of law that the claimant recover the sum of \$128.16 fees for mileage. In the case of *U. S. v. Kerns*, U. S. Dist. Ct., Aug. Sess. 1888, No. 4, this court allowed services for return mileage where marshal has secured or delivered a prisoner pursuant to warrant of arrest or removal. *Harmon v. U. S.*, 43 Fed. 560. Counsel for the United States contends that this item of claim is unauthorized, as the statutes nowhere allow a marshal six cents per mile in addition to the ten cents per mile for transportation on the same warrant at the same time. The treasury department disallowed this item for this reason.

(3) Serving warrants of commitment in 1887, 1888, and 1889, \$60. *Saunders v. U. S.*, 73 Fed. 782, 792. A mittimus for the commitment of a prisoner is a warrant, for the service of which on such prisoner the marshal is entitled, under Rev. St. § 829, to a fee of \$2. In these cases writ was served upon the prisoner,

not upon the jailer. In *U. S. v. Kerns*, supra, the court allowed defendants charges for fees for temporary commitments. Also, see *Turner v. U. S.*, 19 Ct. Cl. 629; *Heyward v. U. S.*, 37 Fed. 764; *Hoynes v. U. S.*, 38 Fed. 542. Counsel for the United States contends that the claim in this item was disallowed by the treasury department for the reason that the writ was served upon the jailer, and not upon the defendants. This item is composed of charges for service of warrants of commitment upon defendants where there was more than one defendant. The fee allowed by law for executing a warrant of commitment where two or more persons are committed under the same warrant is \$2.

(4) Travel. Deputy marshal in 1887 to serve at Richmond, Franklin county, 190 miles, at 6 cents, making a total of \$11.40. Of this amount, \$5.04 allowed, being for 84 miles' travel from Harrisburg, where writ was issued,—\$6.36. Having no deputy at Harrisburg at the time the warrant was issued, the commissioner forwarded warrant to Marshal Dill, at Philadelphia. The distance traveled was necessary to serve writ. The route taken was the most direct. The evident intention of congress was to give the officer 6 cents a mile for every mile actually and necessarily traveled, by the most direct, practical route, in going to serve the writ. In *U. S. v. Kerns*, supra, this court entertained a question regarding the services of venires kindred to the above, in principle, and awarded full claim of mileage. Counsel for the United States states that the original claim was for \$11.40. Of this amount, the treasury department allowed the sum of \$5.04, being the mileage from Harrisburg, where the warrant was issued, to Richmond, where it was served, and disallowed the mileage from Philadelphia to Harrisburg, for the reason that section 829, Rev. St., only allows a marshal mileage from the place where the warrant is served to the place where it was returned.

(5) Total amount of mileage earned, and not received, for travel in going only to serve jury summons during 1887-1888, \$24.82. Section 829, par. 25, before quoted, provides: "For travel in going only to serve any process, warrant attachment or other writ, \* \* \* six cents a mile. \* \* \* But where more than two writs of any kind required to be served in behalf of the same party on the same person might be served at the same time, the marshal shall be entitled to compensation on only two of such writs." The jury summonses in question were all served upon different persons, and there is nothing in this paragraph restraining or controlling the journeys of the marshal or deputies in performing his duty. The mileage was clearly and legally earned. *Saunders v. U. S.*, 73 Fed. 783, and *Harmon v. U. S.*, 43 Fed. 560, decide that a marshal may charge for travel upon two or more writs, against different persons, served at the same time and place. This court allowed this claim in *U. S. v. Kerns*, supra. Counsel for the United States contends that this is double mileage; that the marshal is only allowed for travel in service of one writ, although there may be a number in his hands, and served by him at the same time and place.

(6) Andrew H. Dill claims, for attendance as marshal upon the United States circuit court for the Eastern district of Pennsylvania on the 16th day of October, 1887, earned, but not received, \$5. This was Sunday, and is a claim for actual attendance on court in charge of a jury that was deliberating on a verdict. Counsel for the United States contends that October 16, 1887, was Sunday; that from the records it appears that the case of *Green v. Pennsylvania R. Co.*, No. 2. April Sess., 1887, was given to the jury on the preceding Saturday; and that on the day in question (October 16th) the jury were still deliberating, and their verdict was received on the following day (October 17th).

(7) Total amount actually paid to guards in charge of United States prisoners while in attendance on court during 1887 and 1888, and not received from the United States, \$92. Section 830, Rev. St., provides that the marshal shall be paid, among other items, "his expenses necessarily incurred for fuel, lights and other contingencies that may accrue in holding courts within this district." During the years 1887 and 1888 there was no cage for the keeping of prisoners during the period of attendance upon court awaiting trial. It was absolutely necessary that the prisoners ordered up from the county prison should be guarded. This item represents money actually paid by the marshal, and the cause for the expenditure is certainly a contingency, within the meaning of the section above quoted. Counsel for the United States contends that no such charge for payment to guards is provided by the fee bill.

(8) Amount earned, and not received, for serving warrants to apprehend in 1888 and 1889, \$6. This item represents two cases. In *U. S. v. Mull*, \$2. This was disallowed upon the claim that there were two warrants, and defendant was in custody by virtue of the first, already executed. There were two warrants issued by the commissioner, and the marshal took the defendant in custody on both of them, and so returned the warrants. The defendant might have been discharged on one of the warrants, and held on the other. Therefore the marshal was entitled as much to the service of one as the other. In the other case, *U. S. v. Brennan* (\$4), service was made on three persons. Service on one was allowed; service on the other two, disallowed. The right of the marshal to receive for each and every person served has already been discussed. Rev. St. § 829, par. 25. Counsel for the United States states that this item was disallowed by the treasury department for the reason that there were three cases in which the marshal served two warrants at the same time on the same defendants. The department allowed for service of one warrant only in each case, and refused to allow for the other, contending that one warrant was sufficient to apprehend the defendants.

(9) Total amount of actual expenses incurred in endeavoring to arrest, and not received, during the year 1889, \$3.30. The actual expense was \$5.30. All over and above \$2 disallowed. This represents money actually paid out by the marshal in necessary expenses, and this court sustained such a claim in the case of *U. S. v. Kerns*. Counsel for the United States states that this is a charge for actual expenses incurred in endeavoring to make arrest, for which the fee bill provides but the sum of \$2. The department allowed the \$2, but disallowed the \$3.30, as being an excess charge. See "Fee Bill," Rev. St. § 829.

(10) Total amount earned, and not received, for serving warrants, etc., on indigent convicts, in accordance with section 1042, \$34.70. Allowance suspended until it is shown that there was a contest, and what proceedings were had to constitute a contest. This character of claim is allowed by the court in the case of *Saunders v. U. S.* Counsel for the United States states that this item was disallowed by the treasury department, which contended that there was no necessity for bringing the convict before the commissioner on a warrant, as the commissioner could give the indigent convicts hearings while confined in jail. It is, however, admitted that similar charges were subsequently allowed by the department, and are still allowed.

(11) Charge for making 132 returns (at 40 cents) of *nihil habet* as to defendants in writs of *scire facias* to revive judgment and continue lien, in 1889 and 1890, \$52.80. Disallowed. Explanation desired as to the amount for each return, 40 cents, and as to the meaning of "*return nihil habet*." The government is placed in the same position by two returns of *nihil habet* as if the writ had been actually served. It is the practice of the sheriffs of the counties of the state to charge the same fees for two returns of *nihil habet* to a *sci. fa.* as for one service. This charge of 40 cents was made in conformity to the law of the state. In *U. S. v. Kerns*, *supra*, the court allowed fees claimed by defendant for services in endeavoring to arrest when no service was made. Counsel for the United States claims this item was disallowed as unauthorized by the treasury department, and that technically such returns are, of course, no service upon the defendants. Nevertheless he admits that, as upon two returns of *nihil habet* on the same defendant, the United States was placed in the same position as to such services as if actual services had been made and for which the marshal would have been entitled to a fee of \$2 for each service.

(12) Total amount earned, and not received, for the service of subpoenas in 1888, \$4. These charges suspended to know if prosecution was upon indictment. Certificate of district attorney was attached to the marshal's explanation, and there is no reason why this item should have been disallowed. Counsel for the United States states that the treasury department disallowed the same for the reason that the witnesses had already been subpoenaed in another case for attendance upon court for the same days, and therefore there was no need of service of subpoena the second time.

The assignments of error were as follows:

First. The court erred in allowing the plaintiff the sum of \$328; being the amount claimed in item No. 1, as set forth in the statement of facts agreed upon

by the respective counsel for plaintiff and defendant. Second. The court erred in allowing the plaintiff the sum of \$141.18; being the amount claimed in item No. 2, as set forth in the statement of facts agreed upon by the respective counsel for plaintiff and defendant. Third. The court erred in allowing the plaintiff the sum of \$60; being the amount claimed in item No. 3, as set forth in the statement of facts agreed upon by the respective counsel for plaintiff and defendant. Fourth. The court erred in allowing the plaintiff the sum of \$5; being the amount claimed in item No. 6, as set forth in the statement of facts agreed upon by the respective counsel for plaintiff and defendant. Fifth. The court erred in allowing the plaintiff the sum of \$92; being the amount claimed in item No. 7, as set forth in the statement of facts agreed upon by the respective counsel for plaintiff and defendant. Sixth. The court erred in allowing the plaintiff the sum of \$52.80; being the amount claimed in item No. 11, as set forth in the statement of facts agreed upon by the respective counsel for plaintiff and defendant. Seventh. The court erred in awarding judgment for the plaintiff in the sum of \$754.86, the aggregate of items of claim allowed in the opinion filed by the court, together with plaintiff's costs. Eighth. The court erred in allowing the entry of judgment against the defendant and in favor of the plaintiff in the sum of \$754.86, together with \$7.50 costs.

Michael F. McCullen, for the United States.

H. Meriam Allen, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

DALLAS, Circuit Judge. Upon petition of the executrix of Andrew H. Dill, deceased, late marshal of the Eastern district of Pennsylvania, praying judgment against the United States for the sum of \$758.16, claimed to be due for services rendered and disbursements made by said Andrew H. Dill as such marshal, the district court entered judgment in favor of the plaintiff for the aggregate amount of several of the items claimed. Eight errors have been assigned, the first six of which relate, respectively, to certain of the items which were allowed, and the last two of which are of a general character, and need not be separately considered. The first and sixth are not sustained. As to the items to which they relate, we approve the action of the court below, for the reasons stated in its opinion. The fourth specification objects to the allowance of a fee of five dollars for the marshal's attendance upon a jury on October 16, 1887. The service rendered was an absolutely necessary one, but, being Sunday, the judge was not actually present; and it is contended that therefore the marshal was not entitled to compensation, because, as is argued (Rev. St. § 829), the court was not then "in session." In our opinion, this view of the effect of the statute is not a reasonable one. We hold, for the purposes of this case, that the necessary suspension of the business of the court during Sunday is not to be regarded as a termination of its session, and that the essential duty which in this instance was performed by the marshal upon that day is within the provision of the fee bill, which will be found in the section of the Revised Statutes to which we have referred. The fifth error assigned is to the allowance by the court of "amount actually paid guards of United States prisoners while attending courts." We think that the view taken of this matter by the learned judge is correct. The charge was not for fees, but for a contingent expense needfully incurred, and therefore within the terms of section 830 of the Revised Statutes, as the court below has suffi-



ciently shown. The second and third specifications must be sustained, upon the authority of *U. S. v. Tanner*, 147 U. S. 661, 13 Sup. Ct. 436, and *U. S. v. McMahon*, 164 U. S. 87, 17 Sup. Ct. 28. It is ordered that this cause be remanded to the district court, with direction to modify its judgment in pursuance of this determination. No costs in this court are allowed to either party.

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JACOBUS v. UNITED STATES.

(Circuit Court, S. D. New York. March 19, 1898.)

**AMENDMENT—DELAYING TRIAL—COUNTERCLAIM.**

A cause which had been repeatedly continued because defendant was not ready for trial was peremptorily set for trial on a certain day. Defendant then moved for leave to amend its pleading by setting up a counterclaim, which, if allowed, made another continuance necessary, because of the absence of plaintiff's witness. *Held* that, since the issues raised by the counterclaim might be determined in an independent action, the motion should be overruled.

This was an action by John W. Jacobus against the United States. The cause was heard on motion for leave to amend the answer by setting up a counterclaim.

D. Frank Lloyd, Asst. U. S. Atty., for the motion.

Henry L. Stimson, opposed.

LACOMBE, Circuit Judge. If in no other way than by a counterclaim in this action could the government have the question determined whether or not it is entitled to recover anything from the plaintiff, the former marshal of this district, I should be inclined to allow the amendment. But, so far as I can discover, there is no obstacle to an independent action to recover whatever may be due the government, and no authorities are presented sustaining the proposition that counterclaim is the only relief. This cause has been repeatedly on the day calendar for trial, and plaintiff has always been ready for trial. The limit of all reasonable continuance on defendant's request was passed long since, and the case set peremptorily for the 1st day of the April term. To introduce a new cause of action in favor of defendant at this late stage, probably necessitating a further adjournment, since plaintiff's sole witness as to the transactions out of which counterclaim arises is now in California, would be a denial of justice. The issues now raised in the cause should be tried and disposed of without further delay. Any other controversies between the parties can be disposed of in some other action.

## PATTERSON v. THOMPSON.

(Circuit Court, D. Oregon. March 24, 1898.)

## 1. CORPORATIONS—LIABILITIES OF DIRECTORS—LIMITATIONS OF ACTIONS—LAWS OR. § 3231.

2 Hill's Ann. Laws Or. § 3231, providing that, "if the directors of a corporation declare and pay dividends when the corporation is insolvent, \* \* \* such directors shall be jointly and severally liable for the debts of the corporation then existing, or incurred while they remain in office," is penal, and an action thereon is barred by the statute of limitations of three years.

## 2. SAME—RUNNING OF STATUTE.

The statutory right of action against the directors of a corporation for declaring dividends when the corporation is insolvent accrues, at least, when the debt is due; and neither an agreement for an extension between the corporation and the creditor, nor a part payment by the corporation, stops the running of the statute.

This was an action by C. M. Patterson against D. P. Thompson to enforce an alleged personal liability under the Oregon statute, on the ground that defendant, as a director in a savings bank, had joined in declaring and paying a dividend while the corporation was insolvent.

U. S. G. Marquam and J. W. Whalley, for plaintiff.

Dolph, Mallory & Simon and Cox, Cotton, Teal & Minor, for defendant.

GILBERT, Circuit Judge. The plaintiff in this action seeks to hold the defendant liable for a debt of the Portland Savings Bank, under the provisions of section 3231, 2 Hill's Ann. Laws Or., which provides as follows:

"If the directors of a corporation declare and pay dividends when the corporation is insolvent, or which renders it insolvent, or diminishes the amount of its capital stock, such directors shall be jointly and severally liable for the debts of the corporation then existing or incurred while they remain in office; or if such directors shall, by any official act or conduct, fraudulently induce any person to give credit to such corporation, they shall be liable in like manner to such person for any loss he may sustain thereby; but any director who voted against such dividend or such fraudulent act or conduct, if present, or who thereafter, as soon as the same came to his knowledge, filed his objections thereto, shall be exempt from such liability."

The complaint alleges: That the defendant was a director of the bank, and that he acted with the other directors in declaring and paying dividends to stockholders on September 12, 1892, and that he made no protest against dividends declared upon December 12, 1892, and March 13, 1893. That, at the date when said dividends were declared and paid, the bank was insolvent. That on March 22, 1893, the plaintiff deposited with the bank \$10,000, for which he received a certificate of deposit, payable, with interest, February 11, 1894. That on September 5, 1893, at a meeting of the board of directors, at which the defendant was present and voted in the affirmative, it was resolved that agreements be obtained from the depositors of the bank for extensions of time for the payment of their deposits, and, in pursuance of said resolution, the defendant signed an agreement, which is as follows:

"Whereas, the Portland Savings Bank of Portland, Oregon, has been compelled to close its doors by reason of the unprecedented withdrawal of deposits during the late financial panic in this community; and whereas, we desire to aid said bank to resume business, which we recommend and ask the court to allow; and whereas, we have confidence in the integrity of its officers and the resources of said bank, and desire to lend our influence to the restoration of public confidence in it and its management: Now, therefore, we, the undersigned, depositors in said bank having funds on deposit therein, either upon open account, savings account, or evidenced by certificates of deposit, in consideration of the premises and of the resumption of business by said bank, do hereby severally agree that we will accept for and instead of and in payment of our said balances and claims against the said Portland Savings Bank the following: Ten per cent. thereof payable February 1, 1894; ten per cent. thereof payable May 1, 1894; ten per cent. thereof payable August 1, 1894; ten per cent. thereof payable November 1, 1894; ten per cent. thereof payable February 1, 1895; ten per cent. thereof payable May 1, 1895; ten per cent. thereof payable August 1, 1895; ten per cent. thereof payable November 1, 1895; ten per cent. thereof payable February 1, 1896; and ten per cent. thereof payable May 1, 1896. Deferred payments to bear interest at the rate of six per cent. per annum until paid."

—That on April 18, 1894, the plaintiff received from the bank the sum of \$1,000, which, according to said agreement, was payable on February 1, 1894. That on or about May 1, 1894, the bank resumed business. That no further sum has been paid on said deposit, excepting \$485.91, paid September 15, 1897. To this complaint the defendant demurred, upon the grounds—First, that the same does not state facts sufficient to constitute a cause of action; and, second, that the action was not brought within the three years limited by statute for the commencement of actions to recover penalties.

In considering the second ground of demurrer, the first question to be determined is whether the liability created by the statute is a penalty, such that an action to enforce it is barred at the end of three years. The Oregon statute above quoted is similar to that of many of the states upon the same subject. In nearly all of such states it has been held that such a statute is penal in its nature, and that an action to enforce liability thereunder is subject to the statute of limitations which is made applicable to actions for the recovery of penalties. The courts have recognized the remedial feature of the statutes, in that they inure to the benefit of the creditors, for whose protection they are intended; but they have also held that, so far as the directors are concerned, the liability is in the nature of a penalty, and that the statutory provisions must be strictly construed. In this respect, reason is clearly coincident with the weight of authority. The liability imposed upon directors under the statute is absolute. It is not apportioned to the amount of the interest which the directors may have in the corporation, as stockholders or otherwise, thus differing from the statutory liability of stockholders. It is not predicated upon the amount of the benefit which may accrue to the directors from the illegal dividend. It does not depend upon the amount of the dividend which is declared, nor the extent of the injury to the creditor, which is thereby occasioned. It is intended by such statutes, upon grounds of public policy, to require the directors of corporations to exercise diligence, to deal honestly with creditors, and to faithfully perform their duties. The law clearly presumes that the director is bound

to know the condition of his corporation, and to know whether or not dividends are payable; and it makes no excuse nor release of liability on account of his failure to acquire such knowledge. It is immaterial that the statute contains no direct prohibition of the payment of dividends under the circumstances mentioned therein. It is sufficient that a penalty is denounced against the act. That penalty can be regarded in no other light than as a punishment for the injurious act. *Halsey v. McLean*, 12 Allen, 438; *Bank v. Bliss*, 35 N. Y. 412; *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. 554; *Irvine v. McKeon*, 23 Cal. 472; *Merchants' Nat. Bank of Chicago v. Northwestern Mfg. & Car Co.*, 48 Minn. 349, 51 N. W. 117; *Bank v. Price*, 33 Md. 487; *Moies v. Sprague*, 9 R. I. 541; *Iron Co. v. Pierce*, 4 Biss. 327, Fed. Cas. No. 14,367; *Gregory v. Bank*, 3 Colo. 333; *Breitung v. Lindauer*, 37 Mich. 217; *Stebbins v. Edmands*, 12 Gray, 203; *Derrickson v. Smith*, 27 N. J. Law, 166; *Mitchell v. Hotchkiss*, 48 Conn. 9; *Hill v. Frazier*, 22 Pa. St. 320; *Bank v. Johnson (Mont.)* 45 Pac. 662; *Kritzer v. Woodson*, 19 Mo. 327.

Counsel for the plaintiff contend that by the decision in *Huntington v. Attrill*, 146 U. S. 657, 13 Sup. Ct. 224, the supreme court has overruled its former holding that such a statute is penal. It will be seen, however, on a careful consideration of that case, that the decision was based upon a consideration of the remedial purpose of the statute and the protection intended to the creditor, and that the court went no further than to hold that such a statute is not penal, in the sense that it will not be enforced in a state other than that in which the liability was created. In the later case of *Bank v. Remsen*, 158 U. S. 337, 15 Sup. Ct. 891, it was again ruled that such a statute is one of a penal character, and in the opinion the court remarked that the purport of the decision in *Huntington v. Attrill* was that such a statute was not "a penal law in the international sense."

The action being for a penalty, and subject to be barred at the end of three years, the question next arises, at what date did the statute of limitations begin to run? The statutory liability of the directors is joint and several for all the debts of the corporation "then existing or incurred while they remain in office." It is contended on behalf of the defendant that the statute began to run from the date when the illegal dividend was declared, notwithstanding that the debt was not then due. So far as the question appears to have been adjudicated in other states, it is held that no cause of action accrues against the directors until the debt of the corporation is due. *Jones v. Barlow*, 62 N. Y. 202; *Sullivan v. Manufacturing Co.*, 20 S. C. 79; *Woolverton v. Taylor*, 132 Ill. 197, 23 N. E. 1007. But it is unnecessary to decide that question in the present case. Assuming that the cause of action against the defendant did not accrue until the debt became due, on February 11, 1894, it still appears that more than three years had intervened when, on October 27, 1897, this action was commenced. It is plain that the action is barred, therefore, unless the statute of limitations was suspended either by the agreement of April 10, 1894, extending the time of payment of the debt, or by the payment of \$485.91 on account on September 15, 1897.

Did the agreement between the plaintiff and the corporation.

whereby the time of the payment of plaintiff's deposit was extended, operate to toll the statute of limitations, which had begun to run in favor of the directors? But little light upon this question is afforded by the decisions of other courts. In *Jones v. Barlow*, 62 N. Y. 202, in an action brought to enforce the statutory liability of directors for failure to file an annual report in January, 1871, as required by law, it appeared that during the year 1871 the plaintiff sold to the corporation goods for which, on December 26, 1871, it was indebted to him in the sum of \$6,292.78, for which it gave him its notes due and payable on June 6, 1872. On that date 10 new notes were given, maturing at successive intervals. The action was commenced against the trustees to enforce their statutory liability, on February 7, 1873, before the last three notes were due. It was held that the plaintiff was not entitled to recover on the three notes that had not yet matured. The court said:

"Whatever limitations and conditions attach to the corporate and primary obligation, whether attaching to it at its inception or growing out of subsequent lawful agreements of the parties, necessarily limit and qualify the liability of the trustees."

It is contended by the defendant that the statute of limitations was not necessarily under consideration in that case. It is apparent, however, that the principle on which the statute is to be applied was directly involved. The court decided that the plaintiff was bound by the contract of the corporation extending the time of payment of the debt, and that he had no cause of action until that time expired. In that case, as in the case at bar, the debt had matured, and a cause of action had arisen before the execution of the new notes and the extension of the time of payment. The new notes so taken were not evidence of a new contract or a newly-created liability. They were but the means of postponing the time of payment. But in the case of *Blake v. Clausen*, 38 N. Y. Supp. 514, decided in 1896, the supreme court of New York denied that *Jones v. Barlow* was authority for the proposition which is here contended for by the plaintiff, expressing the view that "the statute of limitations was in no manner involved" in that decision, and held that in a case similar to the case at bar the statute began to run from the moment when the debt became due and a cause of action accrued, and that the operation of the statute could not be suspended by renewals or extensions granted without the knowledge or consent of the trustee sought to be charged. There is no direct intimation in the opinion that the ruling would have been otherwise if the trustee had consented to the extension. On appeal to the appellate division of that court, the decision was affirmed upon the ground that the statute of limitations began to run from the moment when the note fell due, and that, when a cause of action accrued and the statute began to run, no subsequent agreement between the corporation and the creditor could suspend its operation. *Blake v. Clausen* (Sup.) 41 N. Y. Supp. 772. Opposed to the case of *Jones v. Barlow*, and, as I hold, expressing the correct doctrine, are the cases of *Bassett v. Hotel Co.*, 47 Vt. 314, and *Sullivan v. Manufacturing Co.*, 20 S. C. 79. In *Bassett v. Hotel Co.*, it was held that the statutory right of action against directors accrued when the debt was

contracted, and that the statute then began to run, and that a judgment thereafter recovered against the corporation did not operate to suspend it. In *Sullivan v. Manufacturing Co.* it was held that the personal liability of directors, resulting from their failure to perform certain duties, arose at the time of such failure; that the statute of limitations then began to run; and that a subsequent renewal of the debt, by giving a new note therefor, did not suspend its operation. In harmony with these cases are certain decisions applying the statute of limitations to actions against directors for their failure to file reports as required by statute. Thus, it is held that, where a corporation fails to make its annual report, its trustees at once become individually liable for its debts, and that the statute of limitations thereupon begins to run in favor of all debts then due, and that subsequent defaults in making annual statements do not renew such causes of action, notwithstanding that the statute attaches the liability both to the debts existing when the default is made and to those contracted thereafter until the report is filed. *Losee v. Bullard*, 79 N. Y. 404; *Rector, etc., v. Vanderbilt*, 98 N. Y. 170; *Bank v. Johnson* (Mont.) 45 Pac. 662.

The statute of Oregon requires that the acknowledgment or the new promise which shall be evidence of a continuing contract sufficient to take the case out of the operation of the statute of limitations shall be in writing, signed by the party to be charged thereby. In the case before the court the defendant has made no agreement with the plaintiff extending the time of payment. He has signed nothing by which he may be bound. He has no contract whatever with the plaintiff. The director of a corporation has no contract with the corporation's creditors. While he participates with the other directors in ordering the action of the corporation, all corporate acts are, nevertheless, performed by the corporation itself. On February 11, 1894, the plaintiff had a matured cause of action against any or all of the directors of the Portland Savings Bank. The statute at once began to run, and nothing could stay it except an agreement between the plaintiff and the defendant. The plaintiff did not choose to enforce his remedy against the directors. He chose, rather, to look to the corporation for the payment of his debt. He voluntarily signed an instrument expressing his confidence in the officers of the corporation. In consideration of that confidence and the benefit to be derived by him from the opening of the bank, and the interest to be paid on his deferred payments, he contracted with the corporation for the extension of the debt. There can be no doubt that the agreement was based upon a valid consideration, and that it was operative and binding both upon the corporation and the plaintiff. As between the parties to it, it stayed the statute of limitations, and deferred the right of the plaintiff to bring an action against the corporation. It cannot be said, however, that it operated to create a new liability. The debt was the same. Its time of payment only was changed. While so consenting to the extension of time so far as his remedy against the corporation was concerned, the plaintiff undoubtedly retained the right to pursue his concurrent remedy under the statute against the directors. He was not barred from doing so by virtue of

his agreement with the corporation. But it is urged that the defendant cannot invoke the protection of the statute of limitations, for the reason that, as director, he voted for and consented to the agreement. It is difficult to find a principle on which to rest the doctrine that the right to enforce the statutory liability shall depend upon whether or not the director, by his vote, has consented to an agreement between the corporation and the creditor extending the time of payment of the debt. The action of the individual directors in their board meetings is a matter with which the creditor has no concern. He is not presumed to know how they have voted, nor is he required to make inquiry concerning the vote. The application of such a rule would result in holding that a director who voted with the minority against the extension might be discharged from liability, while other directors would still be held. The action of the individual directors is not communicated to the creditor, and he does not act upon the same. He has no privity with the directors. He deals with the corporation through its president and secretary. If the defendant consented to the extension in this case, it was not a consent with the plaintiff, and it cannot be construed as a promise to the plaintiff or a renewal of his statutory cause of action.

The foregoing considerations are applicable also to the plaintiff's contention that by the payment of \$485.91 on account on September 15, 1897, the cause of action against the defendant was renewed. If the corporation could not, by its express agreement with the plaintiff, renew the cause of action as against the directors, it follows that it could not do so by a part payment. The demurrer to the complaint must be sustained.

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### VALCALDA et al. v. SILVER PEAK MINES.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1898.)

No. 373.

#### 1. MINES AND MINING—MILL-SITE CLAIM—EJECTMENT—EVIDENCE.

In ejectment to recover a mill-site location connected with a mining claim, to which no patent has issued, where complainant relies upon his own prior possession and an ouster by defendant, a receiver's certificate to the plaintiff for the purchase money of the land is admissible in evidence, not as showing title, but as tending to show, in connection with other evidence, the good faith of the plaintiff, pursuant to its location and survey. 79 Fed. 886, affirmed.

#### 2. SAME—EJECTMENT—SUFFICIENCY OF POSSESSION.

It is a sufficient possession of a mill-site claim to maintain ejectment therefor that its corners are marked with painted posts, as is the custom in locating such mill sites, and that the claimant had a house and stable thereon, and had constructed tunnels to increase the flow of springs, and built a wagon road to his mines, thus indicating a present and continuous use. 79 Fed. 886, affirmed.

In Error from the Circuit Court of the United States for the District of Nevada.

This was an action of ejectment by the Silver Peak Mines against Giovanni Valcalda and others to recover possession of a mill site

located in connection with a mining claim. In the circuit court judgment was given for plaintiff, and the defendants have sued out this writ of error.

Robert M. Clarke, for plaintiffs in error.

M. A. Murphy, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. On the 1st day of October, 1888, the Silver Peak Mines, a corporation, by its attorney in fact, located the Crown mine, and at the same time located five acres of land, not contiguous thereto, as a mill site, under the provisions of section 2337 of the Revised Statutes of the United States, which provides as follows:

"Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as for survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode."

In the location notice of the mill site, claim was made to all the waters running from the two springs situated thereon. The notices of the location of the mine and the mill site were posted, the one on the mining claim, and the other on the mill site; and both notices were recorded in the records of the Silver Peak and Red Mountain mining district; and thereafter copies of said notices were recorded in the records of the county recorder for Esmeralda county. During the years 1888 and 1889 work was done and money was expended by the corporation upon its mine, and a tunnel was run on the mill site for the purpose of increasing the supply of water from the said springs; and in the year 1889 a survey both of the mine and the mill site was made for the corporation by a United States deputy mineral surveyor, and posts were numbered and marked and placed at each corner of the mill site by the surveyor. Thereafter work was performed by the corporation in cleaning out the said springs, and increasing the supply of the water. Application was made by the corporation to the government of the United States for a patent; and on February 13, 1890, final proof and payment was made for the land embraced in the Crown lode mine and mill site. Long prior to the date when the mill site was located, the land included in the application had been occupied by the locator's predecessors in interest; and a house, a stockade stable, and a corral had been built upon said premises, and a road had been graded therefrom to the mines of the corporation, at a cost of between ten and fifteen thousand dollars. From the time of its location of said mill site, the corporation had made use of the water of the springs by hauling it in wagons a distance of four or five miles, for use at the mines, for its employes, and for culinary purposes. The only way in which mine owners in that vicinity could obtain water for use in their mines was by hauling it or packing it from springs, and it was the custom of miners in that district to locate springs of water in connection with their mines. In March, 1896, the corporation began an action of



ejectment against Giovanni Valcalda and others, the plaintiffs in error, alleging that on March 16, 1896, the defendants had ousted the plaintiff from the premises included in the mill site. The defendants answered, denying the plaintiff's title and right of possession, and denying the plaintiff's right to the spring or the waters thereof, and alleging that the defendant Giovanni Valcalda owned the land upon which the spring rises, and that he had appropriated the water of the spring for mechanical, stock, and domestic purposes. Upon the issues thus formed, the plaintiff in the action had a verdict and judgment for possession of the premises and the springs of water situated thereon.

Upon the writ of error from this court, it is assigned as error, first, that the court admitted in evidence the duplicate receipt for the purchase money of the Crown mill site, offered by the plaintiff. It is contended that the receipt for the purchase money did not vest the legal title in the plaintiff, and that it was not sufficient to enable it to recover in ejectment. To this it is sufficient to say that the record shows that the receipt was not offered or admitted in evidence for the purpose of proving title in the plaintiff, but was offered and admitted in connection with the other evidence, as tending to show the good faith of the plaintiff in its possession pursuant to its location and its survey, by proving that it subsequently posted notice of its intention to apply for a patent, and paid in good faith the purchase price of the land embraced in the claim. The charge of the court to the jury expressly directs their attention to the purpose for which this evidence was admitted, and for which they might consider it. There was no error in admitting it for that purpose. Neither party claimed that it had acquired the title of the government, nor did either in any way connect itself with that title. The questions at issue were whether the plaintiff had been in the possession of the premises, and whether the defendants had ousted it therefrom. The receiver's receipt was evidence only of possession by the plaintiff, in connection with other evidence thereof, and the jury were not permitted to consider it as evidence of a right of possession.

These considerations are applicable to the next two assignments of error, which are—First, that there was error in admitting in evidence an application of one of the plaintiff's grantors to purchase from the state of Nevada the land in controversy, together with the receipt for the purchase money and the deed of such grantor to the plaintiff; and, second, that there was error in excluding the defendants' proffered proof that the certificate of purchase and duplicate receipt issued by the land office to the plaintiff for the mill site had been canceled. The papers so admitted showing a conveyance from the plaintiff's predecessor were admitted solely as tending to prove possession. The plaintiff was making no claim of title through its receiver's receipt, and the fact that that instrument had been canceled had no bearing upon the questions in issue. It having been expressly admitted by both parties to the suit that neither party connected itself with the government title, the plaintiff was left to recover, if at all, upon the fact that it had been in the possession of the premises when ousted by the defendants. The action of the officers of the general land office

could not affect the real question in issue. Its decision was not a judgment that the plaintiff had no right of possession. It was no more than an adjudication against the validity of the steps which it had taken to procure the title from the United States. It was not decisive of its right to remain in the possession or to take further steps to procure the title if it saw fit to do so.

The real question in controversy in the case concerns certain instructions which were given and refused to the jury. The court charged the jury as follows:

"It is not necessary that the land in controversy, which has been designated as the 'Crown Mill Site,' should be inclosed with a fence, or that it should be reduced to cultivation, to constitute possession. If you believe from the evidence that there was a house, stockade stable, and corral on said land, erected by the plaintiff in this action, or those from whom they derived possession of the premises; that plaintiff, at diverse times, improved the springs upon said land, and in 1888 or 1889 made a claim to said land for five acres of land, and the water flowing from said springs on the land, as a mill site and water right; that it caused the land to be surveyed, and posts were erected at each corner of the land, indicating the corners and boundaries thereof, and continued in first possession thereof, until ejected by defendants, if they were ejected, so as to subject the land to its control, and to notify the public that the land was claimed and occupied, this would constitute a possession of the land."

Upon a careful consideration of the question, we find no error upon the part of the court in so instructing the jury. The property was used by the plaintiff in connection with its mining claim. It had been located as a mill site. It was not located on mineral land, it is true, nor was it contiguous to the mining claim; but it had been located pursuant to the custom of miners in a district in which the mines were generally situated in an arid region, and it was necessary to obtain a supply of water from springs located in the foot hills, generally at considerable distances from the mines. The premises in question were clearly necessary to the proper operation of the plaintiff's mines. They were as much used for mining purposes as if they had been used for a dumping place for tailings or as a site for mill machinery. In *Hartman v. Smith*, 7 Mont. 19, 14 Pac. 648, it appeared that a mill site had been located on nonmineral land, not contiguous to the lode, but distant therefrom a distance of two miles and a half. The only improvement made on the land was the erection of a log cabin, in which the shovels, picks, drills, powder, tools, and small quantities of ore from the mining claim were stored. The court held that this use was a use for mining or milling purposes under the statute, and that, having been so used, it was not abandoned or forfeited, notwithstanding the fact that it was put to no other use. The evidence contained in the record now before us does not show that the corporation was not in the actual possession and use of the premises up to the time of the ouster. The bill of exceptions on this branch of the case states only that there was testimony in the case tending to establish the fact that in 1891 the defendants, without obtaining the consent of the plaintiff, finding the cabin on the mill site vacant and unoccupied, and the stable vacant, and no person upon the premises, entered peaceably thereon, made improvements, claimed and used the water from the spring for domestic purposes, and thereafter remained in such possession and use;

but it is not said in the bill of exceptions that there was not evidence contradicting all this testimony, and tending to show that the plaintiff's possession was such as is indicated in the charge to the jury.

That one who is in the actual possession of public land may maintain ejectment against another, who ousts him of that possession, has been well settled by repeated adjudications; but it has never been held that one in the possession of public lands, not mineral lands, who does not connect himself with the title of the government, can maintain ejectment against one who has acquired the possession, unless he shows that his own possession was actual, and not constructive. The mere assertion of title, together with an occasional act of dominion over the premises, or the marking of the boundaries, are ordinarily not sufficient. *Staininger v. Andrews*, 4 Nev. 59.

In *Murphy v. Wallingford*, 6 Cal. 648, it was said:

"Possession is presumptive evidence of title, but it must be an actual bona fide occupation, a *pedis possessio*, a subjection to the will and control, as contradistinguished from the mere assertion of title and the exercise of casual acts of ownership. A mere entry, without color of title, accompanied by a survey and marking of boundaries, is not sufficient."

In *Coryell v. Cain*, 16 Cal. 573, the court said:

"And, with the public lands which are not mineral lands, the title as between citizens of the state, where neither connects himself with the government, is considered as vested in the first possessor, and to proceed from him. This possession must be actual, and not constructive; and the right it confers must be distinguished from the right given by the possessory act of the state. \* \* \* But when reliance is placed, not upon this act, but upon possession of the plaintiff, or of parties through whom he claims, such possession must be shown to have been actual in him or them. By actual possession is meant a subjection to the will and dominion of the claimant, and is usually evidenced by occupation, by a substantial inclosure, by cultivation, or by appropriate use, according to the particular locality and quality of the property."

Said the supreme court of Nevada in *Robinson v. Mining Co.*, 5 Nev. 68:

"Indeed, that the possession, when that alone is relied on, must be actual and complete, is an expression stereotyped in all cases where this question is discussed."

The question, then, arises, what is actual possession as applied to a case such as that now under consideration? It is clear from an examination of the authorities that actual possession may be evidenced in various ways. It is always actual when it is an open and visible occupancy. The occupancy may be evidenced by an inclosure. In such a case it is ordinarily limited to the inclosure, and is not extended to the premises beyond it. It may be evidenced by other improvements, or by actual and visible use. In the case under consideration there was no inclosure, nor was there a personal residence upon the property. In some cases, one or the other of these indications of possession would be held to be essential. But regard must always be had to the nature of the premises and the purpose for which they are occupied. It would seem that a tract of five acres claimed for a mill site, as this was, may, in general, be said to be in the possession of the locator when its corners are marked with painted posts, as is the custom and rule in locating such mill sites, and as required by the regula-

tions of the general land office. In a mining country the presence of the boundary posts is as significant of occupation as an inclosure would be of agricultural lands. In the present case there were, in addition to the boundary posts, the house, the stable, and the springs, together with the tunnels recently constructed to increase the flow of water, and the graded wagon road leading from the mill site to the mines of the plaintiff, all indicating a present and continuous use. In view of all these evidences of open and visible occupation, we cannot say that the court erred in charging the jury as it did. Nor do we find error in the refusal of the court to instruct the jury, as requested by the defendants, as follows: "When land is located for a mill site or for milling purposes, the party locating and claiming the same must, within a reasonable time, use the land for the purpose for which it was located." There is no requirement in the statute such as is contemplated in this request for instruction, nor have the courts so construed the law. Failure to use a mill site for the purpose for which it is located may, indeed, become evidence of abandonment; but there was no evidence, so far as the record goes, tending to show that the locator had failed or ceased to use the property for the purpose for which it was claimed. The statement in the bill of exceptions that there was evidence tending to show that the defendants had entered upon the premises, finding them vacant, is not inconsistent with such continuous use by the plaintiff. It is not intimated that, notwithstanding this entry upon the premises, the locator intermitted its use of the premises and of the water right, so as to indicate abandonment, or that it ever intended to abandon the mill site. It is well settled that lapse of time does not of itself constitute an abandonment, and that it is only a circumstance for the jury to consider in determining the question whether there has been an abandonment. In other words, the question is one of intent. Said the court in *Waring v. Crow*, 11 Cal. 369: "The intention alone governs." *Keane v. Cannovan*, 21 Cal. 293; *St. John v. Kidd*, 26 Cal. 272. In *Richardson v. McNulty*, 24 Cal. 345, it was said: "By the act of occupancy, the plaintiff made it his, and manifested his intention to do so. Once his, it continues his until he manifests his intention to part with it in some manner known to the law." In *Moon v. Rollins*, 36 Cal. 337, it was held that one in possession of land might leave it for a period of five years if he had the intention of returning, and that his mere failure to occupy the land for that period does not necessarily constitute an abandonment.

We find no error for which the judgment of the circuit court should be reversed, and it is therefore affirmed.

## O'DONNELL v. NEE.

(Circuit Court, D. Massachusetts. March 7, 1898.)

No. 636.

**1. SLANDER—REPETITION OF ACTIONABLE WORDS.**

An admission by defendant, at plaintiff's request, and in the presence of a third party, that on a previous occasion he had used the alleged slanderous words, is no ground of action, when it does not appear that the language was originally used in the presence of a third party.

**2. SAME—PLEADING.**

A declaration is defective which fails to set forth the alleged slanderous words substantially as they were uttered.

This was an action by Francis O'Donnell against Thomas Nee for slander. The case was heard on demurrer to the declaration.

E. H. Savory, for complainant.

Albert A. Gleason, for defendant.

COLT, Circuit Judge. This is an action of slander. The present hearing was on demurrer to the declaration. The declaration alleges that the defendant, on January 7, 1897, in the yard of the New York, New Haven & Hartford Railroad Company, located at Boston, falsely and maliciously accused the plaintiff of the crime of larceny. The alleged slanderous words are as follows:

"The plaintiff said to one Curry, 'The watchman' (meaning the defendant) 'has accused me of hiding brass to steal.' Said Curry turned to the defendant, and said, 'Is that so?' whereupon the defendant said, 'Yes' (meaning thereby that the plaintiff was guilty of the crime of stealing said brass)."

It does not appear that the language complained of was originally used in the presence of a third party; but it does appear that subsequently the defendant, in the presence of the plaintiff and a third party, admitted that he had used such language. We believe the sound rule of law to be that the repetition of alleged slanderous words made in the presence of a third person at the special request of the plaintiff does not of itself constitute a ground of action.

Upon the allegations in the declaration, there was no such publication as would entitle the plaintiff to a right of recovery. *Heller v. Howard*, 11 Ill. App. 554; *King v. Waring*, 5 Esp. 13; *Smith v. Wood*, 3 Camp. 323; *Weatherston v. Hawkins*, 1 Term R. 110. The allegations in the second and third counts of the declaration, although more specific than in the first count, quoted above, in no way affect the principle of law which we deem controlling in this case. The fourth count of the declaration is defective, in not setting forth the alleged slanderous words substantially as they were uttered. *Lee v. Kane*, 6 Gray, 495; *Clay v. Brigham*, 8 Gray, 161. Demurrer sustained.

PINNEY v. NEVILLS et al.

(Circuit Court, D. Massachusetts. March 4, 1898.)

No. 658.

**ATTACHMENT—STOCK IN FOREIGN CORPORATION.**

In Massachusetts, there being no statute authorizing it, there can be no attachment of shares of stock in a foreign corporation owned by a non-resident defendant.

This was an action, commenced by attachment, by George M. Pinney against William A. Nevills and others. The case was heard on a motion to discharge the trustee.

Gaston & Snow, for plaintiff.

Charles M. Reed, for defendants.

COLT, Circuit Judge. This suit was originally brought in the state court, and removed to this court. The plaintiff is a citizen of Massachusetts, and the defendants are citizens of California. No personal service was made on any of the defendants. The only service which was made was by attachment of certain certificates of stock belonging to the defendants, in the hands of the National Bank of the Republic, located in Boston. These were certificates of stock of the Rawhide Gold-Mining Company, a corporation organized under the laws of West Virginia. The question presented on these motions is whether shares of stock in a foreign corporation owned by a nonresident defendant can be reached by process of attachment under Massachusetts law. The statutes of Massachusetts provide that shares of stock in a corporation organized under the laws of the state, or under the laws of the United States, where such corporation has a usual place of business in the state, may be attached. Pub. St. Mass. c. 161, § 71; Id. c. 171, § 45. There is no provision in the Massachusetts statutes that shares of stock in a foreign corporation can be reached by attachment, except in the case of a corporation organized under the laws of the United States. The general rule of law is that shares of stock in a foreign corporation owned by a nonresident defendant are not subject to attachment. *Plympton v. Bigelow*, 93 N. Y. 592; *Ireland v. Reduction Co.*, 19 R. I. 180, 32 Atl. 921; *Denton v. Livingston*, 9 Johns. 96; *Winslow v. Fletcher*, 53 Conn. 390, 4 Atl. 250; *Smith v. Downey* (Ind. App.) 34 N. E. 823. Motions granted. Case dismissed for want of jurisdiction.

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BUFORD v. KERR.

(Circuit Court, W. D. Missouri, W. D. March 17, 1898.)

**1. COURTS—FOLLOWING STATE COURTS.**

Where the supreme court of Missouri held that an estate passed by a will is a statutory estate, and that the effort of the testator to further control the estate was in contravention of the statutes of Missouri, the federal court will follow such decision.

**2. ADVERSE POSSESSION—LIMITATION OF ACTIONS.**

In Missouri, a defendant who has held open, notorious, exclusive, continuous, and adverse possession for more than 10 years after the plaintiff became of age is held to have acquired title by virtue of the statute of limitations.

O. A. Lucas and C. F. Moulton, for plaintiff.  
Geo. W. Warder and Fyke, Yates & Fyke, for defendant.

ROGERS, District Judge. I have not the time, nor do I see that it would be profitable, to write an opinion in this case. It is admitted by counsel that the question raised in this case is the same as that raised in *Brown v. Rogers*, 125 Mo. 392, 28 S. W. 630. On argument it was insisted by the plaintiff that the supreme court of Missouri in that case erred in not holding that the will of Jacob Johnson created an executory devise; and it is further insisted that this court is not bound by the decision of the supreme court of Missouri in *Brown v. Rogers*, *supra*, but should disregard the same, and hold that the will created an executory devise. The question presented is not what was the intention of the testator, Jacob Johnson. The supreme court of Missouri, in *Brown v. Rogers*, *supra*, say:

"There can be no doubt that the testator, by the final paragraph of the will, intended, in case of a failure of issue to any of the devisees, to have the estate pass to the other devisees, and the heirs of their bodies; having in view the purpose of finally vesting the entire estate in the grandchildren. The intention of the testator is very clear."

In this statement I concur. There is therefore no difference of opinion as to what the testator, Jacob Johnson, intended by his will. The real question, therefore, presented before the supreme court of Missouri in *Brown v. Rogers*, *supra*, was, what effect did the statute of Missouri of 1845, quoted on pages 398, 399, 125 Mo., and page 631, 28 S. W. (of *Brown v. Rogers*, *supra*), have upon the will of Jacob Johnson; or, to state it in another form, in construing the will, how had the statute modified the common law? The court said:

"There can be no doubt that each separate paragraph of the will which makes devises to the daughters of the testator created, as it would have been under the English statutes of entails, an estate in fee tail."

And I do not understand that the conclusion of the court thus reached, based upon the separate paragraphs, as it is above stated, is combated by plaintiff's counsel. Continuing, the court say:

"If there had been no other provision of the will, the statute of this state concerning entails, in force at the death of the testator, would have immediately converted the estate into one for life only in the devisee, with remainder in fee to her children; and, in the event of such devisee dying without issue, the remainder would have passed to, and been vested in, the heirs of such devisee."

Further on, referring to the statute of 1845, they say:

"Under this statute, where the attempt is made to create an estate tail the estate is immediately converted to one created by the statute, under which the entire estate passes to the grantee or devisee for life, with remainder in fee simple to his or her heirs."

The character of estate, therefore, created by the separate paragraphs of the will, is that described in the foregoing paragraph. In short, it is a statutory estate to each devisee for life, with remainder in fee simple to her heirs, not to the heirs of her body, as designated in the will.

They then say:

"The attempt of the testator by the final paragraph of the will to follow up the estate tail, first created, with a succession of others limited upon cross re-

mainders, with a view that ultimately his entire estate should vest in his grandchildren, is in direct contravention of the clearly-expressed intention of the statute. The intention of the legislature must prevail over that of the testator."

We see, therefore, that the supreme court of Missouri have distinctly held that the estate passed by the separate paragraphs of the will is a statutory estate, and they describe its nature and character, and that the effort upon the part of the testator to further control the estate was in contravention of the statutes of Missouri, as construed by its court of last resort. This court is asked to place another and different construction upon that statute. To do so, we think, is in direct conflict with an unbroken line of authorities which control this court. *Travellers' Ins. Co. v. Township of Oswego*, 19 U. S. App. 321, 7 C. C. A. 669, and 59 Fed. 58; *Madden v. Lancaster Co.*, 65 Fed. 188; *Brown v. Furniture Co.*, 16 U. S. App. 221, 7 C. C. A. 225, and 58 Fed. 286; *McElvaine v. Brush*, 142 U. S. 155, 12 Sup. Ct. 156; *Sanford v. Poe*, 37 U. S. App. 378, 16 C. C. A. 305, and 69 Fed. 546; *Association v. Smith*, 1 U. S. App. 270, 4 C. C. A. 8, and 56 Fed. 141; *Evansville v. Woodbury*, 18 U. S. App. 515, 9 C. C. A. 244, and 60 Fed. 718; *Marbury v. Tod*, 22 U. S. App. 267, 10 C. C. A. 393, and 62 Fed. 335; *Railway Co. v. Hogan*, 27 U. S. App. 184, 11 C. C. A. 51, and 63 Fed. 102.

The supreme court of Missouri further say:

"The statute operating upon the will vested a life estate in the devisees, Clarinda and Mary Jane, to the land devised to them, respectively, with remainder in fee simple absolute in their respective heirs. Both dying without issue, the remainder in fee upon their death passed to, and vested absolutely in, their collateral heirs, as tenants in common. After the death of each devisee, the land devised to her for life was subject to partition, and to the application of the statute of limitation. As it is conceded that defendants and those under whom they claim had been in the adverse possession of the land in question under color of title, for more than ten years after the youngest of the plaintiffs became of age, the judgment is for the right party, and should be affirmed."

In so far as the above paragraph is applicable to the case at bar, I concur. In the agreed statement of facts it is admitted that the defendant, John A. Kerr, and those under whom he claims, have had open, notorious, exclusive, continuous, and adverse possession of the S. E.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 33, township 50, range 32, since 1871, and that the defendant, John A. Kerr, and those under whom he claims, have had open, notorious, exclusive, continuous, and adverse possession of the S. W.  $\frac{1}{4}$  of the S. E.  $\frac{1}{4}$  of section 35, township 50, range 32, ever since June 30, 1860. The court therefore holds that the plaintiff is not the owner, nor entitled to the possession, of either or any part of said tracts of land; that the said John A. Kerr, and those under whom he holds, have acquired title thereto by virtue of the statute of limitations,—their possession being under color of title under deeds derived by virtue of sales in the partition proceedings, as stated in the agreed statement of facts. The court therefore finds the issues of fact for the defendant, and declares the law in his favor, as above indicated. Judgment for defendant.



LILIENTHAL et al. v. McCORMICK et al.

(Circuit Court, D. Oregon. March 1, 1898.)

No. 2,418.

**1. CONTRACT OF SALE—ACTION FOR BREACH—PLEA OF PERFORMANCE.**

An allegation of a tender of hops of an average of the best product of a crop produced upon certain premises, and that defendants exerted their utmost to produce a crop "of choice quality, in sound condition, of good color, and fully matured," does not show a compliance with a contract to deliver, absolutely, hops of that quality and condition, to be produced upon said premises.

**2. SAME—DEMAND BEFORE SUIT.**

A contract of sale subject to inspection provided for the repayment, on demand, of money advanced, if the goods, when delivered, were not accepted because not of the quality agreed upon. Goods were tendered, and on that ground refused, and the seller insisted that he had fully performed the contract. The purchaser sued for the alleged breach. *Held*, that an answer that no demand had been made for the repayment of the money advanced was insufficient.

**3. SAME—PERFORMANCE OF CONTRACT—PLEA OF TENDER.**

A plea of tender of the money advanced, with interest thereon at the agreed rate, is a sufficient answer to a complaint for failure to comply with a contract to repay money advanced in case goods sold subject to inspection were not accepted.

Wirt Minor, for complainants.

John H. Woodward, for defendants.

BELLINGER, District Judge. This is a suit by the complainants upon a hop contract, in which, among other things, it is prayed that the contract sued upon be decreed to be a lien upon certain hops grown upon one of the defendant's hop farms in Marion county, in favor of the complainants, to the extent of moneys advanced by them to the defendants, and of interest upon the same at the rate of 10 per cent. per annum from the dates upon which the same were advanced, and to the extent of all damages which have been sustained by the complainants by reason of the failure of the defendants to deliver hops according to their contract. The contract provides for a delivery not later than November 10, 1897, of 30,000 pounds of hops, in bales of about 185 pounds each, in new 24-ounce bale cloth; 7 pounds tare per bale being allowed. These hops are to be the product of the hop farm of Charles McCormick, defendant, consisting of about 70 acres. The contract further provides that said hops, when delivered, are to be not the product of a first year's planting, and not affected by spraying or mold, and are to be of choice quality, and in sound condition, good color, fully matured, cleanly picked, free from vermin, damage, etc. And it is further provided that when said hops are delivered they may be inspected by the parties of the second part (the complainants herein), or by an agent selected by said parties, at the time of the delivery of any lot thereof, and that should said hops, or any part thereof, not be delivered in the condition agreed upon, according to the judgment of said parties of the second part, or their said agent, the said parties of the first part shall, upon demand, repay to said parties of the second part such sums of money as they may have advanced on said crop,

with interest at the rate of 10 per cent. per annum from the date when advanced; and it is provided that such instrument shall be a chattel mortgage on the entire crop of hops raised on the above-described land, to secure the payment of said sums advanced, and interest, and the performance of all the provisions thereof. This court has heretofore held in this case that this mortgage could not be enforced as a lien to secure damages for the nonperformance of the contract, but that it is a security merely for the repayment of the sums of money advanced by the complainants herein upon the said hop crop, with interest as provided in the contract. The questions to be now decided arise upon exceptions to the answer of the defendants herein.

The defendants answer, and allege the delivery of 30,000 pounds of the crop of hops raised by defendants on the 70 acres of land mentioned in the bill, and not of the first year's planting, in bales of about 185 pounds each, in new 24-ounce bale cloth, etc., "and that the said hops so delivered were an average of the best product of said crop so produced, picked, and cured on said premises of seventy acres; that said defendants did exert their utmost to produce and secure a crop of hops of choice quality, and in sound condition, and of good color, etc.; that said hops so by the defendants delivered at said warehouse as aforesaid were on or about the 10th and 11th days of October, 1897, tendered to the agent of the complainants, who inspected them in part, and upon such inspection did at the first accept and approve a portion thereof, and thereafter did reject and refuse to receive any portion thereof." This answer then sets out a letter written by defendants to complainants, notifying them that they had delivered 30,000 pounds of hops at the warehouse at Woodburn, Or., according to said contract, which said hops complainants, according to the statement in said letter, refused and neglected to take or pay for, and charging complainants with the failure to comply with their said contract. The letter declares that in consequence thereof the defendants elected to consider said contract to be abrogated and annulled, and of no force or effect, and it concludes with the tender of the sum of \$1,063, as the money advanced and paid under said contract, including interest thereon. All of these portions of the answer are excepted to, and the exceptions are sustained. The allegation that the defendants tendered 30,000 pounds of hops, of an average of the best product of said crops so produced, etc., and that they exerted their utmost to procure and produce crops of choice quality, and in sound condition, of good color, fully matured, etc., does not show a compliance with the requirements of the contract. The latter part of this allegation merely shows an attempt to comply with the contract, by an utmost exertion to procure a crop of hops of the quality required. The allegation that the crops tendered were an average of the best product of said crops so produced does not answer the contract, by which the defendants bound themselves to deliver hops of choice quality, and in sound condition, of good color, fully matured, etc. The tender was of an average of the best product of the crop produced, while the obligation was to deliver, absolutely, hops of choice quality, and in sound condition, good color, fully matured, etc. The letter set forth in the answer is wholly immaterial. It makes no difference what the parties

say, in a letter written to the complainants, they have done towards the performance of the contract. The material thing is, what have they in fact done? The exception is also sustained as to the second paragraph on page 3 of the answer, which alleges that complainants have never made demand on defendants for repayment of the money alleged in the complaint to have been advanced by them to defendants, etc. As to the remainder of the answer, the exception is overruled. Part of this matter is immaterial, and might have been stricken out, but connected with it are allegations of a tender, which show a compliance with the condition of the contract by which the defendants agreed to refund the money advanced by the complainants, with interest, etc., if the complainants, according to their judgment, should conclude that the hops tendered were not of the quality required by the contract, and should for that reason refuse to accept them.

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SLADDEN v. NEW YORK LIFE INS. CO.

(Circuit Court of Appeals, Seventh Circuit. April 5, 1898.)

No. 440.

**1. LIFE INSURANCE—FALSE REPRESENTATIONS IN APPLICATION—EVIDENCE.**

An abstract of the application and medical examination contained in the last sheets of the policy introduced by plaintiff will be presumed, in the absence of any evidence of mistake, to be correct, and they are competent evidence of the contents, execution, and genuineness of the originals; and if, in connection with the proofs of loss also introduced by plaintiff, they show a breach of the warranty in the application, there can be no recovery.

**2. SAME—FALSE STATEMENTS IN APPLICATION.**

In an application, the applicant stated that she had no physician, and had consulted none, when in fact she had been attended by a physician for more than two months prior to the application, and had had consumption for nearly a year. *Held*, that the failure to disclose the facts was a violation of the warranty that she had made a full, complete, and true statement, and no recovery could be had.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This action was brought by the plaintiff in error, S. C. Sladden, as executor, to recover the amount of a policy of insurance upon the life of his wife, Mary, to whose executors, administrators, or assigns the policy had been made payable. The declaration embodies a copy of the policy, which contains the usual clause making the written application, with its "agreements, statements, and warranties," a part of the contract. A number of pleas were interposed alleging breaches of warranty in that certain statements of the application were false. At the trial, the plaintiff, according to the bill of exceptions, "introduced in evidence the insurance policy, which is composed of four sheets. The first two pages are set forth in the plaintiff's declaration. The third and fourth pages are as follows." Then follows an "abstract (e. & o. e.) of the application for insurance in the New York Life Insurance Co.," consisting presumably of the usual questions and answers, followed by an agreement signed by the applicant, the first clause of which is as follows: "That the statements and representations contained in the foregoing application, together with those contained in the declaration made by me to the medical examiner, shall be the basis of the contract between me and the New York Life Insurance Company; that I hereby warrant the same to be full, complete, and true, whether written by my own hand or not; this warranty being a condition precedent to, and in consideration

for, the policy which may be issued hereon." Immediately following this, as a part of the four pages of the policy introduced in evidence, is a copy or abstract of the "declarations made to the medical examiner of the New York Life Insurance Company," in which appear the following questions and answers: "(5) What is the name and residence of your physician? A. Have none. (6) What other physician have you consulted? A. None." The plaintiff also put in evidence the formal proofs of death made to the company, including the certificates of physicians in attendance during the last sickness of the deceased. According to the certificate of Dr. H. Wallace, he attended Mrs. Sladden, in November, 1892, which was eight or nine months before the date of the policy, and "the trouble for which the patient consulted was slight uterine congestion, which yielded to treatment within ten days, and during that time she was not confined to the bed or house, but was up about her duties and out of doors. I was then physician for the family for nearly a year, and during that period I was not called upon to treat her again, nor did I see a condition requiring treatment. Whatever the cause of death, it developed after she left my care and observation, which occurred in August, 1893." The certificate of Dr. E. Fletcher Ingalls contains the following questions and answers: "(4) How long have you known deceased? A. Not before first visit to my office. (5) How long had you been the medical attendant or adviser of the deceased? A. May 11, 1893, to October 2, 1893. (6) For what disease did you treat or advise deceased prior to her last illness? A. None. (7a) Did you attend deceased during her last illness? A. Yes. (7b) If so, for what disease? A. Consumption. (8) Date of her first visit to your office? A. May 11, 1893. (9) Date of her last visit to your office? A. Oct. 2, 1893. (11a) What disease was the immediate cause of death? A. Consumption. (11b) How long, in your opinion, did deceased suffer from the disease? A. From the fall of 1892. (14) When were you first consulted by the deceased, or by any relative or friend, for the affection which either directly or indirectly caused death? A. May 11, 1893." Dr. Wallace was called as a witness for the plaintiff, and testified that he had called himself the family physician of the deceased because he had treated her only the time stated, and at another time was called to Mr. Sladden's house when an accident had occurred to his father-in-law, and, when asked if that was all, answered: "I base it as family physician on being called to the house for such medical work as might be needed."

The plaintiff, being called in his own behalf, testified that on May 11, 1893, he went with his wife to the office of Dr. Ingalls, and then was asked the following questions, to each of which the court sustained an objection: "What did you go there for?" "What, if any, trouble was your wife suffering from then?" "What did Dr. Ingalls say she was suffering from at that time?" "What was your wife treated for at that time?" "Was she treated at that time for a slight cold?" "Was she suffering at that time from anything else than a slight cold?" "What was the condition of her health at that time?" "Did she within a few days recover entirely from what she went to consult Dr. Ingalls about at that time?" "Did that trouble affect in any way her general health?" No statement was made when the questions were propounded and the bill of exceptions does not show what answer the witness was expected to make to any of the questions. The same witness, having stated that he was present when Dr. Brown, medical examiner of the defendant, examined Mrs. Sladden, was asked the following questions, to each of which objection was sustained: "Did Dr. Brown ask her, what is the name and residence of your physician?" The Court: "Objection sustained, because it is the understanding of the court that whatever there was at this time was in writing, and that writing should be before the court before any allowance of any examination upon it." "Did Mrs. Sladden write anything to Dr. Brown, or to the defendant?" "Did Dr. Brown write down anything at that time?" Answer: "To the best of my knowledge, yes." "Before writing down such matter, did he ask Mrs. Sladden any questions?" "Did he read to her any questions?" "Did he ask her what is the name and residence of your physician?" "Did he ask her when and for what have his services been required?" "Did he ask her what other physicians have you consulted?" "Did he ask her when and for what?" "If he asked her what is the name and residence of your physician, what did she reply if anything?" "Did she respond to such a question by saying: 'Do you wish me to detail any slight cold or accident I may have had, and the physician, or only grave matters?'"

And did he answer, 'No colds or accidents, but serious matters'?" There was likewise no statement at the time, and the bill of exceptions does not show what answer was expected to any of these questions. The plaintiff, having made all necessary formal proof, rested his case; and thereupon, the defendant having moved for a peremptory instruction to the jury to find a verdict for the defendant, the court directed a verdict "in favor of the plaintiff for \$227.50, the amount of the premium only." To that direction it does not appear that any objection was made or exception taken.

The assignment of error contains numerous specifications which, excepting the ninth, are objected to on one ground or another, and those directed to the refusal of the court to permit answers to questions propounded to witnesses on the ground that the substance of the evidence excluded is not set out in the assignment of errors as required by rule 11 of this court. The ninth specification is that the court erred in instructing the jury to return a verdict for plaintiff for \$227, the amount of the premium only. In the reply brief for the plaintiff in error it is said: "While several assignments of error are made, yet the main and indeed the only question technically before the court is whether that instruction was correct, and the ninth error assigned is probably sufficient to bring the whole case before the consideration of the court."

William Burry, for appellant.

Thomas A. Moran and Henry A. Gardner, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after stating the case as above, delivered the opinion of the court.

No exception having been saved to the peremptory instruction upon which the verdict was returned, the ninth specification of error, instead of being sufficient to bring the whole case before the court, presents no question whatever; and, unless there was error in excluding material evidence, the judgment below must be affirmed. We have considered the meaning and application of rule 11 in a number of cases, and in *U. S. v. Indian Grave Drainage Dist.*, 85 Fed. 928, have explained that, when an exception is to be saved to the exclusion of testimony, a statement should be made to the court at the time of the ruling, or before the conclusion of the trial, of the facts expected to be elicited from the witness in answer to the overruled question, the statement set forth in the bill of exceptions, and the substance of it in the specification of error, as required by the rule. The rule has not been complied with in this case, but, disregarding that objection, we deem it clear that no error was committed of which the plaintiff in error may justly complain. It is perhaps true, as urged, that the plaintiff made a prima facie case by introducing the policy of insurance as set forth in the declaration, by showing the payment of the premium, proving the death, and showing that the required proofs of death had been submitted to the company; and it may be that it was not necessary for the plaintiff to have put in evidence the third and fourth pages of the policy, containing the abstract of the application for insurance (*Insurance Co. v. Rogers*, 119 Ill. 485, 10 N. E. 242; *Insurance Co. v. Kessler*, 84 Ind. 310; *Insurance Co. v. Ewing*, 92 U. S. 377); but the plaintiff having chosen to put in evidence the abstract of the application and medical examination as set forth upon the policy, without asserting any mistake or inaccuracy, the presumption is that they were correctly abstracted or copied, and, as against the plaintiff, they were competent evidence of the contents and of the execution and genuineness of the

originals; and if the proof so made showed a breach of warranty or the falsity of a material representation, as alleged in any of the pleas, the court was right in taking the case from the jury. While the medical examination is not mentioned by name in the policy, it is expressly made a part of the application, which is made a part of the policy. That the application in important particulars was false is established by the certificates of physicians introduced in evidence by plaintiff as part of the proofs of death. So introduced, we have no doubt that the certificates, though not conclusive, were competent evidence against the plaintiff of the facts stated in them. What the significance of the certificate of Dr. Wallace is need not be considered. The importance of that of Dr. Ingalls is evident. It means that the insured visited him first on May 11, 1893, and from that date until the ensuing October 2d he was her medical attendant; that he treated her for no disease, but that she had consumption, and, in his opinion, had had it since the fall of 1892. If it was competent or possible to do it, no adequate attempt was made to remove or break the force of that statement. Dr. Ingalls was not called, and the questions which the plaintiff, as a witness in his own behalf and interest, was not allowed to answer, were directed to the condition of his wife at the time of the first visit only, and to the fact, suggested by two of the questions, that she soon recovered from the slight cold which she then had. If received, full answers to the questions propounded would not have covered the period of her visits to Dr. Ingalls between May 11th and July 29th, when the policy of insurance was issued, and therefore could not have shown an excuse, if excuse were possible, for the failure to state in her application that during that time she had been in attendance at the office and under the advice of Dr. Ingalls, as shown by his statement.

The proposition is asserted, and many citations made of authorities to support it, that "a warranty in an insurance policy is not violated where the insured omitted to mention treatment for a slight cold or temporary ailment or disorder which was cured at the time of the application for insurance, and which left no taint or vice in the constitution or general health of the applicant." But, if conceded in the fullest scope of its terms, the proposition does not meet this case, where one who had consumption went, according to the implications of the questions propounded, to a physician on account of a slight cold, of which she recovered in a few days, but for near three months thereafter, before the policy was taken out, according to the physician's statement, made visits of which no explanation was offered. Neither would the untruthfulness of the answer in respect to Dr. Ingalls have been mitigated if it had been shown that the medical examiner told Mrs. Sladden that he did not wish her to mention any slight cold or accident she may have had, and the physician whom she had consulted, and that she should answer only grave or serious matters. The impropriety, not to say absurdity, of permitting an applicant for insurance to determine what matters of health, which at the time were deemed grave enough to go to a physician about, were too slight and unimportant to mention to a medical examiner when applying for insurance, could not well be emphasized more strongly than by the

facts of this case; but, if the rule admitting such evidence were conceded, it could not apply when, as here, for near three months after the slight cold had gone there was a continued and unexplained attendance upon a physician, who, perceiving the presence of an incurable disease, prescribed no treatment whatever, and gave advice only.

The question has been discussed, but need not now be considered, whether the decision in *Insurance Co. v. Fletcher*, 117 U. S. 519, 6 Sup. Ct. 837, has been modified by the later opinion in *Insurance Co. v. Chamberlain*, 132 U. S. 304, 10 Sup. Ct. 87.

The judgment below is affirmed.

### STEVENSON v. UNITED STATES.

(Circuit Court of Appeals, Fifth Circuit. March 15, 1898.)

No. 620.

**1. CRIMINAL LAW—MURDER—DECLARATIONS.**

Evidence as to the declaration of the defendant, made three months prior to the homicide, that he "intended to kill the next deputy marshal that arrested him," was improperly admitted, as too remote and general to have any legitimate bearing on the issue to be tried.

**2. SAME.**

Where conversations and declarations of the accused, after arrest, forming no part of the *res gestæ*, and not admissible in his behalf, but admissible against him, are proved by the United States, the accused is entitled to have the full conversation or conversations given in evidence.

**3. SAME—INSTRUCTIONS—ABANDONMENT OF QUARREL.**

Where there is evidence tending to show that the accused, after provoking a quarrel with deceased, withdrew therefrom, and was thereafter fired upon without warning by deceased, whom he then shot and killed, it is the duty of the court to instruct the jury as to the effect of such withdrawal, and its refusal to do so when requested is reversible error.

**4. SAME—JURISDICTION—AVERMENTS IN INDICTMENT.**

Where an indictment for murder in the Chickasaw Nation, Ind. T., avers that both deceased and accused were white men, proof that deceased was a white man establishes the jurisdiction, and the averment as to citizenship of the accused is surplusage.

Swayne, District Judge, dissenting.

### In Error to the Circuit Court of the United States for the Eastern District of Texas.

John Stevenson, the plaintiff in error, was, on the 1st day of December, 1893, at a term of the United States circuit court for the Eastern district of Texas, indicted for the murder of one Joe Gaines. On May 13, 1897, he was put upon his trial, and on May 20th was convicted of manslaughter. His amended motion for a new trial was overruled. His motion in arrest of judgment was overruled. The sentence of the court was imprisonment at hard labor for the term of six years and ten months from June 2, 1897, in the Detroit House of Correction, situated at Detroit, in the Eastern district of Michigan, and, besides, a fine of \$50 and all costs of this proceeding. The indictment in the usual form charges the murder as committed in Pickens county, Chickasaw Nation, Ind. T., with the further allegation that both the plaintiff in error and the deceased were then and there white persons, and not Indians, nor citizens of the Indian Territory. The evidence of the trial tended to show the facts substantially as follows: The place of the homicide was the town of Paul's Valley, in the house and business place of one W. R. Bandy, situated on Main street, which runs

north and south parallel with the Santa Fé Railroad. Bandy's place is in the north part of the town, and fronts east on Main street. The building is 18 feet by 36 feet, with a front double door and window south of door in east wall. On the night of the homicide the house was well lighted, and a counter was in the southeast corner, with passage room between it and the south wall. Underwood's drug store is 175 feet south of Bandy's, and the Central Hotel several hundred feet south of Underwood's drug store. Miller & Berry's drug store is still further south of the hotel several hundred feet. All of the buildings are practically, with their fronts, on a line, and face the east and the railroad. Plaintiff in error was legally adopted by the Chickasaw Nation, and his wife, a full-blood Chickasaw, was engaged in the restaurant business in Paul's Valley. The deceased was a constable and deputy marshal for the territory courts. In May prior to the homicide the plaintiff in error, when talking to a Mrs. Joe Paul about deputy marshals, said that he was getting tired of being pulled around by them, and was going to kill the next one that arrested him; but no reference was made to the deceased, nor was it known that plaintiff in error knew him. On the 22d of August, 1893, the plaintiff in error was refused by United States Commissioner Davidson as surety on a bond. About dusk that evening he took from the house of Mrs. Sarah Paul a Winchester. She tried to take the gun from him, and he told her not to be uneasy, he was only going to carry it to his restaurant. She thought her son was in trouble. Subsequent to this, and about 8:30 o'clock that evening, the plaintiff in error saw Davidson, the commissioner, in Underwood's drug store, and cursed him for refusing to take him on the bond, telling the commissioner that he had taken a man in preference to him who could not schedule a horse. Leaving the drug store, he cursed on the sidewalk as he was going off with one Black. At this juncture the deceased came into the drug store, was told by the commissioner of plaintiff in error's conduct, and in about 10 minutes thereafter overtook the plaintiff in error and John Black while they were going home, and talking about a matter of business. Hot words occurred between the two, when the deceased drew his pistol, and presented it to the back of plaintiff in error, and would have shot him, but for the interposition of one Robinson. The deceased arrested the plaintiff in error without a warrant, but released him at the Central Hotel. The plaintiff in error then started home in company with his wife, and en route told Alex Smith (a posse man of deceased) that he would go home, get his gun, come back, and kill the sons of bitches. He went to his house, west of Main street, and found a couple of visitors there,—Mr. and Mrs. Waite; then went to his restaurant, which is between his house and Miller & Berry's drug store, prepared supper for his guests, and took it to his house. After supper (and, the inference is, as he was leaving home then) Ann Palmer, who lived close by, says she heard him say he was going to get his Winchester, and shoot it out with Davidson, but did not hear him mention anything about the deceased, and only called Davidson's name once. Mrs. Waite never heard Davidson's or anybody else's name mentioned by the plaintiff in error, but, as her husband was sick, she requested him to get quinine for him. He was next seen at Miller & Berry's store about 25 minutes before the homicide, where he asked for quinine, and bought some bitters. Arch Matthews invited him to go to Whitehurst (National Hotel) with him, and get some good whisky. This hotel being east of the railroad depot, they started for the hotel, but plaintiff in error, being as "drunk as a goat," was left on some trucks at the depot to wait for the whisky. Matthews not returning promptly, the plaintiff in error left the trucks, and started to Bandy's place, and somewhere between the depot and Bandy's place he fired his Winchester twice in the air, and hallooed, "Hide out, Stevenson is in town yet," or words of similar import. He then went into Bandy's place, and, when first going in was a little angry, but soon got in a good humor, and invited everybody to drink with him. Bandy walked behind his counter to serve the drinks, and plaintiff in error walked up to the counter with his face to the south. When the street shots were fired, Davidson and the deceased were seated in a room in the Central Hotel. The two shots and something like a whoop were heard by Davidson, and, when they were made, the deceased, without saying a word, arose from his seat, got his pistol, and started in the direction of Bandy's place. Deceased was seen going rapidly towards Bandy's, and as he neared the house he was seen in a stooping position, with his pistol in both hands, and as he ap-



proached the south facing of the double door he suddenly wheeled to the left, extended both of his arms with the pistol in his hands, and fired at plaintiff in error, the bullet passing closely in front of plaintiff in error, and lodging in the counter. The plaintiff in error was standing at the time at the counter, preparatory to drinking, his gun at his right side; and, as the deceased fired, he threw his gun across his left arm, and fired, without putting it to his shoulder, or taking aim. The two shots were close together, but the first one was fired by the deceased. There were two gunshot wounds upon deceased made by one bullet. The ball first entered the outside of the left arm about the wrist, and passing through came out on the opposite side of the arm about two inches higher than the point of entrance and entered the body near the left breast. After the shooting, plaintiff in error went out by rear door to his home; had his Winchester with him, and told the people in his house that he had had a shooting scrape; that he was not hurt, and did not know whether the other person got hurt or not, no name being mentioned indicating who the other person was. He then left, saying he would give himself up to the officers.

On the trial the government introduced the evidence of one Scrivener, as follows: "After the killing, I was sent for, and went to where the defendant was, in the rear of the place where the shooting occurred, and walked up to him, and said to him, 'John, it was a pretty bad affair, and you ought to be sorry for this.' He said to me that all he regretted about it was that he did not kill that other son of a bitch, Bluff Davidson. He was talking when I went up to him, and said something about being in danger. I told him not to talk; that any statement made might be used against him. He said he shot at the man that had shot at him. He just fired his gun at the blaze from the door, and he said it was Gaines that shot at him, and when he shot it was in defense of his life. He further said that he would do the same thing again under the same circumstances. Witness stated that no threats or promises or inducements of any kind were made to defendant, but that what was said to him was voluntarily said by defendant." In connection with this evidence the plaintiff in error offered the evidence of one Alexander Smith as to the conversation between the witness and himself at the time just preceding the said Scrivener's approach to the party, to the effect that the witness Smith had opened a conversation with the plaintiff in error, saying to him, "John, you have killed the man," and plaintiff in error replied, "Who is it?" and the witness said "Joe Gaines," whereupon the plaintiff in error replied, "I wish it had been that other son of a bitch, Bluff Davidson;" immediately upon which the government's witness, Scrivener, came up, and continued the conversation as testified to by him. To the introduction of this evidence by Alexander Smith objection was made, and the court excluded the same upon the ground that it was self-serving, and not a part of the *res gestæ*, nor in explanation of the other declarations in evidence. To this ruling of the court exceptions were duly taken. Further, on the trial the court, over the objection of the defendant, permitted a government witness (Mrs. Joe Paul) to testify that she was at the National Hotel in Paul's Valley, and heard defendant say, in May, 1893, "that he intended to kill the next damn marshal that arrested him; that he was tired of being pulled around by them"; which testimony was admitted by the court as showing the feeling of defendant against marshals as a class, and so instructed the jury at the time, which ruling of the court was duly excepted to. After the evidence, the counsel for plaintiff in error asked the court to instruct the jury in some twenty-six propositions of law, besides two special instructions, all and each of which the court refused, because the law applicable to the case was given in the main charge; but this does not appear by any proper bill of exceptions. A regular bill of exceptions does show that on the trial of the cause, and after argument of the counsel, and after the submission of the main charge of the court, the plaintiff in error requested the court to charge the jury as follows: "If the jury believe from the evidence, or have a reasonable doubt of it, that at the time of the homicide the defendant was, previous to and at the time of said homicide, in the public business place of the witness Bandy, you are instructed that the defendant had the legal right to be in said place; and if, when in said place of business, he (the defendant) was not engaged in any act or conduct that showed in itself malice towards Gaines, or a purpose to engage Gaines (the deceased) in an altercation with him, and if at said time, the defendant thus circumstanced, the deceased approached with a deadly weapon, and the

defendant did not know of said approach, or of the purpose of said Gaines in making said approach, and at said time the deceased, Gaines, suddenly appeared at the door of said place with a deadly weapon, and without warning to defendant of his presence and purpose, he, with said weapon, fired or attempted to fire upon the defendant, then you are instructed that the defendant had the right to shoot and kill the deceased, and should be acquitted." This charge was refused by the court for the reason that the proposition of law contained therein was covered by the main charge. Among other things in the main charge was the following: "The right of self-defense exists at all places and under all circumstances. Where the party charged with the offense has been wrongfully assailed by his adversary, and placed in a position of great peril, or a position from which, situated as the party charged with the offense believes and has a right to believe, or any reasonable person situated as he was would have a right to believe, that his adversary then intended to take his life, or do him serious bodily harm, and acting upon such appearances, and from that cause only, and in order to save his own life, or prevent either his life being taken or an act being done that likely would take his life, he has a right to act on those appearances, and repel force by force, even to the extent of taking human life, if necessary. In regard to that matter I will instruct you further on. \* \* \* It appears from the testimony in this case that he did arrest Mr. Stevenson on the outside of that building, down the street somewhere; that Mr. Stevenson had a knife, and that the officer had a pistol, and that there were some words between them,—some trouble between them,—but finally that Mr. Stevenson put down the knife, and that the officer turned him loose, and then, on account of something that was said, rearrested him, then afterwards, down by the hotel, turned him loose again. Whether those arrests were lawful or unlawful, Mr. Stevenson had been released by the officer under the undisputed testimony in this case, is the way I remember it. Of course, upon all these questions, gentlemen, if you don't remember the evidence as I do, follow your recollection, not mine, because it is a question of fact for you to determine, not for me. I only mean to speak of those matters that I understand to be undisputed, not upon controverted questions; and in determining those questions you are to consider the subsequent conduct of the parties. If Stevenson went off,—if you find it is a fact that he went off,—and got a Winchester, and came back, and fired it in the streets, and called out, made exclamations of any kind, and you believe that Gaines, the officer, heard those remarks, heard those shots, and knew who the party was,—then you are instructed that that was in his presence, within the contemplation of that statute, and it was his duty to arrest the party creating the disturbance or breach of the peace. If he did not hear the remark, did not know who it was, then he had no right to make the arrest without a warrant, or attempt to make it without a warrant; but that is a question in this case that you are to determine from the evidence, but, if Gaines did know who it was, did hear him make the remark, heard the shots, and knew who the party was, it was in his presence in contemplation of the law, and he had a right to go where the defendant was for the purpose of arresting him; and if, on account of what had occurred previously between him and Mr. Stevenson, he had a right to apprehend danger from Mr. Stevenson in attempting to make the arrest, he had the right to go prepared to act promptly in the event of an emergency. What I mean is this: he had a right to take his pistol in his hand in going to make that arrest, if, from what had occurred previously between the parties, he had a right to believe that Stevenson would resist the arrest. When he went to where the defendant was, it was his duty as an officer to inform him of his purpose,—that is, that his purpose was to arrest him,—that was his duty. If he did not do it, but simply went there and fired upon Stevenson for the purpose of killing him, and not for the purpose of arresting him, then Stevenson would have the right to shoot Mr. Gaines in order to save his own life, and he would not be guilty of murder in this case, unless you believe from the testimony that Mr. Stevenson had gone off, and armed himself with a Winchester, and had come back, and fired the shots, for the purpose of inducing Gaines to attempt to arrest him, in order to get to kill him; if you believe from the testimony that Stevenson did that,—those acts,—and did it for the purpose of inducing Gaines to attempt his arrest in order to get an opportunity to take his life, then it is immaterial who fired the first shot, and the defendant in that state of case, if you believe those to be the facts,

would be guilty of murder, and could not invoke the law of self-defense, because it would be taking advantage of his own wrongs. \* \* \* If the evidence satisfies you that Gaines went there for the purpose of arresting him, and that when he approached the door with his pistol in his hand, if you believe from the evidence that Stevenson immediately shot him, then the defendant would be guilty of murder or manslaughter, or not guilty of anything, owing to how you determine certain facts. If he went there for the purpose of arresting him, and not for the purpose of killing him, but with his pistol in his hand, if the officer, without informing Stevenson of his intention, made some demonstrations which induced Stevenson to think that he was then going to shoot him, and not arrest him, and he fired in consequence of that, why then Stevenson would be acting in self-defense; but, if Stevenson had fired the shots in the air, and gone into this place for the purpose of inducing the officer to come there in order to get to kill him when he did approach, it would not make any difference whether Gaines fired first or whether Stevenson fired first; in that state of case he would be guilty of murder. If you believe from the evidence that the officer went there to arrest him, and not kill him, and that Stevenson had not procured his gun and fired the shots for the purpose of invoking the difficulty, or inducing the officer to attempt to arrest him, but simply was mad and angry, and believed that he had been mistreated by Davidson in refusing to take him on the bond, and believed that he had been mistreated by the officer in the arrest that had been made by him, and you believe that was an adequate cause for that state of mind upon his part, and when he saw him, acting from those impulses, and those only, he shot him as soon as he saw him,—then he would be guilty of manslaughter, and not of murder." What is here given is substantially all that is contained in the charge of the court bearing upon the law of self-defense as applicable to the case in hand.

Stillwell H. Russell and Moman Pruiett, for plaintiff in error.

J. Ward Gurley, U. S. Atty.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

After stating the facts as above, PARDEE, Circuit Judge, delivered the opinion of the court.

Counsel for the plaintiff in error have presented 15 alleged assignments of error, some of which are in accordance with the rules of this court in regard to assignments of error, but many of them are altogether too prolix and argumentative, and we shall therefore consider the case from our own point of view, dealing only with those alleged errors clearly and specifically assigned. The evidence of Mrs. Joe Paul with regard to the declarations of the defendant made some three months prior to the homicide was improperly admitted. It was too remote and general to have any legitimate bearing on the issues to be tried. The case does not show, nor even tend to show, that the deceased, Joe Gaines, acted as a deputy marshal, or that he was known to the plaintiff in error at any time as a deputy marshal, but rather tends to show—and that was the view of the trial judge—that Joe Gaines, in attempting to arrest the defendant prior to the homicide and afterwards at the homicide, was acting as a constable, and not as a deputy marshal. The evidence as admitted was calculated to prejudice the accused before the jury, by showing his reputation as a brawling, turbulent man. The conversations and declarations of the accused after his arrest formed no part of the *res gestæ*, and in his behalf were inadmissible, but they were admissible against him if the prosecution saw fit to avail itself of them, and when the United States

proved the conversations and declarations the accused was entitled to have the full conversation or conversations given in evidence. This we understand to be elementary. The case clearly shows that what Scrivener heard defendant say after the homicide was intimately and directly connected with the conversation between the accused and witness Smith, and, as the part Scrivener heard was offered in evidence, the whole, on the request of the accused, should have been admitted. Where one part of a conversation is introduced, the other party is entitled to all that relates to the same subject, and all that may be necessary to fully understand the portion given. 1 Bish. Cr. Proc. § 1241; Carver v. U. S., 164 U. S. 694, 696, 17 Sup. Ct. 640. There was evidence admitted on the trial tending to show that at, and some little time before, the homicide, the plaintiff in error had abandoned his controversy with the deceased, Gaines, and was not at the time engaged in any acts, nor making any declarations, showing malice towards the said Gaines, nor showing a purpose thereafter to engage Gaines in any altercation or quarrel for any purpose; and that during this period, in which the plaintiff in error had abandoned the previous purpose to quarrel with Gaines, he was approached and attacked and fired upon without warning on the part of Gaines, and thereupon he shot and killed Gaines in self-defense.

We are not called upon to show how consonant this evidence is with the other, and, perhaps, more important, facts in the case, but it was the theory of the defense in the court below, and, as there was evidence tending to substantiate it, that theory should have been recognized by the judge in his charge. We therefore conclude that the requested charge, to wit: "If the jury believe from the evidence, or have a reasonable doubt of it, that at the time of the homicide the defendant was, previous to and at the time of said homicide, in the public business place of the witness Bandy, you are instructed that defendant had the legal right to be in said place; and if, when in said place of business, he (the defendant) was not engaged in any act or conduct that showed in itself malice towards Gaines, or a purpose to engage Gaines (the deceased) in an altercation with him, and if at said time, the defendant thus circumstanced, the deceased approached with a deadly weapon, and the defendant did not know of said approach, or of the purpose of said Gaines in making said approach, and at said time the deceased, Gaines, suddenly appeared at the door of said place with a deadly weapon, and without warning to defendant of his presence and purpose, he, with said weapon, fired or attempted to fire upon the defendant,—then you are instructed that the defendant had the right to shoot and kill deceased, and should be acquitted,"—was proper to be given to the jury, and applicable to the case under consideration. The judge of the lower court apparently was of the same opinion, but excused himself from giving it, and refused the same, because it was incorporated in the main charge. We seek for the requested instruction, or its equivalent, in the main charge, but without success. There is in the main charge, as shown in the statement of this case, an instruction as to the law of self-defense, in which the general rule is correctly stated, but the instruction is not made specifically applicable to

the facts in the case as claimed by the accused on trial, and is coupled with the remark that the jury will be instructed on the same subject further on. Further on in the charge, wherein the law of self-defense is dealt with as specifically applicable to the case in hand, great stress is laid upon the altercation previous to the homicide between the plaintiff in error and the deceased, without any reference to the contention that after such altercation and threats of continuing the same, the plaintiff in error had abandoned the further prosecution of the quarrel; and, in our opinion, in this part of the charge too much stress is laid upon the frame of mind and intentions of the deceased, which could not have been known to the plaintiff in error, and too little stress is laid upon the frame of mind and intentions of the plaintiff in error at the time of the homicide. In all cases where the court is warranted in submitting the law on facts showing that a difficulty with his adversary was provoked on the part of the accused, if there be evidence tending to show that the accused, after provoking his adversary, abandoned his purpose, and withdrew from prosecuting the same, it is the duty of the court to also instruct the jury as to the effect resulting from such abandonment of purpose, called for by such evidence; and the refusal to give such instruction, when specially requested, is reversible error. *U. S. v. Rowe*, 164 U. S. 546, 17 Sup. Ct. 172.

The charge of the court was objected to in the lower court, and the objections are again urged here, upon the grounds that, while it elaborates and impresses upon the jury the theory of the prosecution, it does not sufficiently give the rules of law applicable to the theory of the defense, which theory was based upon evidence in the case; that it tended to impress the jury with the proposition that, if ill feeling or malice existed upon the part of the plaintiff in error towards Commissioner Davidson, it necessarily included enmity towards the deceased, and served to make the enmity towards Davidson a standard, or test, determining malice, hot blood, and evil design towards the deceased; and that, if there existed in the mind of the plaintiff in error prior to and at the time of the homicide an intention to provoke an altercation with the deceased, with a view of getting a chance to kill him, then the deceased, Gaines, had a right, as a peace officer, to come suddenly upon the plaintiff in error, and without warning, or any attempt to make an arrest, fire upon and kill him. These objections, while perhaps not urged in the lower court in such a way as to fully authorize their consideration in this court, are serious objections to the charge as given; and, if not treated here as constituting reversible error, it must not be understood that in this court all the propositions of the charge as given, and not specifically held ground for reversal, are approved; and particularly is this the case with regard to the method in which, conceding all the facts of the case as claimed on the trial by the prosecution, the deceased, Gaines, undertook to arrest the plaintiff in error. While the conditions of border society may be such that peace officers, authorized to arrest disturbers of the peace with or without warrants, are frequently compelled to shoot down on very short notice brawlers and disturbers who are armed with deadly weapons, yet we are not prepared to hold that in law such shooting without warning is justi-

fiable, particularly where, as in the present case, opportunity exists to collect a sufficient posse, and make an arrest by an immediate show of overwhelming force.

The indictment alleges as follows: "That said Joe Gaines, and he, the said John Stevenson, being then and there white persons, and not Indians, nor citizens of the Indian Territory." The proof shows that Joe Gaines was a white man, and not a citizen of the Indian Territory, but further shows that John Stevenson, the plaintiff in error, had not only married a full-blooded Chickasaw, and was living with her as his wife, but that he was a citizen of the Chickasaw Nation, having been adopted by said Nation. The plaintiff in error sought to avail himself of this variance between the proof in the case and the indictment in motions for a new trial and in arrest of judgment. This question was disposed of by the trial judge, in his charge to the jury, as follows:

"There is a question in this case in regard to the citizenship of the parties. It is shown by the testimony that Stevenson had married a lady that was a Chickasaw, I believe, residing in the Indian Territory. The evidence further shows that Joe Gaines was a white man, and not a citizen of the Indian Territory, although the bill of indictment alleges that they were both white persons, noncitizens of the Indian Territory; that being a jurisdictional matter, when the evidence establishes that either was a citizen of the United States, this court has jurisdiction, so far as that point is concerned."

We agree on this point with the trial judge. The averment in the indictment that Joe Gaines was a white person, and not a citizen of the Indian Territory, having been established by the evidence, the court had jurisdiction in the case, and the averment as to the color and citizenship of John Stevenson became and was surplusage, and no evidence was necessary to be given to prove it.

There are other rulings of the trial court discussed in the assignment of errors and the briefs of counsel, but, from the view we take of the case, they need not be considered. The admission of the evidence of Mrs. Joe Paul, the rejection of the evidence of Alexander Smith, and the refusal of the court to give the charge relating to the law of self-defense, as requested by the plaintiff in error, were errors which require us to reverse the verdict and judgment of the lower court, and remand the cause with instructions to set aside the verdict and judgment, and award a new trial, and it is so ordered.

SWAYNE, District Judge, dissents.

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#### UNITED STATES V. TAFFE et al.

(District Court, D. Oregon. March 23, 1898.)

#### 1. CONSPIRACY—INDICTMENT—SUFFICIENCY OF AVERMENTS.

The averment, in an indictment under Rev. St. § 5440, that defendants conspired to commit the "offense of corruptly endeavoring to influence a petit jury of the circuit court of the United States for the district of Oregon in the discharge of its duty," is insufficient, because it omits any averment of facts constituting the offense for which the conspiracy was formed, by which it can be identified.

#### 2. SAME.

An allegation in such an indictment that the defendants intended to influence the jury to return a large verdict in a case brought by the United

States to condemn a right of way is insufficient, in failing to state facts showing that the effect of what was intended would have been to defraud the United States.

Daniel R. Murphy, U. S. Atty. when the indictment was filed.

John H. Hall, U. S. Atty., and Julius C. Moreland, Spec. Asst. U. S. Atty., upon the trial and on motion in arrest of judgment.

Rufus Mallory and Chester V. Dolph, for defendant Taffe.

Henry E. McGinn and Geo. C. Stout, for defendant Killfeather.

BELLINGER, District Judge. This is an indictment for conspiracy, under section 5440 of the Revised Statutes of the United States. The indictment contains two counts. The first count is for conspiring to "commit an offense against the United States, to wit, the offense of corruptly endeavoring to influence a petit jury of the circuit court of the United States for the district of Oregon in the discharge of its duty." The second count is for conspiring "to defraud the United States" "by corruptly endeavoring to influence a petit jury of the circuit court of the United States for the district of Oregon in the discharge of its duty in a certain cause then pending in said court, wherein the United States was plaintiff and I. H. Taffe was defendant, the object of which said action was to condemn a certain right of way for a proposed boat railway through the lands of the said I. H. Taffe, and to have said jury, by means of corrupt influence, return a large verdict in favor of said I. H. Taffe in said cause; that on the trial of said cause in said court said Edward Killfeather and said S. C. Bratton were duly sworn as jurors to try said cause." The acts alleged to have been done in furtherance of the conspiracy are the same in both counts. They consist in the execution and delivery by Taffe of two promissory notes, for \$2,500 each, to Bratton and Killfeather, respectively, and the payment of \$10 in money to Killfeather. Bratton and Walker entered pleas of guilty, and became witnesses for the United States against the other defendants, who were found guilty on the trial under both counts in the indictment, and who now move in arrest of judgment, and for a new trial, on the ground that the matters and things charged in the indictment do not constitute offenses against the United States.

There is no such crime under the statute as that of corruptly endeavoring to influence a "jury." The offense intended to be charged is that of endeavoring to corruptly influence "jurors," and unless the word "jury," in the indictment, is construed to mean "jurors," the objection that is made upon this ground will be a fatal one. But, with this construction, the objection that the indictment is insufficient because it fails to state the facts relied upon as constituting the offense which the conspiracy had for its object, remains. The allegation in the first count, that the object of the conspiracy was to commit the offense of corruptly endeavoring to influence a petit jury of the circuit court of the United States for the district of Oregon in the discharge of its duty, omits any description of the offense for which the conspiracy was formed, by which it can be identified. Every offense consists of certain acts done or omitted under certain circumstances; and in the indictment for the offense it is not sufficient to charge the accused generally with having committed the offense, but all the circumstances

constituting the offense must be specially set forth. Archb. Cr. Pl. (15th Ed.) 43. In the case of *U. S. v. Cruikshank*, 92 U. S. 558, where there was an indictment for conspiracy and a verdict against the defendants, it is laid down as an elementary principle of criminal pleading that when the definition of an offense, whether it be at common law or by statute, includes generic terms, it is not sufficient that the indictment shall charge the offense in the same generic terms as in the definition, but it must state the species,—it must descend to “particulars.” While the case referred to was not for a conspiracy to commit an offense, and while the general rule is that the same certainty is not required in setting forth the offense which the conspiracy was formed to commit that is required in other cases, yet the guiding principle is the same. The difference in the cases is one of degree merely as to the certainty with which the facts constituting the offense are required to be stated. In any case facts must be stated with such certainty as will suffice to apprise the defendant of the particular case he is to meet, and enable him to plead the judgment in bar of a second prosecution for the same offense. To constitute a good indictment under section 5440, Rev. St., it must charge that the conspiracy was to do some act made a crime by the laws of the United States; and it must state with reasonable certainty the acts intended to be effected or carried out by the agreement of the parties, so that it can be seen that the object of the conspiracy was a crime against the United States. In *re Wolf*, 27 Fed. 611. In this case the first count contains no averment of facts constituting the offense which the conspiracy was formed to commit. The averment that defendants conspired to commit the offense of corruptly endeavoring to influence a petit jury of the United States in the circuit court of the United States for the district of Oregon does not describe an offense. It states a mere conclusion of the pleader. Nothing is added to the generic terms by which such crime is described, except the statement that the jury was a petit jury, and was in the circuit court of the United States for the district of Oregon. The acts which were intended in this crime, and which are necessary to its commission, are not set forth. There is no particularity of time, or of individuals to be corrupted on the jury, or of the cause to be affected, or of the means to be employed, or of other facts and circumstances by which the defendant may be apprised of the case he is required to meet, and by which he may so identify it as to be able to avail himself of any judgment rendered therein in bar of other prosecutions for the same cause. If, as stated by Mr. Justice Clifford in *U. S. v. Cruikshank*, “avague and indefinite description of a material ingredient of the offense is such a failure of compliance with the rules of pleading in framing an indictment that the indictment must be held bad on demurrer or in arrest of judgment,” by the stronger reason no judgment of conviction should be pronounced where the indictment is without any description of the offense intended by the conspiracy with which the defendants are charged. And the insufficiency of the indictment in this respect cannot be aided by averments of acts done in furtherance of the object of the conspiracy. 4 Enc. Pl. & Prac. 721, note 1; *Pettibone v. U. S.*, 148 U. S. 197, 13 Sup. Ct. 542.

The second count in the indictment is insufficient in failing to state



facts showing that the effect of what was intended would have been to defraud the United States. The allegation is that the defendants intended to influence the jury to return a large verdict in a case brought by the United States against Taffe to condemn a right of way across the lands of the latter for a boat railway. It does not appear that a large verdict, if returned, would result in defrauding the United States. For aught that appears, Taffe was entitled to a large verdict. Such was the tendency of the testimony of all of the witnesses in the case. It does not appear what the intended "large verdict" was to be, or that it was to exceed the value of the land condemned. Furthermore, a verdict against the United States in such a case does not involve an obligation on the part of the latter to pay the amount for which the verdict is returned. The verdict merely ascertains the amount required to be paid as compensation for the land taken, if the plaintiff elects to take it.

The attempt to corruptly influence the action of a "jury," assuming that this is in legal effect an averment of an attempt to corruptly influence the action of "jurors," is a crime against justice, punishable under the laws of the United States, and is not the crime of attempting to defraud the United States. But an indictment for a conspiracy having for its purpose the use of criminal means for the accomplishment of an act not in itself criminal must allege facts, in order that the court may see that the means proposed are in fact criminal. Whether the criminal character of what is proposed relates to the object of the conspiracy, or to the means to be employed, the requirement of certainty in the indictment is the same. In this case facts are not alleged from which it may be seen that what was proposed constituted a corrupt endeavor to influence a jury. The allegation that such an endeavor was agreed upon states a mere conclusion of the pleader. It does not appear that the case, though pending, was on trial, except as an inference from the allegation that Bratton and Killfeather were jurors. The case had long been pending, and is now pending for a third trial. Nor does it appear who comprised the jury, nor what jurors were intended to be influenced, and the means or character of such influence. And, as we have already seen, the insufficiency of the indictment is not helped by averments of acts done in furtherance of the conspiracy. The facts appearing on the trial do not tend to sustain the charge of a conspiracy to corruptly endeavor to influence a jury. According to the testimony, there was a meeting of the parties, at which Taffe corrupted Bratton and Killfeather by paying some money, and giving to each a promissory note for \$2,500. There was no agreement to endeavor to influence any other juror. The act of corrupting these two jurors does not establish a conspiracy to endeavor to corrupt them. The acts by which the crime is committed cannot be made to constitute a conspiracy for the purpose of endeavoring to commit such crime. The motion in arrest of judgment is allowed.

In re MONACO et al.

(Circuit Court, S. D. New York. April 1, 1898.)

**IMMIGRATION—INSPECTOR'S DECISIONS—JURISDICTION OF COURTS.**

28 Stat. 390, making decisions of the customs or immigration officers excluding aliens final, "unless reversed on appeal to the secretary of the treasury," does not exclude the jurisdiction of the courts in habeas corpus when, although an appeal to the secretary has been taken, through some rule of procedure in the office the papers will not be sent to him.

This was an application for a writ of habeas corpus by Sofia Monaco and others, who have been refused a right to land in this country by the immigration or customs officers.

Henry Gotlieb, for the motion.

Lorenzo Ullo, opposed.

LACOMBE, Circuit Judge. The statutes regulating immigration evidently contemplate that the alien immigrant shall have at least the opportunity to appeal from the subordinate officers to the secretary of the treasury; and, where he is prevented by the subordinate officers from presenting his case to that tribunal of review, it seems not to be within the intent of congress that the decision of the subordinate officers shall be final. The language used is, "Shall be final unless reversed on appeal to the secretary of the treasury." 28 Stat. 390. When it is remembered that this section took away from the courts the power to determine upon habeas corpus whether the alien was in fact an immigrant, and as such within the operation of the exclusion acts, it is the most natural construction of this language to hold that it gave the alien the right to have that important question passed upon by the secretary of the treasury. If the statements of petitioners' counsel are correct, this is a case in which a review somewhere should be allowed; for he asserts that the physician who at first reported that the immigrants were suffering from a loathsome contagious disease has modified his diagnosis. And upon the facts as asserted by petitioners, and not contradicted, two of the aliens are not immigrants; they have been domiciled here 10 years, and are now returning after a brief absence. The counsel for the board concedes that petitioners have appealed to the secretary of the treasury, but that the papers have not been, and will not be, forwarded to him, in accordance with some rule of procedure in their office. Under these circumstances, the decision of the board cannot be accepted as final, and the case is sent to the clerk of the court, to take testimony and report the facts bearing on the questions: (1) Whether petitioners are immigrants; (2) whether they, or any of them, are suffering from a loathsome, contagious disease.

## WORTHINGTON et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 3, 1898.)

## CUSTOMS DUTIES—PLATEAUX OR FLATS.

"Plateaux" or "flats," manufactured from plaits of straw, were free of duty, under paragraph 518 of the tariff act of 1890, as "plaits, and similar manufactures, composed of straw, suitable for making or ornamenting hats," and were not dutiable at 30 per cent., as "manufactures of straw not specifically provided for," under paragraph 460 of the same act.

This was an appeal from a decision of the board of general appraisers sustaining the action of the collector of the port of New York in the classification for duty of certain goods imported by the appellants, Worthington, Smith & Co.

Albert Comstock, for appellants.

Max J. Kohler, for the United States.

TOWNSEND, District Judge (orally). Several exhibits were introduced in this case, but counsel for the importer at the hearing confined his contention to the articles composed wholly of straw, or of which straw is the component material of chief value. It appears from the report of the assistant appraiser, and the evidence before the board of general appraisers, that the articles in question were in fact "plateaux" or "flats" and braids of straw, or of which straw was the component material of chief value. The importer claims that the braids are free, under the decision in *U. S. v. Rheims*, 45 U. S. App. 755, 89 Fed. 1020;<sup>1</sup> and as this claim appears to be well founded, and was not contested by the attorney for the United States, it is sustained. The plateaux or flats are manufactured from plaits of straw. They were classified for duty at 30 per cent. ad valorem, under paragraph 460 of the act of October, 1890, as "manufactures of straw not specifically provided for." The importer protested, claiming that they were entitled to free entry, under the provisions of paragraph 518 of said act, as "plaits, and similar manufactures, composed of straw, suitable for making or ornamenting hats." In their present condition they are ready for the milliner, who uses them for making hats, by shaping, wiring, trimming, sewing, and perhaps cutting, fitting, and resewing them. In their present shape they are merely oval shapes of braided straw, useless except for making hats. The testimony shows that they are commercially known as "plaits." They are therefore free, either as plaits, or as similar manufactures suitable for making or ornamenting hats. The decision of the board of general appraisers sustaining the action of the collector is reversed.

<sup>1</sup> 33 C. C. A. 687.

## BOKER et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 8, 1898.)

## 1. CUSTOMS DUTIES—CLASSIFICATION—NICKEL ALLOY.

Rods and plates of nickel alloy, incapable of practical use without further manipulation or manufacture, were dutiable as alloy in which nickel is the component material of chief value, under paragraph 167½ of the act of 1894, and not as manufactured articles composed in whole or in part of any metal, not specifically provided for.

## 2. SAME—NICKEL-ALLOY WIRE.

Wire composed of nickel alloy, imported in spools, and ready for use in the construction of rheostats, was dutiable as a manufactured ware not specifically provided for, composed wholly or in part of metal, under paragraph 177 of the act of 1894, and not as nickel alloy, under paragraph 167½.

This was an appeal by Hermann Boker & Co. from a decision of the board of general appraisers affirming the action of the collector of the port of New York in respect to the classification for duty of certain nickel alloy in the form of rods, sheets, and wire.

Albert Comstock, for importers.

H. D. Sedgwick, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise in question comprises certain nickel alloy, in the form of rods, sheets, and wire. The board of general appraisers, affirming the action of the collector, assessed all the articles for duty as manufactures of metal, at 35 per cent. ad valorem, under the provisions of paragraph 177 of the act of August, 1894, for "manufactured articles or wares, not specifically provided for, composed wholly or in part of any metal, and whether partly or wholly manufactured." The importer protested, claiming that they were dutiable at 6 cents per pound, under the provisions of paragraph 167½ of said act, as "nickel," or "alloy of any kind in which nickel is the component material of chief value." The first question involved is whether the alloy in these forms is raw material or a manufactured article. It seems clear that the rods and plates are not advanced from the condition of nickel alloy, and are therefore provided for under paragraph 167½. They are incapable of practical use without being subjected to further manipulation and manufacture. I think congress, by the provision for nickel alloy, itself a manufacture, must be presumed to have intended to provide for such alloy in its ordinary commercial forms as known at the passage of said act. The wire is a manufacture of metal, a complete merchantable article, imported in spools, and sold by the spool, to be used in the construction of rheostats, and dealt in commercially, in various sizes, adapted to the purposes for which it is wanted. The decision of the board of general appraisers is reversed as to the rods and plates, and affirmed as to the wire.

## MEYER et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 8, 1898.)

## 1. CUSTOMS DUTIES—SARDELLES DE SCANDINAVIE.

Sardelles de Scandinavie packed in oil in quarter boxes were dutiable at 20 per cent. ad valorem, under paragraph 211 of the tariff act of 1894, as "fish in cans and packages made of tin, except anchovies and sardines," and were not dutiable at 2½ cents per box, under paragraph 208, as "anchovies or sardines."

## 2. SAME—KIELER SPRATS.

Kieler sprats packed in oil in quarter boxes, commercially known as "smoked sardines in oil," were dutiable at 2½ cents a box, under paragraph 208 of the tariff act of 1894, as "sardines packed in oil in quarter boxes," and were not dutiable at 20 per cent. ad valorem, under paragraph 211, as "fish in cases or packages made of tin, except anchovies and sardines."

This was an appeal from a decision of the board of general appraisers affirming the action of the collector of the port of New York in respect to the classification for duty of certain goods imported by Meyer & Lange, the appellants.

Albert Comstick, for appellants.

H. D. Sedgwick, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The merchandise in question comprises two varieties of fish packed in oil, and labeled, respectively, "Kieler Sprotten in Oil," and "Sardelles de Scandinavie." They were classified for duty at 2½ cents per box, under the provisions of paragraph 208 of the act of 1894 for "anchovies and sardines packed in oil in quarter boxes," and were claimed to be dutiable at 20 per cent. ad valorem, under the provisions of paragraph 211 of said act, as "fish in cases or packages made of tin, except anchovies and sardines." There is no competent evidence to support the finding of the board of general appraisers that the sardelles are commercially known as "anchovies," and nothing except dictionary definitions to support the argument of the attorney for the United States that they are sardines. When thus put up, they are commercially known as "sardelles," and are not commercially known or dealt in either as anchovies or sardines. The decision of the board of general appraisers as to the sardelles is reversed.

The other fish are called "Kieler sprats." They are probably neither genuine sardines nor anchovies. This point, however, is not material. The evidence shows that, when pickled and packed in half barrels, they are commercially known as "Norwegian anchovies"; if put up in tins, and labeled "sardines," they are commercially known as "smoked sardines"; and, if labeled "sprats," they are commercially known as sprats. The evidence before the board sufficiently supports the finding that these fish are commercially known as "smoked sardines in oil." The whole evidence tends to show that little fish of this general character, when thus put up in oil in tin boxes, are commercially recognized as belonging to the general class, "sardines," although this particular species, when labeled "sprats," are known as "Kieler sprats." The facts bring the case within the

rule enunciated in *Re Herrman*, 52 Fed. 941. The decision of the board of general appraisers affirming the act of the collector with reference to sprats is affirmed.

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## ARBIB et al. v. UNITED STATES.

(Circuit Court, S. D. New York. March 8, 1898.)

## CUSTOMS DUTIES—IVORY.

Cross sections, 2-2½ inches long, sawed from the solid portion of ivory tusks, with the outer covering or bark left on, and generally known in trade as "billiard-ball blocks" and "logs," were free of duty, under paragraph 519 of the tariff act of 1894, as "ivory sawed or cut into logs, but not otherwise manufactured," and were not subject to a duty of 35 per cent., under paragraph 354 of the same act, as "manufactures of ivory not otherwise provided for."

This was an appeal by E. J. Arbib & Co. from a decision of the board of general appraisers affirming the action of the collector of the port of New York in respect to the classification for duty of certain goods imported by them.

William B. Coughtry, for importers.

Henry C. Platt, Asst. U. S. Atty.

TOWNSEND, District Judge (orally). The articles in question are cross sections, 2-2½ inches long, sawed from the solid portion of ivory tusks, with the outer covering or bark left on. From the conflicting testimony of witnesses, chiefly foreigners, it appears that they are generally known in trade and commerce of this country as "billiard-ball blocks," and as "logs," under which latter name they are generally known in Germany. The cost of sawing is about two cents per block. Such sawing does not increase the value of the ivory, and no selection is exercised therein, except to sever the solid portion from the hollow portion at one end, and the point at the other. They are generally used for making billiard balls, but are capable of use, and are actually used, for other purposes. They were classified for duty at 35 per cent., as "manufactures of ivory not otherwise specially provided for," under the provisions of paragraph 354 of the act of 1894. The importer protested, claiming that they were free, as "ivory sawed or cut into logs, but not otherwise manufactured," under paragraph 519 of said act. I think congress must be presumed to have inserted the word "log" into the act of 1894 because frequently the whole tusk was not imported, and in order to remove all ambiguity in the use of the word "tusks" in the prior act, and that congress thereby intended to permit free the introduction of pieces of ivory merely cut into cross sections, where the bark was left intact, and not otherwise manipulated. It appears that while the various portions of the tusk are respectively known by particular names of "point," "ball blocks," or "hollows," they all fall within the descriptive name "logs," when the bark is left on, to distinguish them from the entire tusk. These portions of the tusk, if somewhat longer, would unquestionably be universally known as "logs." The term "billiard-ball blocks" is not found

in the act of 1894. Congress having adopted the descriptive term "logs," it has acquired a statutory meaning in this country which takes precedence of other designations. Even if these logs were manufactures of ivory, as contended by counsel for the United States, they are otherwise specifically provided for as "ivory sawed into logs," etc. The decision of the board of general appraisers affirming the action of the collector is reversed.

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MALLORY v. MACKAYE.

(Circuit Court, S. D. New York. March 24, 1898.)

1. COPYRIGHT AND INVENTION—TRANSFER—RESCISSION OF CONTRACT.

Defendant engaged his services to plaintiff for a period of 10 years, as an author and inventor, and stipulated that the property in his productions, including his time and services, should belong exclusively to plaintiff, in consideration of an annual salary of \$5,000, and a proportion of profits in excess of certain amounts. *Held*, that a play written by defendant, and a patent procured by him and transferred to plaintiff, became the absolute property of the plaintiff, and that changing the rates of admission, and omitting the name of the author from the announcements and advertisements, did not justify him in departing from the contract, and himself using the play.

2. SAME—PROFITS.

Under a contract which provides that the product and income from the intellectual and physical labor and skill of an author and inventor shall belong absolutely to plaintiff, and that the author and inventor shall be paid a certain proportion of cash earnings or profits above a certain amount, a play and patent produced during the existence of the contract are not to be considered as profits, while earnings invested in a theater are to be so considered and accounted for.

Lewis Cass Ledyard, for complainant.

E. W. Tyler, for defendant.

WHEELER, District Judge. Steele Mackaye, the intestate, by written contract under seal, agreed to give and devote to the service of Mallory the whole of his time and energy, as Mallory might direct, in any of the capacities of an author, a manager, an actor, a director, or in any other capacity having any connection with theatrical labor, and that the entire product and income of his intellectual and physical labor and skill should belong absolutely to Mallory, and be his exclusive property; and, in consideration of these covenants, Mallory agreed to pay Mackaye, and Mackaye agreed to receive, "as full compensation, except as hereinafter otherwise provided for," an annual salary of \$5,000, in equal monthly installments. The contract further provided:

"Fourth. The said Marshall H. Mallory further agrees that if, at any time, the sum of the profits produced by or resulting from the enterprises in which the aforesaid services of the said Mackaye may have been employed by him, the said Mallory, shall be equal to twice the amount of money, with interest, expended by the said Mallory in and upon the said enterprises, or, if the amount so expended shall be less than thirty thousand dollars, at such time as the sum of the profits produced by or resulting from the said enterprises shall be equal to the amount so expended by the said Mallory, with interest, and the sum of thirty thousand dollars in addition, then, at that time, the said Mallory agrees to increase the before-mentioned annual salary to be paid by him to the said Mackaye

by a sum which will be equal to one-fourth part of the net profits produced in each year thereafter from the enterprises in which the services of the said Mackaye shall by him have been employed." That the duration of the contract should be 10 years from July 1, 1879, with the privilege of renewal to Mallory so long as he should desire, upon the same terms, and of at once terminating it at the end of any year; and: "Sixth. The said Marshall H. Mallory further agrees that if, after the total earnings produced by or resulting from the enterprises in which the services of the said Mackaye may have been employed by the said Mallory shall have amounted to a sum equal to the amount of money, with interest, expended by the said Mallory in and upon the said enterprises, if after such time this agreement shall be terminated as herein provided for, and at the time of said termination any cash earnings or profits of the said enterprise over and above the last above mentioned sum shall be in existence, then at such termination the said Mallory agrees that, as compensation to the said Steele Mackaye for the termination of this agreement, and the cessation of his salary under it, he will pay to the said Mackaye a sum which shall be equal to one-fourth part of the above-described existing cash surplus."

Under this contract Mackaye completed the play called "Hazel Kirke," which was copyrighted, and an invention of a double stage, which was patented. Mallory procured a lease of the premises, and completed the Madison Square Theater, with the patented double stage; and Hazel Kirke was played there, and by traveling companies, with great success, under the management of Mackaye, and general direction of Mallory, until January, 1881, when Mackaye claimed that Mallory had violated the contract, and began presentation of the play himself elsewhere. Mallory brought this original bill upon the contract to restrain such presentation, and a preliminary injunction was thereupon granted; and he terminated the contract July 1, 1881. Mackaye brought this cross bill for a decree of rescission of the contract, and for his share of the profits and property. What Mackaye became dissatisfied about, and for which he claimed to rescind, was a changing of rates of admission that he deemed injurious, and the omission of his name from announcements and advertisements that he thought intentionally and needlessly humiliating, and perhaps justly so, and other minor matters; but all were within the ownership and direction given to Mallory by the contract, and seem to have fallen short of being any adequate justification for departing from such an important engagement, and taking the play with him. Mallory therefore seems to have been at all times entitled on final hearing, when reached, to a decree making the preliminary injunction perpetual. Such a decree is necessary to the carrying out of the rights of the orator in the original cause now. As Mackaye had no sufficient grounds for rescission, his rights to the property must be ascertained from the provisions of the contract itself with respect to a termination of it. *Mackaye v. Mallory*, 12 Fed. 328. Aside from the theater, Mallory had, according to his own testimony, received \$58,793.99 more than he had expended; and he had expended upon that \$95,000. From other testimony his interest in the theater appears to have been well worth \$65,000. The event was such that he has declined to show what the actual value turned out to be. This value was a part of the profits of the enterprise in the hands of Mallory. The play and the patent are said in argument for the administratrix to be such profits, which may be true, but they are also products of the services of Mackaye, which



were expressly to become absolutely the property of Mallory, while such an investment as the theater itself was not so mentioned. To let that absorb the cash earnings, and allow Mallory to retain it because it was not cash, would not seem to be equitable or just. In this view, the profits, after making a correction of \$500 for a retainer in this litigation, would be \$29,293.99, of which Mackaye was entitled to one-fourth, \$7,323.49. The footings of accounts have been put in evidence, and may require a change in these figures on settlement of the decree. Interest would follow, especially as the defendant retained the profits after demand, making gain from them. The jurisdiction in equity for this relief in the cross cause is challenged, but the following of and accounting for the profits, in which there was a joint interest, seem sufficient to uphold it. Decree for plaintiff, making injunction perpetual, with costs, in original cause; and for plaintiff, for \$7,323.49, with interest and costs, in cross cause.

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MAITLAND v. B. GOETZ MFG. CO.

(Circuit Court of Appeals, Second Circuit. March 2, 1898.)

No. 90.

1. PATENTS—ELECTRIC LIGHT FIXTURES.

The Stieringer reissue, No. 11,478 (original No. 259,235), for an electrical fixture, the gist of which consists in making use of metallic gas fixtures by introducing insulated conducting wires concealed within the fixture and capable of carrying the electric current, in supporting the fixtures by the gas pipes, and in placing a joint having metallic couplings and insulating material between the fixture and the gas pipe, so as to secure insulation from the grounded gas pipe, covers a patentable invention.

2. SAME—PRIOR INVENTIONS.

Claim 1, Stieringer reissue, No. 11,478 (original No. 259,235), for electric light fixtures, was not anticipated by Edison patent No. 248,420, or other patents, nor by the "Ferryboat" fixture used in the Pennsylvania Railroad boat Jersey City.

3. SAME—REISSUE—LACHES.

Where a patent was obtained June 6, 1882, held void by the circuit court June 19, 1894, and by the circuit court of appeals October 22, 1894, a reissue, dated March 11, 1895, is held not void by reason of lapse of time after the original was issued.

This is an appeal from an interlocutory decree of the circuit court for the Southern district of New York, in favor of the validity of claim 1 of reissued letters patent No. 11,478, dated March 12, 1895, and issued to Luther Stieringer, as assignor to George Maitland, for improvements in electrical fixtures.

The original Stieringer patent, No. 259,235, was dated June 6, 1882. Claims 1, 7, 8, and 9 of this original patent were found by the circuit court for the Eastern district of Pennsylvania to be invalid (*Maitland v. Gibson*, 63 Fed. 126), and its decree was affirmed by the circuit court of appeals for the Third circuit, upon the opinion of the circuit judge (11 C. C. A. 446, 63 Fed. 840). Thereupon the original patent was surrendered, the reissue now in suit was asked for and was issued, and its claim 1, the successor of claim 1 of the original patent, was adjudged to be valid by the circuit court for the Southern district of New York. *Maitland v. Archer & Pancoast Co.*, 72 Fed. 660. Thereafter the present suit

was brought before the same court, and decided in the same way, no written opinion having been filed. The infringement of the claim by the defendant is not in dispute. The questions in controversy relate to the validity of the claim by reason of anticipation, or lack of invention, or the invalidity of the reissue.

Charles E. Mitchell and Harry M. Brigham, for appellant.  
Frederick P. Fish and Richard N. Dyer, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). Shortly before the year 1881, the means by which Edison's incandescent electric lamp could be introduced into houses and buildings which had theretofore been lighted by gas, and which were supplied with gas fixtures, began to be actively discussed by electricians and mechanics. The public was accustomed to gas fixtures. Much money had been expended in developing graceful and ornamental styles. The fixtures to be used exclusively for the new lamp were undeveloped, and those who proposed to try electricity as an illuminating agent desired to use the class of fixtures to which they were accustomed. The objection to such use was that, if the gas-pipe system was employed as a support for the two electrical wires, the gas-pipe outlet which connected with the ground would be a source of constant danger to the safety of the electrical appliances, and of the house itself. Underwriters against fire became alarmed, and finally demanded that where incandescent lights were attached to a gas fixture, or a metallic fixture having a ground connection, the wires should be separated  $2\frac{1}{2}$  inches from each other, or should be separated from the metal of the fixtures by some solid insulation. At this experimental stage of the new art, what may be called the "ceiling block system," which will be briefly described hereafter, and by which the chandelier was supported upon a wooden block upon the ceiling, seems to have been the best known method of utilizing gas fixtures. In March, 1881, the Edison Electric Light Company was fitting up its office at 65 Fifth avenue, and was causing to be constructed upon Mr. Edison's plans incandescent lamp appliances. The difficulties which were being encountered in one particular part of the building, which resulted in the annoying extinguishment of lights, were overcome by an insulating expedient which Stieringer, then one of the workmen, adopted. Thereafter the insulating joint as described in both the original and reissued patents was introduced by him into dwellings in New York and Chicago which were being wired for incandescent lamps. Subsequently the manufacturers who were making lamp fixtures for the Edison Company adopted the Stieringer system, and became licensees of his patent. Their example was followed by all other leading manufacturers. The underwriters accepted his method of insulation in lieu of their previous requirements, and the patent was acquiesced in until the Gibson litigation.

The gist of the invention consisted in making use of metallic gas fixtures by introducing insulated conducting wires concealed within the fixture, and capable of carrying the electric current to and

from the electric lamps; in supporting the fixtures by the gas outlets or gas pipes; and in placing a joint having metallic couplings and an intermediate section of insulating material between the upper end of each fixture and the end of the gas pipe, so as to secure complete insulation of the fixture from the grounded piping of the house. The utility of the invention is acknowledged by the universality of its use without special modification. The gas metallic terminals furnish a strong and convenient support, the insulation avoids the danger which would otherwise result from the use of grounded metallic piping, and the concealed wires are neither unsightly nor liable to abrasion.

The circuit court, in the *Archer & Pancoast Case* (72 Fed. 660), evidently did not suppose that reliance was placed by the defendant upon any of the antecedent patents as anticipations of the Stieringer device, but upon this appeal the question of novelty is presented, although their value, if any, is upon the defense of want of patentable invention. The Edison patent No. 248,420 described a swinging bracket, having two wires running through it, and a turning joint midway between the ends of the bracket. The theory of the defendant is that the two sections are electrically insulated at this joint. Upon the truth of this theory the experts differ, but it is certain that the patentee described as one mode of construction a single wire through the bracket, "the metal of the bracket and system of pipes being used for the other conductor"; and it is testified that, as actually constructed by Bergman & Co., Edison's fixture manufacturing company, the bracket had a metallic contact at the joint. Moreover, if there was any insulation, it was at a point where it would not beneficially accomplish the object of the Stieringer joint. The invention described in Edison's patent No. 248,424 was the original of the fixture which was made by Bergman & Co. under patent No. 263,103, and before they took a license from Stieringer. It had what was called a "base piece," or insulated block of wood, to which the wires led, and which had a central screw-threaded aperture to receive and support the stem of the chandelier. This large wall block supported the fixture, which was not hung from the gas pipe. Edison's patent No. 251,551 described a system of electric house lighting in which the main conductors enter the house, and at a point beyond the gas meter one of them is connected with the main gas pipe, "an insulating joint being formed in the pipe between this point and the meter, in order to prevent the current from passing through the meter to the ground. The other wire passes through the house to the various translating devices." Stieringer places the date of his invention prior to the date of the application for this patent. The Maxim patent, No. 247,086, was for "a chandelier for incandescent lamps, the two sides of which are insulated from each other, and each connected, respectively, with one terminal of a line wire and the contact strip of an incandescent lamp." The frame is hung from a ceiling block, and has no insulating joint between the stem of the chandelier and the gas pipe. Vansant's patent, No. 139,692, was for an electrical lighting attachment mounted upon the gas burner. Other patents

were introduced in evidence, and were remarked upon by experts, but we have mentioned all that were discussed in the defendant's brief, and neither of them, except Edison's patent No. 248,420, bears upon the question of anticipation. If the sections of Edison's bracket were electrically insulated at the midway joint, that patent was nearer than the other to the Stieringer device; but it must be remembered that the location of the insulating joint constitutes a very important part of the Stieringer invention. If the Edison fixture was supported by the gas pipe at the gas outlet, and no insulation was interposed until at the end of the stationary part of the bracket, it was practically a fixture noninsulated at the point where both the house and the fixture especially need protection.

The great reliance of the defendant is upon the "Ferryboat" fixture, so called, which was used in the boat Jersey City, of the Pennsylvania Railroad, in October, 1881. It had an insulating joint between the stem of the fixture and the support, which was made of a solid block of vulcanized fiber, at each end of which a brass thimble was fastened and riveted through the fiber. It was truly called by Judge Coxe "a one-wire system." One of the wires passed down from the ceiling outside the insulating joint and was soldered upon the pipe just below the joint. The metallic portion of the fixture thus became a part of the electric circuit, and a vehicle of danger. The device proved to be, in fact, a dangerous one, and was subject to the mishaps which were incident to its method of construction. It is by no means certain that this fixture anticipated the date of Stieringer's invention, but, if it did, its existence proves, rather than discredits, the originality and the patentability of the patented structure.

The lack of patentable invention is the next subject of adverse criticism of the reissue in suit. The history of the failures in the attempted art of electrical house lighting by the aid of gas fixtures, and the position of acknowledged success which was conceded to Stieringer's method, afford convincing evidence upon this branch of the case. Inventors of known repute and genius who had studied the subject, and who greatly desired to promote incandescent lighting, failed, and the patentee succeeded because he adopted the means which apparently had not occurred to them. The adverse decisions upon the original patent in *Maitland v. Gibson*, *supra*, are naturally dwelt upon by the defendant as of great importance. The complainant in that case was handicapped by the broad and vague terms of claim 1 of the patent, which was as follows: "A fixture for electric lights, supported from the piping of a house, and electrically insulated therefrom, substantially as set forth," and which made his invention to consist merely in the insulation of a fixture from the supporting gas pipe, with a very broad range of equivalents. The court considered that the claims described an unpatentable invention, and it is manifest from the opinion of Judge Dallas that he was not favorably impressed with the character of the invention however described, but his attention was not directed to its peculiarities as stated in claim 1 of the reissue, and

the decision is not, therefore, authoritative upon that claim, which is as follows:

"(1) A fixture for electric lights, constructed wholly or largely of metal, and provided with insulated conducting wires for conveying current to and from the lamps carried thereby, in combination with a joint or section having metallic coupling portions, and an intermediate section of insulating material electrically insulating the metallic coupling portions from each other, such joint being located at the upper or inner end of the fixture, and serving to electrically insulate the fixture from the grounded piping of a house by which it is supported, substantially as set forth."

The defendant's argument against the validity of the reissue is ingenious, but the facts are plain, and not unusual. The device of the specification was recognized as an invention by the manufacturers of lighting fixtures. They became licensees, and the patent was acquiesced in and respected for a number of years. The Gibson litigation showed that the principal claim was fatally loose in the opinion of both the circuit and appellate courts. It was reissued so as to make the claim correspond with and be limited to the description in the specification. The claim was narrowed, but narrowed to conform to the specification, and to state the same invention which it had described. The reissue is not one of the class of reissues of which *Machine Co. v. Searle*, 20 U. S. App. 301, 8 C. C. A. 476, and 60 Fed. 82, is an example, which pretend to narrow a claim, but which in fact describe an invention of an independent character, and one which the patentee either did not make, or omitted to describe, but which he now finds "lurking" somewhere in his structure. In the reissue in suit the specification was not varied. The part of a sentence which is added in the statement of the object of the invention states nothing which was not previously obvious. The narrowed and truthful reissue is, therefore, unobjectionable, except that it was belated; and upon the point of laches in obtaining a reissue the federal courts are now sensitive. Delay in this regard is obnoxious, because, as a rule, individuals and the public have acquired, during such delay, "adverse equities which would be destroyed by a reconstruction of a void claim." In this case, the adverse interests, whatever they are, arose after the termination of the Gibson litigation, and as soon as they came into being they were warned by the reissue of the existence of a patent which covered the attempted infringements. This reissue cannot be declared void by reason of the lapse of time after the original was issued, without establishing a new rule of law upon the subject of reissued patents. The decree of the circuit court is affirmed, with costs.

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#### HINSON MFG. CO. v. WILLIAMS.

(Circuit Court, N. D. Illinois, N. D. March 11, 1898.)

#### PATENTS FOR INVENTIONS—PATENTABILITY—CAR COUPLER.

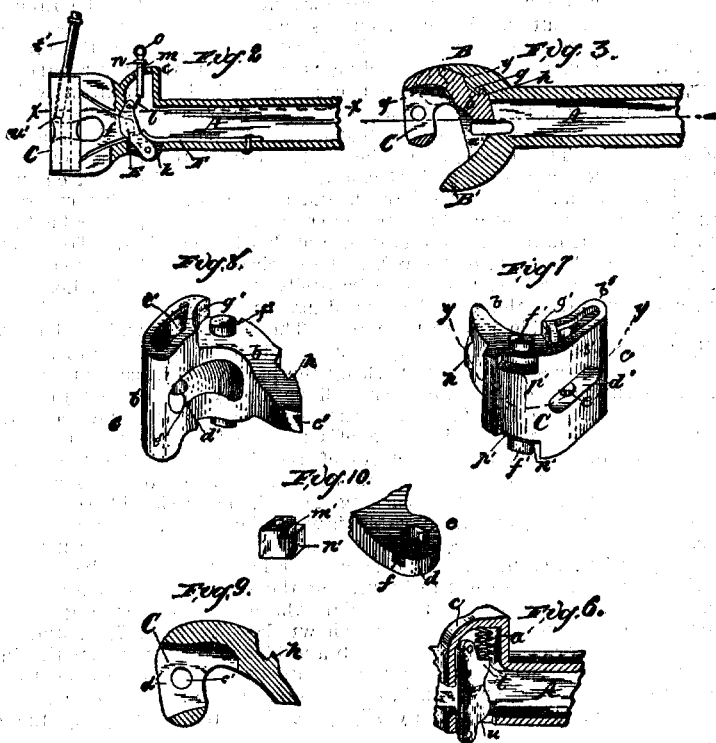
The Hinson patent, No. 389,510, for improvement in car couplers, consisting in the use of a spring to reinforce the action of gravity upon the latch, is not void for want of patentable invention.

The bill is to restrain the infringement of letters patent No. 389,510, issued to James A. Hinson for "improvements in car couplers." The

complainant is the owner of letters patent by assignment from Hinson. The invention is described by the patentee as follows:

"My invention relates to car couplers of that type known as 'twin jaws,' in which jaws pivoted in the drawbars interlock to couple the cars, and it has for its object to provide a very simple and durable coupler, of but few parts, which will automatically couple, and which may be uncoupled from the side of the car, at the end, almost instantly and with great ease, and it consists of the parts and combinations of parts hereinafter described and claimed. In the accompanying drawing, forming a part of this specification, Fig. 1 is a perspective view of my improved coupler in position on the end of the car; Fig. 2, a vertical longitudinal section through the drawbar; Fig. 3, a horizontal section on the line, x, x, Fig. 2; Fig. 4, a sideview of the drawbar; Fig. 5, a like view, partly broken away, to show the means for securing the movable jaw to the drawbar; Fig. 6, a detail view, showing a modified arrangement of the latch; Fig. 7, an end front perspective view of the movable jaw; Fig. 8, a perspective view of the movable jaw, looking toward its inner side; Fig. 9, a horizontal section of the line, y, y, Fig. 7; and Fig. 10, a detail view of the end of one of the arms and a block. Similar letters refer to similar parts throughout the several views. A represents the drawbar, which is made hollow, and so connected to the car as to have a limited longitudinal movement, its rear end being cushioned against a spring to deaden the effects of concussion as is customary. At the front end of the drawbar two flaring arms, B, B', the latter being merely a guard arm, are cast, between which is a recess, a, to receive the branch, b, of the movable jaw, C, as will be explained hereinafter. A hollow offset, c, is also cast, integral with the drawbar, which forms a shoulder to abut against the front beam, D, of the car, as shown in Fig. 1, when the drawbar is driven back. The arm, B, of the drawbar, is cast with the flanges, d, having circular recesses, e, forming in their contiguous faces, and slots, f, entering said recesses from the outer edges of said flanges, for a purpose which will be described hereinafter. On the inner face of the arm, B, at a suitable distance from its end, a wedge-shaped recess or depression, g, is formed to receive the hook-shaped projection, h, on the branch, b, of the movable jaw, C, when the coupling is made. In the lower part of the drawbar, immediately beneath the offset, c, a recess, k, is formed, in which the lower end of the latch, E, is pivoted, as shown in Fig. 2, and a spring, F, having one end bearing against said latch, is adjustably secured in the drawbar in the rear of said latch. The upper end of the latch extends into the hollow offset, c, and is connected to one end of a short chain, l, the other end of said chain being attached to a pin, m, having a collar, n, and an eye, o, cast thereon, said pin passing through an opening in the upper part of the offset, c, to make the connection. The collar, n, prevents the entrance of dirt in the offset. To the eye, o, of the pin, the crank arm, p, of the rod, r, is attached, said rod being suitably attached to the end of said car, so as to be easily turned by its handle, s, to lift the pin, and thus draw the latch backward against the spring, and release the branch, b, of the movable jaw to uncouple. The spring, F, will hold the latch normally in the position shown in Fig. 2, and will throw it back into such position after the latch has been forced back by the branch, b, in coupling, or by the rod, r, in uncoupling, so that the latch will be always in position to lock the branch, b, in place. In Fig. 6, I show the latch, E, provided with a shoulder, t, and pivoted at its upper end in the offset, c, and its lower end projecting through a slot, u, formed in the bottom of the drawbar, and connected to a drawbar, and connected to a rod, v, being suitably journaled to a hanger, w', extending from the car, so that, upon turning the rod, the latch will be drawn back to release the branch, b, of the movable jaw, while a spiral spring, a', in the offset, c, and resting upon the shoulder, t, will throw the latch forward, or into its normal position, again, when the same is released. It will be understood that both the rods, r, u, are not to be used at the same time, although they are both shown in Fig. 1, to more clearly explain the means of operating the latch, E, when pivoted above and below. As shown best in Figs. 7, 8, and 9, the movable jaw, c, is formed with branches, b and b', the former, when the jaw is in position on the drawbar, extending back into the recess, a, in said drawbar, and having the projection, or hook, h, on its outer face, and its end, c', tapering off, so that it will the more readily slip past the latch in coupling the cars.

The branch, *b'*, is rounded, or curves on its outer face, as shown in *s'*, in Fig. 7, to form a buffer, and has a slot or pocket, *d'*, formed through the same, to receive a link when one of the cars it is desired to couple together is not provided with my improved coupler, but only with the ordinary link, and an opening or perforation, *e'*, is formed vertically through *b'*, at right angles to the pocket, *d'*, to receive a pin, *t'*, to secure the link in position, and complete the coupling. This pin rests on a shoulder, *u'* [shown in dotted lines in Fig. 2], which is cast in the front side of opening, *e'*, so that, when the drawheads come together in coupling, the shock or concussion will jar the pin off of the shoulder, and cause the same to drop into the opening, *e'*, and through the link. On the body of the jaw, *C*, at the junction of the branches, *b*, *b'*, oblong journals, *f'*, are cast. As will be noticed, the branch, *b'*, is wider than or longer than the branch, *b*, and the reduction of the latter leaves shoulders, *g'*, at the ends of the branch, *b'*, which are curved or hollowed out, so as to fit the rounded ends of the flanges, *d*, of arm, *B*, snugly, and the journals, *f'*, are at right angles to said curved shoulders. The journals are adapted to fit the recesses, *e*, formed in the flanges, *d*, they being inserted endwise therein through the slots, *i*, and thus prevent their accidental displacement. To guard more securely against any displacement, I form the curved grooves, *p'*, in the jaw immediately opposite the journals, *f'*, and fit a perforated block, *n'*, having a shoulder, *m'*, into the slot, *i*, and there secure it by a screw or bolt, entering its perforation through a perforation formed in the jaw, while its shoulder, *m'*, enters the groove, *p'*, and serves to limit the swinging movement of the jaw. Thus, it will be seen that the strain in drawing the cars is borne by the latch and hook, *h*, and that I provide a very strong coupler, there being but three pieces practically performing the same, and that the means employed to effect the journaling of the jaw to the drawhead forms a very secure and strong attachment, which is not liable to break or get out of repair."



The claim relied upon is the second, and is as follows:

"The combination, in the car coupler, of the hollow drawbar, having the offset, c, and arms, B, B', cast therewith, the latch, E, pivoted in said drawbar, the spring bearing against said latch, a rod connected to said chain, and the movable jaw pivoted to said arm, B, and having the branches, b, b', one of said branches being adapted to swing against the latch, substantially as described."

Robert H. Parkinson, for complainant.

Stanley S. Stout, for defendant.

GROSSCUP, District Judge (after stating the facts as above). The defendant's car coupler is almost an exact copy of the coupler described in this patent. It was not seriously questioned at the argument that, if the patent be valid, the defendant's coupler is an infringement. The complainant's device is not claimed to be a foundation invention. Car couplers, embodying its general conception, were in use many years previously. The inventive faculty has been especially fertile in this field,—so much so, that minute classification has taken place. The complainant's device falls within what is known as the "Twin Jaw," or "Janney," class. But though many inventions in this field have been offered to the public, few have been chosen. The vast majority have been found to be impracticable. The want, indeed, was a difficult one to fill. It required a coupler which could be depended upon to automatically lock with precision and certainty when the cars came together; which could be easily and instantly unlocked from the side of the car; which would remain locked under all the various movements and strains to which it was exposed; which would relieve the shock of contact without sacrificing the stability of the lock or impairing it; and which would be simple in its construction and inevitable in its operation, and hold until intentionally released.

The advance claimed for this patent over its predecessors resides in the effect produced by the offset, c, and the spring, a'. It is claimed that these two features result in flexibility of connection, and in a responsiveness that is almost instantaneous. It is true that the recess is found, in some degree, in some of the preceding patents. It is true, also, that, in some of the previous patents, a spring has been used to reinforce gravity. But no patent called to my attention discloses such recess, spring, and latch, in the same relation to each other, as the patent under consideration embodies. Success or failure in mechanical devices, requiring such nice adjustment, and subjected to so many contrary influences, may depend upon some apparently trifling alteration in the structure; but, if the required alteration has gone unheeded, through years of constant demand for its disclosure, I can see no reason why the person fortunate enough to finally hit upon it should not be given the benefits of an inventor. Retrospectively, the alteration may seem simple, such as any mechanic would have suggested; but the fact remains that, prospectively, it remained, even in the face of a strong demand, securely concealed. The court that, after the fact, pronounces such an alteration, under such circumstances, too simple to be invention, mistakenly sets its own powers of apprehension above the apprehension of the whole of that portion of the inventive world that



has been, for so long a time, giving its attention to the want in hand.

It is admitted that, in the character of coupler under consideration, until a spring appeared reinforcing the action of gravity upon the latch, the coupler fell considerably short of success. The previous letters issued to Hinson, called to my attention at argument, failed precisely at this point. Gravity, unaided, is in a degree inert and sluggish. The insertion of the spring gave greater alertness and responsiveness to the latch. In this difference, though slight, may be found the source of the present coupler's qualities for success. This view is reinforced by the fact that, though many of the preceding patents are open to the defendant for use, he chose to use a coupler embodying these so-called trivial advances found in the complainant's patents. He thus unconsciously testifies to the superiority of the complainant's coupler,—a superiority that must be due to those qualities in which it differs from its predecessors.

On the whole case I am of the opinion that the complainant's combination is a true mechanical organization, and that it includes features that are a patentable advance upon the preceding art. The usual decree for an injunction and accounting may be entered.

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WESTINGHOUSE AIR-BRAKE CO. v. GREAT NORTHERN RY. CO. et al.

(Circuit Court, S. D. New York. March 29, 1898.)

1. PATENTS—PRELIMINARY INJUNCTION AGAINST USER.

When a patent has been repeatedly sustained by adjudications of the circuit court affirmed in the circuit court of appeals, a preliminary injunction will issue, even against a mere user, when he has been notified that he is buying an infringing article, and when there are no new defenses, and no special equities in his favor.

2. SAME—PUBLIC INCONVENIENCE.

Public inconvenience is no ground for entirely denying an injunction, but the court will so frame the decree as to accomplish the result intended with the least practicable disturbance to the business of defendant, so far as the public is concerned therein.

This was a suit in equity by the Westinghouse Air-Brake Company against the Great Northern Railway Company and others for an infringement of a patent for air brakes. The cause was heard on a motion for preliminary injunction.

Simon Sterne, for the motion.

Frederick H. Betts, opposed.

LACOMBE, Circuit Judge. This is a motion for injunction based on the Westinghouse patent, No. 376,837, against certain air brakes now in use by defendant railway, and which were bought from the New York Air-Brake Company. The owners of the patent have finally established their rights, after a long and arduous litigation against the manufacturers of the infringing brakes (59 Fed. 581, 11 C. C. A. 528; 63 Fed. 962; 65 Fed. 99; 16 C. C. A. 371, 69 Fed. 715; 77 Fed. 616), and are now seeking to enjoin the users of such

brakes from continued infringement of their rights. The affidavits show that defendant railway company bought with notice that the brakes infringed complainant's patent. The affidavits of the plaintiff distinctly assert that notice was given as far back as 1891, 1892, and 1893, and there is no substantial denial,—the most that is said by the single affiant produced by defendant, its superintendent of motive power, being that "he does not now remember any particular interview"; that whatever statements were made to him he regarded merely "as statements intended to prevent the purchase of competing articles" (which they undoubtedly were); and that "charges of infringement \* \* \* are not regarded with any more particular seriousness than any other charges that may be made by rivals in business against each other."

It is well settled in this circuit that a preliminary injunction may, in a proper case, issue against the user, and that when a patent has been repeatedly sustained by adjudications in the circuit, affirmed in the court of appeals, such injunction will issue (especially when the user was notified that he was buying an infringing article), when there are no new defenses, and no special equities in favor of defendant. *Manufacturing Co. v. Booth*, 24 C. C. A. 378, 78 Fed. 878. A patentee who has established the validity of his patent against the manufacturer will not be compelled to litigate the same questions over again against scores or hundreds of users, or denied the only relief which can secure him the fruits of his invention during its lifetime, merely because the injunction prayed for is in form one pendente lite, although quoad the infringing device which was made by the manufacturer, defendant in the former suit, it is in fact an injunction after final hearing. The only new evidence which it is contended bears upon the validity of the patent is the British patent 4,676 of 1887; but it discloses nothing calculated to modify the former decisions of this court and of the circuit court of appeals, although it indicates that the patentee and the court were apparently not in entire accord as to what constitutes invention.

The question of jurisdiction is settled for this case in this court by the decision of Judge Coxe upon the plea.

The objection of personal and public inconvenience is one which has been repeatedly considered and disposed of in this court (*National Meter Co. v. City of Poughkeepsie*, 75 Fed. 403), which always endeavors to arrange the terms of its orders or decrees so as to accomplish the result intended with the least disturbance to the business of a defendant, when that business is one which concerns the public. In a like proceeding against the Buffalo, Rochester & Pittsburgh Railway Company, another user of the New York Company's infringing brakes, an order was prepared by Judge Coxe providing for a gradual change. Inasmuch as defendants were able to withdraw their cars temporarily from the public service in order to put the infringing devices on them, it would seem quite practicable for them to be again temporarily withdrawn in order to take these devices off. The total number of defendant's cars

(16,000), and also the number equipped with infringing devices (3,200), greatly exceed those in the other case, and require a modification of the terms of the former order. Complainant may take an order in the same general form as that issued in the Buffalo, Rochester & Pittsburgh Case, but requiring removal of 500 within 60 days from date of entry of order, and 500 each 30 days thereafter (changes in excess of the allowance for each period to be credited to the next one), until 2,500 shall have been thus removed, and thereafter 250 each 30 days until all are removed. Order to be settled on notice.

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**BLAISDELL PAPER PENCIL CO. v. EAGLE PENCIL CO.**

(Circuit Court, S. D. New York. February 4, 1898.)

**PATENTS—INTERPRETATION—VALIDITY—PENCILS.**

The Blaisdell patent, No. 461,911, for a pencil in which the marking lead or crayon is rolled in a covering of flexible material, preferably parchmentized paper, weakened by creasing, scoring, or perforating in diagonal lines, so as to divide it into narrow strips, which may be separately removed to sharpen the pencil, covers a meritorious invention, but is limited to this particular form, and is not infringed by a pencil made under the Boman patent, No. 554,212, with a covering formed by a continuous strip of wood.

This was a suit in equity by the Blaisdell Paper Pencil Company against the Eagle Pencil Company for infringement of a patent.

Clarence Ladd Davis and Charles E. Mitchell, for complainant.  
Kerr, Curtis & Page and Marcellus Bailey, for defendant.

**TOWNSEND, District Judge.** This is a bill alleging infringement of patent No. 461,911, granted October 27, 1891, to F. E. Blaisdell for a pencil. The defendant denies infringement. In the specifications of the patent, the case, covering, or holder of the pencil is described as made of some flexible material, preferably parchmentized paper. Weakened lines are made diagonally across a sheet of such paper by creasing, scoring, perforating, or otherwise; thus dividing the sheet into narrow strips, which may be readily separated. This sheet is then rolled around the marking lead or crayon. Thus, to use the words of the complainant's expert, "the case or cover of the marking lead is made of a scroll of flexible material adapted for removal in pieces taking the form of a section of a conical helix or helical cone." The pencil is sharpened, or rather a portion of the lead is exposed, by removing one of the strips. The portion thus left uncovered by any one removal will always be equal to the width of one of the strips. The inventor does not confine himself to paper, but suggests that other substances, such as thin wood, veneer, cloth, etc., may be used, and adds:

"Although I have shown the covering or casing, 2, of my improved pencil, in the form of a sheet bearing weakened lines, it is evident that such sheet may be entirely severed along such lines before being rolled upon the lead or crayon, and that the strips thus formed may then be rolled upon the crayon in the manner described with precisely the same effect as when in the form of a sheet.

Also, instead of rolling the sheet directly upon the marking lead or crayon, the same may be rolled upon a mandrel, and the lead afterward inserted."

Complainant maintains that all of the eight claims of the patent are infringed, and especially relies on claims 1, 2, and 4, which are as follows:

"(1) A pencil having its marking lead or crayon inclosed in a roll of flexible material, substantially as shown and described.

"(2) A pencil having its marking lead or crayon inclosed in a roll composed of a sheet of flexible material weakened at intervals, substantially as shown and described."

"(4) A pencil having its marking lead or crayon inclosed in a covering from which sections in the form of a conical helix may be removed one by one, so as to uncover the marking lead or crayon section by section, substantially as shown and described."

Defendant's pencil is made under a patent to Claes W. Boman,—No. 554,212. The covering thereof is made of wood cut or shaved in a continuous strip by special machinery (the patent for which is No. 562,273) from a round stick, in such manner that the inside of the strip is shorter than the outside, and so that, when rolled around the marking lead, the inside edge of the strip or shaving will always touch the lead, while the outside edge will always be at the same distance from the lead. When the pencil is to be sharpened, pieces of the strip of wood of any length desired are broken or picked off, thus uncovering as much or little of the marking lead as may be found necessary at the time.

The prior art put in evidence in this case consists of the following patents: Somers patent, No. 557,881 (1874), and Sholes patent, No. 191,816 (1877), both of which make the case or covering of cones of paper fitted or nested together so as to form a solid holder; Hyatt's patent, No. 238,908 (1881), in which a cord is "wound to form successive cone-shaped layers, with short cylindrical extensions at their smaller ends, the cord being carried back from the end of each cylindrical layer nearly to the commencement of the larger end of the previously formed conical layer, and being then wound spirally forward to form the next outer conical layer, and its cylindrical extension extending in advance of the end of the previously formed cylindrical layer"; British patent No. 11,524 of 1887, to Robert Ellis Green, in which a sheet of paper is rolled around the marking lead to form a covering, but which is not self-sharpening.

Said Hyatt patent, the application for which was filed May 2, 1877, contains this statement:

"I do not claim broadly a holder or handle for lead pencils, etc., formed by spirally winding strips of paper, cloth, tissue, or cord around a removable core, as such is not new."

Blaisdell's original application contained the following claims:

"(3) A pencil having its marking lead or crayon inclosed in a covering, cone-shaped sections of which may be removed one by one, substantially as and for the purposes set forth."

"(5) A pencil having its marking lead or crayon inclosed in a covering, sections of which may be removed one by one from the end thereof, so as to uncover the lead section by section, and leave the covering of a conical form at such end, substantially as shown and described."

The examiner rejected all the claims, citing the Sholes and Somers patents above mentioned. Thereupon the claims 3 and 5 last referred to were erased, and applicant's attorneys applied for a reconsideration, saying:

"We are unable to see how the patents cited have any bearing whatever upon the claims of applicant as now presented, inasmuch as the covering of the crayon in each of said references is in the form of a series of cones built up or placed one upon the other, while in the device of applicant it is in the form of a sheet rolled around the lead or crayon. While both result in forming a self-sharpening pencil, the construction is radically different."

The patent was then allowed.

Complainant claims that the Blaisdell patent is a pioneer patent, and that its claims are entitled to the widest consideration. On the evidence, Blaisdell was the first to make a commercially successful self-sharpening pencil, and I have no doubt that the patent shows invention, and is valid, and is entitled to the favorable consideration earned by the inventor in making the public acquainted with the merits of a self-sharpening pencil. I am unable, however, to find that defendant has infringed either the essence of Blaisdell's invention or the letter of his claims. The commercial success of the Blaisdell patent may have caused the defendant to request Boman to see whether he could make a self-sharpening pencil. Assuming that Boman examined the prior art of the patent office for that purpose, as he naturally would, it is certainly as probable that he obtained the hint for his construction from the Sholes or the Hyatt patents as from the Blaisdell patent, especially in view of the statement in the Hyatt patent that it was old to make such a holder of a strip of paper spirally wound around a removable core. The Boman patent certainly contains invention of a high order. The complainant endeavored to obtain a patent for a covering, of which cone-shaped sections might be removed one by one, and for a covering, sections of which, not limited as to shape, might be removed one by one so as to uncover the lead section by section, and leave the covering of a conical form at the end. The patent office refused it, and complainant acquiesced. If claim 1 could be taken literally without the words "substantially as described," it would be anticipated by the British patent. It must be confined to the actual invention as shown in the specification and the other claims, and limited by the striking out of the broad claims referred to. The suggestion that the grain of the wood which constitutes the strip of the Boman patent is the equivalent of the "weakened at intervals" referred to in the second claim, I cannot accept; neither the argument that the strip of the Boman patent is the equivalent of the sheet, referred to in all the claims of the Blaisdell patent except the first and fourth; neither can I adopt complainant's argument that, when more than one convolution of the Boman pencil is removed, it constitutes a helix or coil, and, being conical, it must, of necessity, be a conical helix or helical cone. By the terms "conical helix" in the Blaisdell patent is intended a strip forming a coil of which the diameter of the upper end taken from the outside of the pencil cover is wider than that of the lower end which fits to the marking lead. All parts of a cross-

section of the strip of the Boman patent are always at the same distance from the lead. Blaisdell has proved that self-sharpening pencils may be profitably manufactured, and thereupon Boman has invented another way of making them. Defendant thus profits by the Blaisdell invention, but I think he has not infringed it. Let the bill be dismissed.

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CLINTON WIRE-CLOTH CO. v. HENDRICK MFG. CO., Limited.<sup>1</sup>

(Circuit Court of Appeals, Third Circuit. February 25, 1898.)

No. 1.

PATENTS—INVENTION—COAL SCREENS.

The Phillips patent, No. 500,508, for improvements in revoluble coal screens, consisting in providing the woven-wire segments with protector plates to connect them together and cover the joints,—the plates also having inwardly extended projections to form lumbars,—discloses patentable invention, and is infringed by a similar construction, though the latter omits the provision for fastening the protector to one of the two woven-wire segments. 78 Fed. 632, reversed.

Appeal from the Circuit Court of the United States for the Western District of Pennsylvania.

This was a suit in equity by the Clinton Wire-Cloth Company against the Hendrick Manufacturing Company, Limited, for alleged infringement of a patent for a revoluble coal screen. The circuit court dismissed the bill on the ground that the patent was void for want of invention (78 Fed. 632), and the complainant has appealed.

James H. Lange, for appellant.

Samuel O. Edmonds, for appellee.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

DALLAS, Circuit Judge. This is an appeal from a decree of the circuit court for the Western district of Pennsylvania dismissing a bill filed by the Clinton Wire-Cloth Company, a corporation of the state of Massachusetts, against the Hendrick Manufacturing Company, Limited, of Pennsylvania, charging infringement of letters patent No. 500,508, for a revoluble coal screen, issued June 27, 1893, to the complainant, as assignee of David E. Phillips. The opinion filed by the learned judge of the court below furnishes us with a clear statement of the several methods which prior to the invention of Phillips had been employed for screening coal, and of the device which he designed to overcome objections to which they were subject, as follows:

"The case concerns the use of apparatus for screening anthracite coal. Such screens generally consist of a series of screen segments bolted to a revoluble circular framework built upon an inclined axle. The meshes or perforations of the segments increase in size from the upper, or inlet, to the lower, or outlet, end. By this means the smaller sizes of coal pass through the meshes at the upper end. The larger sizes pass on, and gradually leave the screen as their appropriate sized mesh is reached, until the larger sizes find exit at the lower

<sup>1</sup> Rehearing denied April 29, 1898.

end. Originally the screen segments used were of cast iron, but they were found objectionable for several reasons. Their great weight necessitated more powerful machinery. Where they did not correspond exactly to the contour of the framework, which was often the case, from difficulties of casting, they could not be sprung and clamped rigidly to the framework without risk of breaking. Consequently allowance for play was necessitated. When this was provided for, or the severe action of the mine water affected the bolts and segments to the extent of allowing such play, it is obvious that the slipping of these heavy segments in two different directions as the screen revolved had a tendency to increase the extent, and also the severity, of the play. The consequence was, the segments separated from each other, and allowed the coal to pass through the longitudinal openings thus made, instead of through the mesh interstices. Twenty or thirty years ago this imperfect screening was not material, for the smaller sizes of coal were not of commercial value, and passed to the culm pile. Of later years they have proved valuable, and the effort has been to effect their separation. For the reasons stated, cast-iron segments were not adapted to do this successfully. To meet these difficulties, wire-woven screen segments were introduced. These consisted of wire woven to the proper-sized mesh, and mounted on rigid segment frameroads, sprung or bent to conform to the curvature of the framework, to which they were in turn securely fastened. Obviously, such segments possessed two desirable features, namely, the lack of clacking in the cast-iron pipe, viz. lightness, and a resiliency which prevented the rigid clamping of the framework. They had two weak points, however. One was the rapid disintegrating effect on the individual wires of the sulphur water which in some regions had to be used to wash the coal, and the other was that by the continuous pounding action of the coal the wires were liable to be displaced. When such displacement once started, subsequent use of the screen served to still further separate the wires, the desired uniformity of mesh was lost, and imperfectly screened coal resulted. The objections to these two types of screen were overcome by the introduction of perforated steel segments. They united the excellencies of both the preceding forms. Their comparative lightness and resiliency gave them the desirable features of the wire-woven segments, while they preserved uniformity of mesh openings as well as cast iron. They had, however, two weak points which did not exist in the other two types. It is obvious that as a screen revolved the heavier pieces of coal would gather to and lie on the bottom, and thus be carried up and slide back, in the revolution of the screen, in the same position. The result was the mesh surface was thus covered, and the finer portions above, instead of passing through their proper mesh, were carried forward on the screen, and eventually passed out with sizes of coal much larger than themselves. This objection had been overcome in the cast-iron segments by a protuberance cast on the inner surface, which served the purpose of 'tumbling' or stirring up the mass as it was carried around, and prevented its merely sliding along in the way described. These protuberances were cast between the meshes, and did not lessen the screen surface. In wire segments this tumbling was done by the waving, undulating surface of the web itself, caused by the overlapping of the wires. This objection to the steel segment was overcome by the introduction of tumblers, but the pounding or action of the coal upon them, owing to their comparatively light weight, caused them to sag or dip at the joints, and cause openings through which the coal passed unscreened. Such objection was more particularly present in the earlier days of their introduction. The art was then such that small-sized holes could not be punched in heavy plates,—a difficulty overcome later. This objection was not found in the cast-iron or wire screens. While the former separated and caused longitudinal openings, as we have seen, they were too heavy to sag, and the segment frame of the wire-woven ones were so heavy and rigid they did not sag. It was to overcome these objections to the use of perforated steel segments that Phillips designed the device embodied in the patent in suit. He strengthened the segment joint and prevented sagging by bolting or riveting protector plates to the perforated abutting edges of the segments. These extended along the longitudinal edges of the segments, and covered the joints. To provide tumblers which should not cover the perforations of the segments, and thus reduce screen surface, he riveted a metallic strip upon the protector plates, or made it integral with the plates.

Upon this device two claims were granted, as follows: '(1) In a revoluble screen, a series of screen segments combined with a flat protector plate, secured to and to connect the contiguous longitudinal edges of adjacent segments, and covering the joints between them, and an inwardly extended projection on said plate to form a tumbler, substantially as described. (2) In a revoluble screen, a series of screen segments having imperforate edge portions of and to cover the abutting longitudinal edges of adjacent segments, and inturned projections extended along and secured to each plate to form a series of tumblers for the screen, substantially as described.'

The bill charges infringement of both claims. The court below did not pass upon the question of infringement, but, being of opinion that the patent was invalid, dismissed the bill upon that ground alone. The purpose which Phillips set himself to accomplish was undoubtedly a very desirable one, and the means he devised certainly did accomplish it. His construction proved to be satisfactory and passed into extensive use. It remedied the very serious defects which had existed in all prior contrivances, and thus supplied a want which, though it had been acutely felt, had never before been adequately provided for. The merit due to an artisan who thus promotes a useful art, the court below accorded to Phillips; but yet the learned judge, being of opinion that what he did "was purely mechanical," held that he was not entitled to be ranked as an inventor. This conclusion was founded upon the prior state of the art, as disclosed by the statements of the patentee himself, and by the testimony of complainant's witnesses, only; but we, upon examination of the entire record, find nothing to show that anything more had been previously done than is indicated in the opinion of the circuit court:

"The idea of tumbling coal, or of means for doing it, was not original with Phillips; nor was he the first to show strengthening or closing of the segmental joints of coal screens, or means for doing the same. He found these things in the art before, but in what might be called an awkward and unhandy way. This was the necessary result of the methods employed. The segments were furnished by the manufacturer to the colliery, and the tumbler and joint closing or protecting devices were supplied and attached by the colliery mechanics in such a way as the means at hand allowed. The result was more or less imperfect appliances, insufficient methods of attachment, tumblers made of wood because it was handy, or, if of angle iron, it was of such size as was found in the scrap heap; and when a segment was changed the work of putting in tumbler or connecting joints had to be done again."

Without pausing to explain, by describing the method and appliances here referred to, how very unsatisfactory and imperfect they were, we proceed to consider what it was that Phillips in fact did to improve upon them, and find that by the adoption of the means he substituted the former method was radically changed, and the old appliances entirely superseded. He created a device—a composite structure—by which all need of the former awkward and unhandy makeshift appliances was completely obviated. As was said by the court below:

"To the economic or business mind it is obvious that if these parts could be assembled in a manufactory, and the segment with a tumbler and a connecting joint plate brought to the colliery in a completed and combined shape, and if they were so constructed with reference to the frame rim and the next adjoining segments as to permit speedy attachment when new, and as rapid displacement when worn, it would be a much more desirable practice than the old method.



The advantages of Mr. Phillips' device in this regard are well summed up by Mr. Livermore, complainant's expert, who says: 'By the construction and arrangement of the protector plate and tumbler bar with relation to the screen segment, said plate and bar are wholly independent of the spiders or main frame of the machine, by which the screen segments are carried; and, as there is one plate and bar for each screen segment, it can be securely and substantially, permanently fastened to one edge of a screen segment, the other edge of which is adapted to be fastened to the edge of the protector plate belonging to the next segment; and consequently when a worn segment has to be removed, and replaced by a new one, it is necessary only to unbolt the worn segment from the spiders, and disconnect its protector plate from the adjoining segment at one side, and disconnect it from the protector plate of the adjoining segment of the other side, and substitute the new segment by making the corresponding connections with the spiders and adjoining segments, when the screen will again be ready for use, with the joints between the segments properly connected, strengthened, and covered, and the tumbler bar in place, ready to perform its function of agitating the coal. This construction and arrangement of the protector plate and tumbler bar, wherein they are secured to the edges of the screen segments, and become a part of the screen wall, as distinguished from the frame of the machine by which the screen surface is supported and operated, is, as I understand, the essential feature of novelty of the structure shown and described in the Phillips patent.'

It may be that upon this showing Mr. Phillips does not appear to have been a pioneer; but, in our opinion, his claim to invention cannot be justly denied, nor the patent which was issued in affirmance of that claim be properly annulled. He substituted for the different crude and imperfect expedients which had formerly been applied by the colliery workmen a convenient and perfect arrangement, "in a completed and combined shape"; and in doing this it seems to us to be clear that he exercised, not merely the mechanic's skill, but that higher faculty of creation which is the peculiar attribute of the inventor. We cannot agree that he simply rearranged and assembled old parts. He devised an implement which both covers and strengthens the joint and tumbles the coal. It is true that it is the plate portion only which directly covers the joint, and that the inturned projections are mainly, if not solely, concerned in effecting the desired tumbling; and it may also be conceded that both of these things had previously been defectively done,—as, for instance, by the use of two angle irons placed back to back. Yet the fact remains that the device which Phillips gave to the art was, in its entirety, new, and was not only more convenient in its adaptation for use than any appliance which had preceded it, but also performed its twofold function so as in both respects to produce much better results than had ever before been attained. Both in the character of the means which he employed, and in the improvement in operation which he achieved, there is evidence of origination; and therefore we cannot assent to the suggestion that his performance amounted to nothing but ingenious aggregation of the varied, offhand, and inefficient contrivances which it was his declared object to supplant.

Upon the question of infringement we have experienced no difficulty. The stipulation and evidence contained in this record leave, we think, no room for reasonable doubt upon that subject. If, in view of the admissions of the officers and servants of the defendant company, it

could be supposed that it had not manufactured any device having means for securing the protector plate to both of the adjacent segments, yet it would not follow that infringement had been avoided. It is obvious that, even with provision for fastening to one of the two segments omitted, the gist and substance of the Phillips construction would still be present in that of the defendant,—it would still effect the same object, and by means not essentially different. The decree of the circuit court is reversed, and the cause will be remanded to the circuit court of the United States for the Western district of Pennsylvania, with direction to enter a decree in favor of the plaintiff.

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EPPLER WELT MACH. CO. v. CAMPBELL MACH. CO.<sup>1</sup>

(Circuit Court of Appeals, First Circuit. February 19, 1898.)

No. 236.

**WAX-THREAD SEWING MACHINES.**

The Campbell patent, No. 253,156, for improvements in wax-thread sewing machines, construed, and limited as to claim 19, covering a combination of a hook needle, a thread arm, a thread eye, and operating mechanism for the arm and eye. 83 Fed. 208, reversed.

Appeal from the Circuit Court of the United States for the District of Massachusetts.

This was a suit in equity by the Campbell Machine Company against the Eppler Welt Machine Company for alleged infringement of the nineteenth claim of letters patent No. 253,156, granted January 31, 1882, and of the first claim of patent No. 374,936, granted January 31, 1882, both to the complainant, as assignee of D. H. Campbell, for improvements in wax-thread sewing machines. The circuit court found that the first-mentioned patent was valid, and had been infringed by defendant as to the claim in issue, and that the first claim of the second patent was invalid. 83 Fed. 208. From this decree the defendant has appealed.

Frederick P. Fish and James J. Storrow, for appellant.

James E. Maynadier, for appellee.

Before PUTNAM, Circuit Judge, and ALDRICH and LOWELL, District Judges.

PUTNAM, Circuit Judge. The patent in suit relates to "improvements" in wax-thread sewing machines, and contains 29 claims. It is, consequently, necessary in the present case, where, for some reason unknown to the court, the complainant limited its suit to one claim out of the many in the patent, to make sure that the claim in issue does not receive improper color or breadth from those not in issue.

The claim in issue is as follows:

"(19) The combination, substantially as hereinbefore described, of a hook needle, a thread arm, a thread eye, and operating mechanism for the arm

<sup>1</sup> Rehearing denied April 28, 1898.

and eye, which causes said eye to first carry and deliver the thread to the arm and thence deliver thread to the needle, and also causes the arm to merely retain and release the thread delivered to it by the eye, whereby said arm is prevented from abrading the thread, as set forth."

The purpose to be accomplished by the device of this claim is shown in the specification as follows:

"It is not new to employ a swinging thread arm with a swinging eye, but, as heretofore organized and operated, the arm helped itself to thread during the movement of the eye, and by continuing onward said arm carried the thread in a direction away from the eye and over the presser foot, so that the thread slipped over the arm; and it is the abrasion incident to this slipping action at the arm which I have obviated by having the eye carry the thread to the arm, which merely holds it while the eye next proceeds to and around the needle, and, instead of delivering the thread to the needle in a straight line between eye and arm, as heretofore, the thread is delivered to the hook in a horizontal bight, as clearly shown in Fig. 9, thereby greatly contributing to an unailing and accurate engagement of the thread by the hook."

That it was old in the art to deliver thread freely to the needle from both directions, and that thus abrasion by the needle itself had been overcome, are admitted in the specification by reference to the inventor's prior patent, No. 231,954, and are clearly shown to have also anticipated that patent, and to have been a long time well known. Prior to the invention now in issue, this had been accomplished by use of a vibrating arm as well as a vibrating eye, the arm seizing the thread and drawing it out from the spool, and delivering up, when needed to make the stitch, the intermittent supply thus obtained by it. It is claimed in the extract we have made from the specification that the arm abraded the thread, and the function of claim 19 is to overcome this abrasion.

The specification also contains the following:

"In said prior organizations of swinging thread eye and arm, the latter swung over the presser foot; and, in order that the latter could nevertheless be lifted, said foot, eye, and arm were connected together, so that all were raised or lowered together, involving a complication in the operative mechanism of the eye and arm, which I obviate by locating my arm wholly at one side of the presser foot."

It is argued, and seems to have been held by the court below, that this relates to some function of claim 19; but this proposition is without foundation. We are re-enforced in this by the fact that this function is specially covered by claim 18, and also by the illustrative fact that it would not be conceded that claim 19 might not be infringed without reference to the question as to the side of the presser foot at which the infringing arm might be located.

During the progress of the application for this patent, the patent office required the applicant to amend the claim in issue, as originally drawn, by adding the words, which now appear therein, as follows: "And also causes the arm to merely retain and release the thread delivered to it by the eye, whereby said arm is prevented from abrading the thread, as set forth." Some other verbal changes were made, which related only to clearness of expression, and are not now of importance. We have no occasion, as to these amendments, to add anything to what was said by us in *Reece Button-Hole Mach. Co. v.*

Globe Button-Hole Mach. Co., 10 C. C. A. 194, 61 Fed. 958. The word thus introduced which has been principally discussed is "merely." Whatever was the invention, and whatever the patentee ought to have been allowed to incorporate into claim 19, it is clear that, under the circumstances of this case, the patentee bound himself and the court by the addition of these amendatory words. Applying the rules in *Reece Button-Hole Mach. Co. v. Globe Button-Hole Mach. Co.*, especially those at pages 961 and 967, 61 Fed., and pages 197 and 201, 10 C. C. A., and, aside from that, applying the rules of interpretation which we have no judicial right to reject, we must give the amendment, including the word "merely," full effect. We are, however, to apply again the fundamental rules of law in construing the word "merely." These rules do not allow us to construe it so literally as to result in what is contrary to common sense, or so as to support what is trifling or useless. The arm, as shown in the patent, operates by being lifted on its axis to catch and retain the thread, and by depression on its axis to surrender the thread to the needle. So much it must do in order to "merely retain and release the thread"; and, on the proper construction, under the rules of law, of the words added by amendment to claim 19, this constitutes the proper action and function of the arm, and the whole of them. On a legal construction of this claim, anything which does not possess this function and this action, no matter to what extent in other particulars it may answer its calls, does not infringe it.

The result is that it is an essential element in claim 19 that the arm shall have no positive or affirmative function in making the loop of thread to furnish a supply for the needle, as explained, and therefore the claim cannot be infringed by any device in which the arm has a proper function of that kind. Of course, it might be infringed when the arm is given a movement needless to the performance of its proper function, or additional to it, because to refuse to admit this would violate the rule of construction to which we have referred, which does not allow literalness to the extent of triviality.

In the complainant's device, as it is shown in the patent, the arm occupies a position, fixed at its axis or base, at some distance from the needle, so that, when the eye has traveled around it, there is necessarily laid thread sufficient, when the arm releases it, to supply the needle from a direction in effect opposite to the spool. This, however, would not be the fact if the normal position of the arm were substantially close to the perpendicular of the needle, because, in that event, the arm must make a substantial movement away from the needle in order to secure a supply of thread, even though the eye traveled about the arm as in the claim in issue. In the latter case, the arm would make substantially the same movement as in the old art, though not the whole of it, even if the eye did not, and therefore there could be no infringement. If, however, the movement of the arm were not functional for the purpose named, but only colorable, or purely supplemental, infringement would not be avoided. What are the facts at bar with reference to these hypotheses?

If should be observed that there is nothing functionally new in

the relative manner in which the arm and the eye approach each other in connection with the delivery of thread to the former by the latter, although, on the proper construction of claim 19, that matter alone would not be material to the case. In all the devices before the court, the relative manner of their approach is the same, although in the old devices the arm makes the approach, while in complainant's device it is made by the eye. Therefore, there is nothing functionally new in the fact that the complainant's arm, when receiving the thread, interposes between the eye and the needle; nor would it affect this case if it were otherwise. The old devices required an ultimate double movement across the whole plane of operation,—the arm to the right, the eye to the left. The complainant's invention reduced materially the quantum of these movements, and this alone may well have involved invention. But, as claim 19 is drawn, this constitutes only one element in it, and therefore this fact is not of itself of importance in this case.

Coming back to the principal question already stated, and referring to the respondent's machine, the complainant says:

"In defendant's machine the mode of operation of the thread eye and thread arm with reference to the hook needle is the mode of operation of those parts described in the 19th claim. The thread eye on its return stroke carries and delivers the thread to the thread arm, which is then in its forward position; the thread arm then moves back to engage and hold the thread, and the eye then makes its needle-threading stroke and threads the hook needle, which then draws a loop of thread through the material, and the thread arm moves forward to release the thread as the needle draws the loop. The thread eye has the new function of carrying and delivering the thread to the thread arm, and the thread arm has merely to retain and release the thread delivered to it by the eye, in order that the two may co-operate to thread the needle with a bight of thread between the needle and the material."

His expert, referring to the respondent's expert, says:

"Mr. Calver totally disregards this difference as a basis of comparison, and bases his comparison apparently wholly upon the fact that while in defendant's machine the bight is formed by the delivery of thread by the thread eye to the thread arm, the holding of that thread by the thread arm, and the subsequent delivery of thread by the thread eye to the needle, the thread arm moves further than is necessary to the performance of its function in forming the bight, and that in addition to performing this function it elongates the bight."

On the other hand, the respondent says:

"In the Campbell patent in suit, as we have pointed out, the entire share of the thread arm in the thread-drawing movement has been given to the thread eye, so that the thread arm merely retains the thread in position to which it has been brought by the thread eye. It is because the thread arm of the patent in suit has no thread-drawing, but merely a thread-retaining movement, that the rubbing or slipping of the thread over thread arm, referred to in the specification as objectionable, is prevented. In the Campbell patent in suit not a hair's breadth of thread is drawn down by the thread arm; the thread arm simply first retains the apex of the bight and then drops it. The exact amount of thread drawn down relatively by the thread arm and the thread eye in the defendant's machine varies somewhat. The thread arm and thread eye of the defendant's machine, as in all machines of this class, are capable of a certain amount of adjustment, so as to enable them to deal with leather of different thicknesses. When the defendant's machine is ad-

justed so as to give the least possible movement to both thread arm and thread eye, the thread eye will draw down three-sixteenths of an inch of thread while the thread arm will draw down four-sixteenths. When both the thread arm and thread eye in the defendant's machine are adjusted to draw down the greatest amount possible of thread, the thread eye will draw down six-sixteenths of an inch of thread and the thread arm will draw down ten-sixteenths of an inch of thread."

The respondent's expert testifies as follows:

"As to the defendant's machine, \* \* \* the arm begins with a bight-forming movement against the line of the standing thread, the eye moving not first, but last, and the arm and eye co-operating together, and each having a positive movement to form the bight."

We derive from the record no further substantial assistance, and have been compelled to resort to an inspection of the respondent's machine, put into the case by the complainant. Complainant also put in one of its commercial machines, which has complicated any attempt at comparison, as it clearly does not conform in construction to claim 19. The complainant's expert testifies about it and the respondent's machine as follows:

"In saying that each of these two machines contains a thread arm and a thread eye operating together, after the manner described in the patent in suit, and referred to in the nineteenth claim, I have not failed to notice that in each of these two machines the thread arm has a little more movement than is necessary to enable it to take hold of the bight formed and delivered to it by the thread eye. The result of this excessive movement is that, after the bight has been formed by the thread eye and delivered to the thread arm, it is slightly elongated by the excessive motion of the thread arm before the thread eye begins to move towards the needle. I regard this excessive movement, however, wholly immaterial so far as concerns the practical results of the operation of the machine, and so far as concerns any question of the embodiment of the invention described in the patent in suit, and referred to in the nineteenth claim."

But an inspection of complainant's commercial machine shows that the arm has a very considerable throw, and that, so far from having only the motions shown by the patent to be necessary for retaining and releasing thread, it has a very substantial, independent, positive action, in drawing out the supply required to feed the needle from the direction opposite to the spool. We are therefore without the advantage which would come from making a comparative inspection, and we are compelled to observe as best we can, without any practical standard with which to compare. This inspection discloses to us that, at the beginning of the series of movements which results in feeding the needle, the respondent's needle and arm are substantially in the same perpendicular, so that, as already said, the arm must presumably make a substantial movement away from the perpendicular of the needle in order to form the necessary loop; that, consequently, the arm, in forming the loop, does apparently exert a proper and necessary function by a substantial and very considerable active throw in drawing out a supply of thread; and that the respondent's eye and arm apparently co-operate in a normal manner in forming the loop, substantially as the loop co-operated in the old device, although approaching from different directions. Such being the apparently normal and proper

operation of the respondent's machine, we have nothing to overcome the presumption against the complainant, arising therefrom, except the bare statement of the complainant's expert, which we have already cited, that the respondent's "thread arm moves further than is necessary to the performance of its function in forming the bight." To accept a statement so general that it gives the court no details by which it can apply its terms, or by which it can judge for itself the limitation to be put on the expression "further than is necessary," or by which it can determine whether the alleged excessive degree of throw is substantial, would be to substitute the witness for the court. The attempted application of so general a statement is made all the more doubtful because the long throw of the arm in the complainant's commercial machine shows apparently that the inventor's idea that abrasion by the arm of the old devices was injurious, was fanciful, or that it was easily overcome by properly reshaping the arm, or by somewhat changing its relative location. This is apparently all the respondent has done, and it had a right to do this. We do not think the complainant has met the burden, resting on it, of proving infringement of claim 19, as properly construed. The decree of the circuit court is reversed, and the case is remanded to that court, with direction to dismiss the bill, with costs, the appellant to recover the costs of this court.

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#### SAFEGUARD ACCOUNT CO. v. WELLINGTON.

(Circuit Court, D. Massachusetts. January 27, 1898.)

1. PATENTS—INVENTION.

The use of perforated lines in paper, for the purpose of permitting easy separation, having for many years been common in the arts in which paper is used, its application to any particular art, or any subdivision thereof, does not involve invention, unless under peculiar circumstances.

2. SAME—BLANK BOOKS FOR LEDGERS.

The Horne patents, Nos. 393,506 and 393,507, for blank books, considered; and the former, which is for a book having full leaves of the same width, a part of which are longitudinally perforated near their outer edges to make removable margins, thereby forming a long and short leaf ledger, is, nevertheless, following the analogy of *Thomson v. Bank*, 3 C. C. A. 518, 53 Fed. 250, *held* valid and infringed, and the latter *held* void for want of invention, over the former.

This was a suit in equity by the Safeguard Account Company against Edward F. Wellington for alleged infringement of letters patent No. 393,506 and 393,507, issued to John W. Horne for blank books.

Clarke, Raymond & Coale and George O. G. Coale, for complainant.  
Robert W. Hardie, for defendant.

PUTNAM, Circuit Judge. The earlier of the two patents in suit, No. 393,506, is the only one which requires particular consideration. It was applied for June 27, 1887, and issued November 27, 1888. Claim 1 is as follows:

"A blank book having full leaves of the same, or substantially the same, width, a part of which are provided near their outer edges with longitudinal lines of perforations to form removable margins, and the rest of which are unperforated, the perforated and unperforated leaves being interposed between each other throughout the book with one or more of the perforated leaves between the unperforated ones, substantially as set forth."

The nature and purposes of the alleged invention are pointed out by the complainant substantially as follows: The advantage of a long and a short leaf ledger is that one column of names will answer for the pages on several narrow leaves of the book, as well as for the wide page on which it stands, and the opposing wide page. The book with a long and a short leaf is old. The book of the patent, however, is not made with a long and a short leaf, but with leaves of the same width, or substantially the same, throughout, and is so constructed, by perforation or its equivalent, that the user of the book can, without difficulty, make a long and a short leaf book, by removing so much of certain intervening leaves as is necessary in order to so expose the names column of one page that it may be used with the other pages of the series. Before the invention in suit, to make a long and a short leaf ledger it was generally best to make a book in which all of the leaves were of full size, and then to cut from one or more leaves, following the leaf which contains the names column, a margin of proper width. Such a construction of a long and a short leaf book is difficult and expensive, from the bookbinder's point of view, owing to the fact that the book, if it is to have the ordinary finish, namely, a flat, heavy, broad binding, and colored, burnished edges, must be made and finished exactly like an ordinary book, and then have certain of its leaves shortened by cutting by hand. If the employé carelessly cuts the wrong leaf, the book is ruined. Moreover, the result is a book in which the outer edges of the leaves are flabby, and liable to collect dust, and become dog-eared; the covers themselves also being liable to become warped when in use. Looked at from the bookkeeper's point of view, such a book is difficult to use, for the reason that there is no firm, solid surface upon which to enter in the names column the various accounts. On the other hand, in the complainant's book the leaves which are to be made short leaves are perforated before the book is bound up, and, in case of any error in the perforations, the leaf or sheet may be discarded when the sheets are gathered before stitching. The various processes which follow are those ordinarily practiced in making a long-leaf book of equal thickness. The book may receive proper pressing, and the edges of the leaves may be colored and burnished in the ordinary manner, and in fact be made without any increased expense in its manufacture over that of the ordinary long-leaf book, except the cost of perforating. As the result, the accountant has a book in which the names may be easily written in the names column, for the reason that the book is solid throughout, like an ordinary ledger, and yet, when it has been partially used, he may convert it into a long and a short leaf book, so that the same names column may apply to a number of pages.

We think we have thus fully stated what the complainant main-



tains as the invention covered by claim 1 of patent No. 393,506, and the advantages of its use. None of these alleged advantages are suggested in the patent; and while, of course, this fact does not deprive the holder of the patent of the benefit of them, if they in fact exist, it weighs in favor of the proposition that they do not exist, or at least are not of importance. The complainant's treasurer testifies that "many thousands," constructed according to the patents, have been sold; but he is unable to define this, nor does he make it appear whether the sales were on account of the patented features, or of the superiority of complainant's manufacture in other particulars. The complainant put in evidence a printed catalogue of its customers,—to be sure, of only a part of them; but it is significant from the almost total absence from it of banks and bankers, by whom complainant's patented device would be especially used if it possessed substantial merit. The manufacturer of the alleged infringing device apparently admits that "it is desirable to make the book appear like an ordinary ledger with full leaves," and the evidence also sustains most of the complainant's propositions as to the existence of the other advantages claimed by it. These advantages, however, are of a minor character, and the case fails to weigh all the peculiarities of the patented book pro and con, or to show that the patent marked, on the whole, any substantial step in advance in the matter of practical utility, or has ever been accepted as such. Sitting as triors of the facts, as well as of the law, we must take notice that the use of perforated lines in paper for the purpose of permitting easy separation has for many years been common to all the arts where paper is used. Under these circumstances, its application to any particular art, or any subdivision thereof, cannot be regarded as involving invention, unless under special circumstances. We have great doubts whether the advantages claimed in this case exhibit utility of that striking character which stamps on the mind an impression of the actual presence of the spirit of invention. *Hollister v. Manufacturing Co.*, 113 U. S. 59, 72, 5 Sup. Ct. 717; *Electric Co. v. La Rue*, 139 U. S. 601, 605, 606, 11 Sup. Ct. 670; *Potts & Co. v. Creager*, 155 U. S. 597, 608, 15 Sup. Ct. 194; *National Cash-Register Co. v. Boston Cash Indicator & Recorder Co.*, 156 U. S. 502, 515, 15 Sup. Ct. 434; *Manufacturing Co. v. Holtzer*, 15 C. C. A. 63, 67 Fed. 907, 910. Nevertheless, in *Thomson v. Bank*, 3 C. C. A. 518, 53 Fed. 250, the court of appeals for the Eighth circuit found invention in a patent in this same art issued for a device of substantially the same nature as that at bar, though not the same. We feel constrained to follow the analogy of that decision, especially as the case at bar is one of doubt. Applying to the question of novelty the rule stated by Judge Lowell in *Stewart v. Mahoney*, 5 Fed. 302, 305, and cited by us in *American Street Car Advertising Co. v. Newton St. Ry. Co.*, 82 Fed. 732, 735, and also restated by the court of appeals for this circuit in *Heap v. Suffolk Mills*, 27 C. C. A. 316, 82 Fed. 449, 453, we conclude that the patent has not been anticipated. No definite point has been made that the complainant may not prevail on the second claim of patent No. 393,506, if it does on the first.

The other patent in suit, No. 393,507, which must be regarded as the later one issued, clearly contains nothing patentable not covered by the earlier one, and is void. Let there be a decree for the complainant, under rule 21, sustaining its suit on both claims of patent No. 393,506, and adjudging patent No. 393,507 void, with costs for complainant.

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A. B. DICK CO. v. BELKE & WAGNER CO.

(Circuit Court, N. D. Illinois. July 3, 1897.)

1. PATENTS—INVENTIONS—IMPROVEMENTS IN INKS.

The Fuerth patent, No. 437,588, which, by the use of linseed oil, vaseline, and the essential coloring matter, produces an ink rendered limpid by friction, and avoiding the tendency to adhesiveness characteristic of ordinary printer's ink, and adapting it to the needs of stencil printing, discloses a new discovery, and a valuable advance in the art of printing.

2. SAME—INFRINGEMENT.

Where the analysis of an alleged infringing ink shows the presence of the constituents entering into the patented combination, and the defendants fail to deny on oath the use of such constituents, the analysis will be taken as correct, and as proof of infringement.

This was a suit in equity by the A. B. Dick Company against the Belke & Wagner Company for the alleged infringement of a patent for an improvement in inks.

Dyer & Driscoll and Poole & Brown, for complainant.

C. C. Bulkley and N. H. Hanchett, for defendant.

GROSSCUP, District Judge. The bill is to restrain infringement of letters patent No. 437,588, granted to the Redding Ink & Duplicator Company, as assignee of William C. Fuerth, September 30th, for improvement in inks. The defendant denies infringement, and also contests the validity of the patent.

The purpose of the patentee was to produce an ink adaptable to the needs of stencil printing. Such an ink must necessarily be different, in some respects, from the ordinary printer's ink, and especially in view of the new stencil sheet, which is composed of more delicately constructed paper. Mr. Fuerth points this out in the following language:

"Printer's ink, properly speaking, is a viscid and very tacky mass, and, when applied, for printing purposes, for a printing roller over a stencil sheet composed of delicately waxed paper, it would naturally tend to tear it, and the ink in a pure state was of no utility. Consequently, in the old state of the art, it was necessary to the production of even a few impressions to thin the printing ink with an excess of linseed oil, castor oil, turpentine, and the like."

And Professor Morton concurs with this in substantially the same language. The introduction of these solvents, however, was calculated to make the ink too fluid to be available for use in the usual manner of stencil printing. The patent in question produces an ink which, appearing to the printer in a state of jelly-like consistency, is rendered limpid by friction, and avoids the tendency to adhesiveness

characteristic of ordinary printer's ink. In these respects it seems to be a genuine and valuable advance in the art.

Printer's ink for a long time has been made from the products of petroleum, linseed oil, fatty oils, vegetable oils, and other products, according to different formulas. The patent in suit employs linseed oil, together with vaseline, a product of petroleum, with the essential coloring matter, and is not, in this respect, generally speaking, very different from the old printer's ink. But, while vaseline is a product of petroleum, it is likewise, in many of its characteristics, different from the other products of petroleum, and, when combined with linseed oil and the other coloring matter, as pointed out in the patent in suit, presents an ink, as a finished entirety, very different from the old printer's ink, and different in just those respects that make the one adaptable to stencil printing and the other unadaptable. This constitutes a new discovery in the art of printing, just as much as if its elements, or a portion of them, were derived from some substance hitherto unrelated to printing ink. In my opinion the patent is valid.

The analysis of defendants' ink by the complainant's experts shows the presence of vaseline and the other constituents entering into the complainant's combination. This testimony might be much less conclusive if the defendants, who are alive and filed their answer, had denied under oath the use of such constituents. Their failure to meet complainant's analysis by a denial leaves me in no doubt that the analysis is substantially correct. The usual decree for an injunction and accounting may be entered.

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**THAMES & MERSEY MARINE INS. CO., Limited, v. O'CONNELL.**

(Circuit Court of Appeals, Ninth Circuit. February 14, 1898.)

No. 375.

**MARINE INSURANCE—PROHIBITED PLACES.**

A marine insurance policy warranted a schooner not to use certain ports or places. The schooner left San Francisco bound for Suislaw River, a prohibited place, and, in tempestuous weather, came to a buoy near the entrance to the river, was driven about, and anchored a mile from the entrance, where the chain broke, and the schooner was driven ashore, and wrecked. *Held*, that when the schooner came up to the buoy, with the intention of entering the river, and afterwards anchored one mile from the entrance, it was using places prohibited by the policy, and the insurance company was not liable for the loss.

Gilbert, Circuit Judge, dissenting.

Appeal from the District Court of the United States for the Northern District of California.

Page & Eells, for appellant.

Andros & Frank, for appellees.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

\* Rehearing denied.

ROSS, Circuit Judge. This is an appeal from a decree given the libellant in the court below. The appellant, who was the respondent there, underwrote a policy of marine insurance on the interest of Thomas O'Farrell, the libellant's intestate, in the schooner Robert and Minnie, against perils of the seas and other perils in the policy mentioned. The policy contained, among other warranties, the following:

"(4) Not to use any ports or places on the west coast of America north of San Francisco, nor islands adjacent thereto, except Umpqua and Columbia Rivers, Humboldt, Coos, and Shoalwater Bays, Gray's Harbor, Sitka, Ounalaska, and St. Paul's Harbor, and ports inside the mouth of the Straits of Fuca; not to use any inside passage on the west coast of America north of Burrard's Inlet, nor ports or places on the east coast of Asia, north of Shanghai, nor islands adjacent thereto, except ports in Japan; nor to use Torres Straits, nor any guano island, nor to engage in inter-island trade, nor to go on a whaling, fishing, or trading voyage. It shall and may be lawful, however, for said vessel in her voyage to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance."

On the margin of the policy this stipulation was written:

"It is understood and agreed that this company is not liable for any claim resulting from using ports or places not allowed by this policy."

While the policy was in force, the schooner, under command of O'Farrell, the assured, sailed from San Francisco bound to Suislaw River, in the state of Oregon, which was a port or place which the assured agreed and warranted that he would not use. It appears from the Pacific Coast Pilot, which was read in evidence, that this river was first reconnoitered by the Coast Survey in 1883, when the bar was found to be bad, and had only five feet of water upon it. It could then be crossed only on the flood tide near high water. It was then nearly a quarter of a mile across, and the channel narrow. But in 1887 the bar was found, not only to have changed its location, but from the northernmost point of the cliffs a great sand flat had made out fully three-fourths of a mile to the south, and changed the whole location of the bar. The Coast Pilot proceeds:

"It is therefore evident that only a local knowledge will serve to determine the peculiarities of the bar and channel at any time. \* \* \* It is reported that the bar works around from the south to the north as far as possible, and then again breaks out near the south spit. When it is settled towards the north, it is claimed to carry nine feet of water; but that it has been less during the change. There is a sunken rock near the beach about half a mile to the south-east of the south spit."

During the voyage from San Francisco, the schooner was driven by tempestuous weather to a point about 65 miles to the northward of the entrance of the Suislaw River, having passed its entrance about 30 miles to the westward. The vessel then tacked, and proceeded to the southward, her master intending to take her into the river should he be able to secure the services of a tug to tow her in, which he expected would come out for that purpose. There was a buoy located a quarter of a mile outside of the bar, near the entrance of the river, which indicated the entrance to the channel over the bar. The schooner sailed right up to that buoy. The

tug could not then come out, on account of the roughness of the bar and the lack of sufficient water thereon at the then stage of the tide. The schooner then stood off to sea about half a mile, and afterwards stood in towards, and came up to, the buoy. She then stood off again for a short time, but lost the wind, and drifted in-shore to a point about one mile to the southward of the bar, where the master dropped anchor. Shortly after letting the anchor go, the heavy swell brought such a strain upon the chain that it parted, and the vessel in a few minutes drifted upon the shore, and was wrecked and totally lost. The vessel did not at any time while the policy was in force enter the river, nor was she nearer thereto than about one mile. The above facts were made to appear to the court below by an agreed statement, upon which the cause was determined there and is brought here.

By the fourth clause of the stipulations above quoted, the assured bound himself not to use any ports or places on the west coast of America north of San Francisco, nor islands adjacent thereto, except Umpqua and Columbia Rivers, Humboldt, Coos, and Shoalwater Bays, Gray's Harbor, Sitka, Ounalaska, and St. Paul's Harbor, and ports inside the mouth of the Straits of Fuca; and, by express agreement indorsed on the margin of the policy, it was covenanted that the insurer should not be liable for any claim resulting from using ports or places not allowed by the policy. This contract is the measure of the rights and obligations of the respective parties. Confessedly, Suislaw River was a place the assured was prohibited by the policy from using. Was not the buoy, which stood near the entrance to that river, and within a quarter of a mile from the bar and its immediate vicinity, equally a place the assured was prohibited by the policy from using for the purpose of getting into the river? Was not the point about one mile to the southward of the bar, where the assured dropped his anchor, equally a place the assured was prohibited by the policy from using, under the circumstances appearing in this case? Undoubtedly so; for they are all on the west coast of America, north of San Francisco, and neither of them is Umpqua or Columbia River, Humboldt, Coos, or Shoalwater Bay, Gray's Harbor, Sitka, Ounalaska, or St. Paul's Harbor, or any port inside the mouth of the Straits of Fuca, and neither of the places was so used by the assured in going where, under the policy, he had a right to go. Nor was the assured obliged by stress of weather or other unavoidable accident to sail to, touch, or stay at or near, the buoy, or at or near the Suislaw River, or at or near the point where he dropped his anchor. On the contrary, he was at those prohibited places in pursuance of the intent with which he started on his voyage, and in spite of tempestuous weather, which, so far from taking him to the prohibited vicinity, had taken him 65 miles to the northward and 30 miles to the westward of those places. It is idle to say that he did not use the prohibited places, when the agreed statement of facts shows that the assured sailed his schooner "right up to the buoy" in the endeavor to get into the Suislaw River. Was he not

"using" this place when he sailed his schooner there? And did he not "use" the place about one mile southward of the bar when he dropped his anchor there? Undoubtedly so. Each of these places and its immediate vicinity was as much prohibited by the terms of the policy as was the Suislaw River, when used, not in going where under the terms of the policy the assured had the right to go, but in the endeavor to enter a prohibited port.

Nothing more, we think, need be said to show that the judgment appealed from is erroneous. It is accordingly reversed, and the cause remanded, with directions to the court below to enter judgment for the respondent on the agreed statement of facts.

GILBERT, Circuit Judge (dissenting). I am unable to concur with the majority of the court in holding that the insured in this case used the Suislaw River in violation of the stipulations of the policy. It must be presumed that the contract of insurance expressed exactly the risks which the insurance company agreed to assume. The vessel was prohibited from using certain specified ports and places. She was free to go anywhere except to those ports or places. She had the right to traverse the open sea in any direction in going to and from any of the ports which the policy permitted her to use. She undoubtedly had the right to approach as near as possible to the Suislaw River without entering it. For aught that appears to the contrary, her ordinary route to or from some of the permitted ports would take her as near to the Suislaw River as the point where she was anchored when her chain parted, causing her to be drifted ashore. But the opinion of the majority of the court rests upon the fact that, notwithstanding that the vessel was not prohibited to approach that point, her master took her there on this particular occasion, with the intention of entering the Suislaw River. This leaves the decision of the case to turn upon the question of the intention with which the vessel approached the river. It would seem upon principle that no citation of authority would be necessary to sustain the position that the intention or the attempt to enter a prohibited port is not tantamount to using it. If the intention determines, then it would follow that if the vessel had cleared from San Francisco with the intention of entering a prohibited port, and immediately thereafter that intention had been abandoned, and she had been lost on her way to one of the permitted ports, there could be no recovery under the policy. I think that the principle announced in the case of *Snow v. Insurance Co.*, 48 N. Y. 624, should be decisive of this case. In that case the court held that a warranty in a policy of marine insurance not to use a certain port means not to go into it, and that going near or in the direction of the prohibited port is not a breach of the warranty. Said the court by Earl, C.: "A mere intention to violate a policy can never have the effect of an actual violation. The vessel, at the time of her loss, was not sailing in forbidden waters, and, so long as she had not actually reached a forbidden place, the unexecuted intention to reach one cannot avoid the policy." In *Wheeler v. Insurance Co.*, 35 N. Y. Super. Ct. 247, it was held that, where the words "to use"

were adopted in a covenant not to use certain ports and places, they meant "to go into a port, harbor, or haven for shelter, commerce, or pleasure, and to derive a benefit or advantage from its protection," and that to clear for a port or to sail for it is not to use it under the policy, and is not a violation of the warranty. In *Insurance Co. v. Tucker*, 3 Cranch, 357, a vessel was insured at and from Kingston, in Jamaica, to Alexandria; but she took in a cargo at Kingston for Baltimore and Alexandria, and sailed with the intent to go, first to Baltimore, and then to Alexandria. While on her way, and before reaching the point of deviation from the direct route from Kingston to Alexandria, she was captured. The court held that it was a case of intended deviation only, and that "an intent to do an act can never amount to the commission of the act itself." These authorities and others, in my opinion, sustain the proposition that where in a policy of insurance there is a warranty not to use a certain port, and the insured proceeds towards that port with the intention and in the attempt to use the port, but in fact goes to no point to which he is prohibited from going, and uses no place or port interdicted by the policy, there is no breach of the terms of the policy. It is to be presumed that the precise agreement of the parties has been specified in the contract, and that the vessel is free to go anywhere upon the high seas, or into any port or place except the interdicted ports and places. In this case the vessel was not to use the Suislaw River. It may be assumed that the insurance company declined to insure against the risks that might be encountered in that river, or, perhaps, in crossing the bar at its mouth. The vessel approached no nearer than the buoy, a quarter of a mile outside the bar. She did not use the river, although her master intended and attempted to use it. The policy did not prohibit the intention or the attempt to use it. It prohibited only the use. The contract of insurance has indemnity for its object, and it should be construed liberally to that end. "Stipulations are construed strictly against the party in whose favor they are made." 11 Am. & Eng. Enc. Law, 286; *Catlin v. Insurance Co.*, 1 Sumn. 434, Fed. Cas. No. 2,522; *Hoffman v. Insurance Co.*, 32 N. Y. 405; *Insurance Co. v. Cropper*, 32 Pa. St. 351. I think the decree should be affirmed.

## GRACE et al. v. BROWNE et al.

(Circuit Court of Appeals, Second Circuit. March 2, 1898.)

No. 81.

## 1. SHIPPING—CARRIAGE OF GOODS—DATE OF SAILING.

A cargo of nitrate of soda having been purchased to be shipped on a sailing vessel to sail in November, the purchaser refused to receive it, on the ground that the ship did not sail in November. The proofs showed that on November 29th, after loading, the vessel broke moorings, took a pilot, and went to a place known as the "starting ground," but did not actually depart until December 1st. There was a conflict of evidence as to whether the master intended to depart on the 29th, and was prevented by lack of wind. *Held*, that the issue was properly submitted to the jury.

## 2. EVIDENCE—SHIP'S PAPERS.

An application by a vice consul for a permit for the vessel to depart, a bill of lading signed by the captain, a license to sail, a certificate of the custom-house official that the vessel had paid its tax for hospital dues, and the bill of health signed by the maritime subdelegate; the bill of lading being identified by the mate, and the other papers being official documents under seal, executed by the Chilean authorities, and such as the laws of maritime nations generally require, and produced by the proper custodian from the proper place of custody,—are entitled to confidence, and should be admitted as evidence.

## In Error to the Circuit Court of the United States for the Southern District of New York.

On October 30, 1894, Hemenway & Browne, hereafter called "the plaintiffs," sold to William R. Grace & Co., hereinafter called "the defendants," 3,000 bags of nitrate of soda, to be shipped in a sailing vessel to sail in November, 1894, from the western coast of South America to New York. The complainants alleged that this quantity of nitrate was duly shipped from Taltal, Chili, on the west coast of South America, in the Beechdale, a British sailing vessel, which sailed during the month of November, and arrived in New York on March 29th, when the defendants refused to receive any of it, upon the ground that the vessel had not sailed from Taltal until December 1, 1894; that the price of nitrate had fallen; and that the damages to the plaintiffs therefrom were \$2,988.10. These allegations were admitted, except that it was denied that the vessel sailed during the month of November. The case was tried to the jury upon the question of the date of sailing, and the verdict was for the plaintiffs. The vessel reached Taltal on October 26th, and finished loading on November 29th, about 6 o'clock p. m. Taltal is a small bight on the open coast, has no docks, and vessels are loaded from lighters. The vessel broke moorings, took a pilot, hove anchor, and was taken to what is called the "starting ground," at the outside harbor limit, on the evening of November 29th, but did not actually depart to sea until December 1st. The two alleged errors which are relied upon by the defendants are the refusal of the trial court to direct a verdict in their favor, and the admission of the clearance papers of the vessel, which will be hereafter described, without further authentication. There is no disagreement between court and counsel as to the terms of the contract, or as to what constituted a sailing. The circuit judge charged the jury that the question whether the vessel sailed on November 30th or December 1st was not technical; that the parties had, by their contract, made a November sailing a matter of substance; and that performance of the contract was necessary to a recovery. He further charged that "a vessel sails from a port when she breaks her moorings, being fully prepared to go to sea, with the intention of immediately proceeding to sea, and is only delayed by some accidental circumstance"; and that "a vessel sails when she weighs anchor, or casts off or gets under way with the intention to proceed at once to sea without further delay; but, if she is not entirely ready for sailing, she has not sailed by merely moving down the harbor." The court further charged that three



requisites must be shown by the plaintiffs,—a condition of preparation or readiness, some action taken, and an intention to sail on November 30th. No objection was made to the terms of the charge, but the defendants are of opinion that under this conceded state of the law there was no question of fact to be submitted to the jury. The captain of the Beechdale died on the homeward voyage, and the question as to the time of sailing depended very much upon the value which should be given to the mate's testimony, which was that the pilot left the vessel on the evening of November 29th outside of the harbor limit; that there was no wind on the 30th, and the vessel was weighed out about half a mile further, in the hope of getting wind when she was in the open sea in about 45 or 50 fathoms of water; and that the failure to continue the voyage was the lack of wind, and that the witness was on the watch, looking for a breeze. The clearance papers were introduced to show a readiness for sea.

Wm. L. Turner, for plaintiffs in error.

Wm. M. Ivins, for defendants in error.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts). The point in dispute was the intention with which their action was undertaken on the 30th, for the court abundantly charged that the intention of the captain was an essential element to be affirmatively proved. There was room from the mate's testimony for the inference that the vessel left her moorings, and was at the edge of the harbor, for the purpose of getting ready to depart, but not with the intent of instantaneous sailing, and that the action which was taken was simply to put the vessel in readiness to go when the captain was ready to quit the port, and that the theory of her moving seaward with the intent of a forthwith departure was fictitious. But the question could not properly be taken from the jury. There was too much affirmative testimony on the part of the plaintiffs for a court to declare that there was no question of fact in actual controversy.

The next question is in regard to the inadmissibility of the clearance papers without additional proof of the official character and signature of the officers who executed them. They were found, after the captain's death, with the other ship's documents, and consisted of six papers. The first was the ship's manifest, with the crew list, signed by the captain, with a certificate by the British vice consul of the examination of the sailing letter, and the return of the ship's articles, on November 29th, and with a certificate of the captain of the port, dated November 29th, that the vessel arrived in Taltal on October 25th and departed November 29th, "the clearance having been presented, executed by competent Chilean authorities." This paper was admitted without objection. The other papers were: (1) An application by the British vice consul to the Chilean authorities on November 29th for a permit for the vessel's departure. (2) The bill of lading, dated November 30th, and signed by the captain, and both bill and signature identified by the mate. (3) The license to sail, which consisted of the application of the shippers to the governor of the port for a sailing license; the certificate of the governor granting license after payment of charges; the certificate of the custom-house official that there are no charges; and the permit of the maritime subdelegate

of the port granting leave to weigh anchor. All these papers were dated November 30th. (4) A certificate of the custom-house official that the vessel had paid its tax for hospital dues, dated November 30th. And (5) the bill of health, signed by the maritime subdelegate of the port on November 30th, at 11:30 a. m. All these official documents were under seal. The certificates of the notary and of the governor of the port to the signature of the notary, and the certificate of the British vice consul to the signature of the governor upon the bill of health, were dated on December 1st, and this fact was one of the main points of the defense as indicating that the vessel was not ready to sail on November 30th. The reply to this argument was that these attestations were not necessary, but were probably taken out of abundant caution, as the vessel was obliged to delay. The bill of lading was sufficiently identified by the testimony of the mate. The other papers which were of value were not copies, but were original documents, executed by the Chilean authorities, who were public agents appointed for the purpose of protection to foreign commerce, to furnish the documentary evidence that vessels are engaged in regular traffic, and that they have permission to sail, which the laws of maritime nations generally require, and which must be furnished by foreign vessels when they arrive in this country. Rev. St. § 4209. They were produced by the proper custodian from the proper place of custody, and that they were the clearance papers intended for use upon that voyage was manifest. These documents are of a public nature, which are made by persons specially appointed for that purpose, in discharge of a public duty, are entitled to confidence on that account, and their admissibility stands upon the same ground with that of official registers, in regard to which it is said by Professor Greenleaf (1 Greenl. Ev. § 483):

"These documents, as well as all others of a public nature, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth, the obligation of an oath and the power of cross-examining the persons on whose authority the truth of the documents depends. The extraordinary degree of confidence, it has been remarked, which is reposed in such documents, is founded principally upon the circumstance that they have been made by authorized and accredited agents, appointed for the purpose; but partly, also, on the publicity of their subject-matter. Where the particular facts are inquired into, and recorded for the benefit of the public, those who are empowered to act in making such investigations and memorials are in fact the agents of all individuals who compose the state; and every member of the community may be supposed to be privy to the investigation. On the ground, therefore, of the credit due to agents so empowered, and of the public nature of the facts themselves, such documents are entitled to an extraordinary degree of confidence; and it is not necessary that they should be confirmed and sanctioned by the ordinary tests of truth. Besides this, it would always be difficult, and often impossible, to prove facts of a public nature by means of actual witnesses upon oath."

It is true that they are foreign official documents, but, because the laws of maritime countries universally require the issuance of that general class of documents, and the statutes of this country require them to be taken by the master of a foreign vessel if he is destined for a port in this country, and compel their production to

the collector of the port where he makes entry of his vessel, they stand, in regard to admissibility, upon the same footing with other original official documents. 2 Tayl. Ev. §§ 1431-1434. The judgment of the circuit court is affirmed, with costs of this court.

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STONE v. MURPHY et al.

(District Court, D. Oregon. March 4, 1898.)

No. 4,288.

ADMIRALTY—SUIT IN PERSONAM—DAMAGES—BOND.

Under Admiralty Rule 47 and Rev. St. §§ 990, 991, where the master and mate of a ship are arrested in the state of Oregon on a libel for damages for injuries inflicted on the high seas, they are entitled to discharge on giving bond conditioned at all times to "render themselves amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment," as provided by the laws of Oregon, and cannot be required to give a bond conditioned for the payment of the money awarded by the final decree.

This was a libel by Amos Stone, by Edward N. Deady, his guardian ad litem, against E. L. Murphy and George Harvey, to recover damages for personal injuries inflicted by defendants on the high seas. The cause was heard on plaintiff's motion to require defendants to give a new stipulation.

Edward N. Deady and John H. Hall, for libellant.

C. E. S. Wood and J. C. Flanders, for defendants.

BELLINGER, District Judge. This is an action for damages for personal injuries received at the hands of the defendants on the high seas. The defendants are respectively the master and mate of the ship George Stetson, recently arrived in this port. Upon the filing of the libel the defendants were arrested, and gave bonds in the sum of \$2,000 each, upon condition that they shall at all times render themselves amenable to the process of this court during the pendency of this action, and appear herein and render themselves amenable to such process as may be issued to enforce the decree herein. The plaintiff moves that the defendants be required to give a new stipulation, conditioned that they will appear in the suit, and abide by all orders of the court, and pay the money awarded by the decree herein. Admiralty Rule 3 provides as follows:

"(3) In all suits in personam, where a simple warrant of arrest issues and is executed, the marshal may take bail, with sufficient sureties, from the party arrested, by bond or stipulation, upon condition that he will appear in the suit and abide by all orders of the court, interlocutory or final, in the cause, and pay the money awarded by the final decree rendered therein in the court to which the process is returnable, or in any appellate court. And upon such bond or stipulation summary process of execution may and shall be issued against the principal and sureties by the court to which such process is returnable, to enforce the final decree so rendered, or upon appeal by the appellate court."

This application for a new bond is based upon rule 3, as above, and is supported by the decision of this court in the case of *Hanson v. Fowle*, 1 Sawy. 497, Fed. Cas. No. 6,041.

On the other hand, it is contended that under rule 47, which provides that, "in all suits in personam where a simple warrant of arrest issues and is executed, bail shall be taken by the marshal and the court in those cases only in which it is required by the laws of the state where an arrest is made upon similar or analogous process issuing from the state courts," inasmuch as by the laws of Oregon a party arrested in a civil action is entitled to his discharge from the arrest upon giving an undertaking to the effect that he will at all times render himself amenable to the process of the court during the pendency of the action, and to such as may be issued to enforce the judgment, the defendants in this case cannot be required to give a bond conditioned for the payment of the money awarded by the final decree herein. Defendants also call attention to sections 990, 991, of the Revised Statutes, which provide as follows:

"Sec. 990. No person shall be imprisoned for debt in any state, on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished. And all modifications, conditions, and restrictions upon imprisonment for debt, provided by the laws of any state, shall be applicable to the process issuing from the courts of the United States to be executed therein; and the same course of proceedings shall be adopted therein as may be adopted in the courts of such state.

"Sec. 991. When any person is arrested or imprisoned in any state, on mesne process or execution issued from any court of the United States, in any civil action, he shall be entitled to discharge from such arrest or imprisonment in the same manner as if he were so arrested and imprisoned on like process from the courts of such state. The same oath may be taken, and the same notice thereof shall be required, as may be provided by the laws of such state, and the same course of proceedings shall be adopted as may be adopted in the courts thereof. But all such proceedings shall be had before one of the commissioners of the circuit court for the district where the defendant is so held."

In the case of *Hanson v. Fowle*, it was held that these provisions, which relate to imprisonment for debt, do not apply in case of an arrest in a suit in personam for damages for injuries done the person; that, while a person who willfully injures another in person is liable therefor in damages, and may, therefore, in a sense, be called the "debtor" of the party injured, and the sum due for the injury "debt," he is in fact a wrongdoer, a trespasser, and does not come within the reason of the rule which exempts an honest man from imprisonment because he is pecuniarily unable to pay what he has promised; that, for instance, a person who wrongfully beats his neighbor, kills his ox, or girdles his fruit trees, ought not to be considered in the same category as an unfortunate debtor. And yet it must be admitted that a claim of this kind, when it ripens into a decree for a sum of money, becomes a debt against the defendant in the decree. It is true, such a claim is not a debt; it is less than a debt; and it cannot be said that the reason for abolishing imprisonment for debt does not apply in a case like this. If a defendant is not liable to imprisonment for a debt, he should not, for the stronger reason, be liable to imprisonment in an action where the result can only be a judgment for money.

Rule 47 is comprehensive. It provides no exception that will exclude this case from its provisions. It provides that in all suits in personam, where a simple warrant of arrest issues, bail shall be taken only in those cases in which it is required by the laws of the state where an arrest is made upon similar process issuing from the state courts. And so, too, of section 991 of the Revised Statutes. Here the provision is that, when any person is arrested or imprisoned in any state on mesne process or execution issued from the courts of the United States in any civil action, he shall be entitled to a discharge from the arrest or imprisonment in the same manner as if he were so arrested and imprisoned on like process from the state courts. The language, "on mesne process from any court of the United States in any civil action," admits of no exception in civil actions. And this is a civil action to recover damages. Upon the contention made by the plaintiff it might happen that a party would be subjected to imprisonment in a case where it would be impossible that such a bond as is required in this suit should be given. These are cases where the parties are usually at a distance from their homes. There is no limitation upon the amount that a plaintiff may claim in such cases, and, if the right exists to demand a bond for the payment of any decree that may be awarded, the plaintiff will be under the temptation to make his claim for damages so large that a defendant situated as these defendants are, will, in the nature of things, be incapable of giving it. The requirement, therefore, that is made in this case, is not only not within the law, but it is a requirement most unreasonable to be made under the circumstances. The bonds already given are all that can be required. They secure to the plaintiff all that he now has under his warrant of arrest, namely, the appearance of the defendants in a suit, and their submission to all the orders of the court made therein. If no bonds were given, and the defendants remained in custody, this is all the security the plaintiff would have, and this is what is secured to him by the bonds as given. The motion that the defendants be required to give further bail is therefore denied.

## FARMERS' &amp; MERCHANTS' NAT. BANK OF WACO v. SCHUSTER et al.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1898.)

No. 629.

## 1. REMOVAL OF CAUSES—LOCAL PREJUDICE.

After a cause has been tried in a state court, and a mistrial entered, it cannot be removed on account of local prejudice.

## 2. SAME—DIVERSE CITIZENSHIP.

Where an action in trespass to try the title to land has been tried in a state court, and a mistrial entered, a person becoming interested in the land in controversy, and intervening as a defendant, cannot have the cause removed to the federal court on account of diverse citizenship.

Appeal from the Circuit Court of the United States for the Northern District of Texas.

John W. Davis, for appellant.

D. T. Bomar, for appellees.

Before McCORMICK, Circuit Judge, and NEWMAN and PARLANGE, District Judges.

NEWMAN, District Judge. The facts in this case, necessary to an understanding of the issues involved, are as follows: A suit, being a trespass to try title to land under the Texas statute, was filed in the district court of McLennan county, on the 17th day of February, 1894, in favor of the Farmers' & Merchants' National Bank of Waco against A. N. Schuster et al. On July 2, 1895, the plaintiff filed its first amended original petition, which petition was trespass to try title to about 20,000 acres of land lying in Sterling county, Tex., the defendants being A. N. Schuster and wife, Mrs. Lucretia Schuster, A. Judson Cole and wife, Luda Cole, Mrs. Florence King, August Schuster, and D. T. Bomar, all of whom resided in the state of Missouri, except defendant Bomar, who resided and resides in the state of Texas. The petition showed the levy, in favor of the bank on the 26th of February, 1894, of a writ of attachment on the land sued for as the property of August Schuster, issuing out of the district court of McLennan county, Tex.; a judgment in said cause foreclosing its attachment lien; an order of sale under said judgment, and purchase by petitioner, with sheriff's deed to the land. The petition also alleged that on the 5th day of December, 1893, August and A. N. Schuster, for the purpose of hindering, delaying, and defrauding their creditors, conveyed part of said land to A. Judson Cole, trustee for Mrs. Lucretia Schuster; that on the same day said August Schuster, with intent to hinder, delay, and defraud his creditors, conveyed all of the remainder of said land except six sections to A. N. Schuster, his co-defendant; that on the 8th day of May, 1894, A. N. Schuster conveyed all the land conveyed to him by August Schuster to D. T. Bomar, as trustee, for the benefit of Mrs. Luda Cole and Mrs. Florence King in the first class, and for the benefit of about 60 other parties, scattered all over the United States, in the second class, said trust deed directing said Bomar to take charge of said property, manage and dispose of the same, and pay

the proceeds of the sale to the parties secured in said trust deed; that on the 29th of October, 1894, A. N. Schuster, joined by his wife and August Schuster, conveyed to D. T. Bomar, trustee, all the land sued for, to secure certain parties named therein; and that by said last-named deed said Bomar is given possession of said property, rents and profits arising from the same, and is directed to sell the same, and pay the proceeds of the sale to the creditors secured by said deed. Fraud was alleged in all these conveyances, with the knowledge and participation on the part of grantees, and that said lands were the property of August Schuster at the date of the levy of the attachment on the same. Therefore petitioner claims title in fee simple in itself; that it is entitled to possession, and is deprived of possession by D. T. Bomar, who holds the same, and is receiving the rents; alleges the value of the rents; prays for title and possession of said land, that the fraudulent deeds be set aside, and that cloud be removed from the title. On August 1, 1895, A. Schuster filed his answer and disclaimer in the state court. On July 3, 1895, D. T. Bomar filed, in the state court, his petition and bond for removal to the United States court at Waco, on the ground that the substantial controversy in the suit was between citizens of different states; that he (Bomar) had no interest, and was only a formal or nominal party, being trustee in two certain deeds; that the beneficiaries in said trust deeds had petitioned for removal, etc. The other defendants, on July 30, 1895, filed their petition and bond for removal on the ground of diverse citizenship, alleging that defendant Bomar had no substantial interest in the controversy, being trustee, and only formal or nominal party, and filed with their petition copies of trust deeds under which Bomar held the land. On July 3, 1895, all the defendants filed their joint answer with exceptions, special and general, filing therewith certified copies of said trust deeds as exhibits. On motion, in the United States court, on November 18, 1895, the cause was remanded to the state court from which it was removed. After the cause was remanded to the state court, and additional pleadings were filed by both plaintiff and defendants, on the 18th day of January, 1897, the case came on for trial, resulting in a mistrial, there being a hung jury. On the 5th of March, 1897, the bank filed its second amended original petition in the state court in lieu of its petition filed in November, 1894, and of its first amended original petition, filed in July, 1895, against the same defendants, and alleging, in addition to the facts contained in its original petition, that in October, 1896, Bomar, trustee, had conveyed part of said property to W. T. Fenton, of Chicago, Ill., and another part of said property to Joshua Graham, and by petition making Fenton and Graham parties for the first time to the suit, also alleging that Fenton and Graham had actual knowledge of the pendency of the suit and of the issues involved in the suit, at and before the date of their purchase, and constructive notice of the plaintiff's title by reason of the registration of said attachment writs and sheriff's deed; and praying for title and possession of land, and for rents. On the 11th of March, 1897, Mrs. Lucretia Schuster filed her petition for certiorari to remove this cause from the state court to the United States court for the Northern district of Texas, in which petition she sets up a history of

the case, alleges that there is a separate controversy as between plaintiff and defendant Fenton, that she only owns and claims 3,200 acres of land, which lands are also claimed by her co-defendant Joshua Graham; that as to the rest of the land there is a controversy solely between the plaintiff and Joshua Graham; that all of the defendants except herself, Fenton, and Graham have filed disclaimers, and have no interest in the controversy; that Bomar was never a necessary party to the suit, having no interest therein; alleging also that from prejudice and local influence she would not be able to obtain justice in the state court, or any other court to which, under the law of Texas, she would have the right to remove said case on account of such prejudice and local influence. The reasons afterwards set out in the petition for the prejudice and local influence were the unpopularity of A. and A. N. Schuster, and the fact that the Farmers' & Merchants' Bank of Waco has extensive connections in Waco, and that prominent citizens are its officers. The petition was sworn to by Mrs. Schuster, accompanied by an affidavit by D. T. Bomar, very much on the same line as that of Mrs. Schuster. This application for removal was presented to the district judge holding the circuit court for the Northern district of Texas on the 18th of March, 1897, and granted. On March 16, 1897, D. T. Bomar filed a disclaimer, alleging that he had never had any interest in the subject-matter of the suit, that he was trustee in two deeds of trust described in the record, and that both of said deeds of trust had been foreclosed, and the property conveyed thereby sold to William T. Fenton and Joshua Graham; that Fenton and Graham, having been made parties thereto, would answer, setting up their rights in the premises, and that Bomar was no longer a necessary party. On March 27, 1897, Fenton and Graham filed their answer to the second amended original petition of plaintiff, in which they demurred generally, and pleaded not guilty. On the 27th of March, 1897, Fenton and Graham each filed their petition and bond for removal of the case from the state court to the United States court, on the ground that it was a controversy wholly between citizens of different states, setting out the nature of the controversy, their purchase from Bomar, trustee, under foreclosure of trust deed, that Bomar never was a necessary party to the suit, and had parted with all right or interest that he might or could have had in the said premises, and that said Bomar had filed a disclaimer herein disclaiming all interest whatever in said premises. On the same day the case was removed to the United States court for the Northern district of Texas. On the 13th of April, 1897, the bank filed its motion in the circuit court to remand the case to the state court from which it had been removed, on the ground that the United States court was without jurisdiction to hear and determine the case. On the 20th of April, 1897, the motion to remand was denied. Subsequently the case, having been docketed on the equity side of the court, was transferred to the law side, and then afterwards transferred back to the equity side of the court. Thereafter an issue out of chancery was submitted to a jury. The verdict and decree entered thereon was partly in favor of the bank and partly against it. It was dissatisfied with the same, and, after the court had overruled its motion to set aside the verdict, and after



the court had overruled another motion to remand the cause, entered its appeal, and brought the case to this court. It appears from a stipulation that on March 3, 1897, the parties in the case agreed, in order to facilitate the litigation, that certain suits which had been instituted by Fenton and Graham in the circuit court should be dismissed, and that they should be made parties defendant to this suit, which was subsequently done. It was also agreed that Mrs. Schuster might file her application for removal, but the plaintiff reserved its right to object to the jurisdiction of the circuit court, and to endeavor to remand the case if it should be removed. We do not see that this stipulation affects the questions presented here for determination in any way, certainly not favorably to the appellees.

The first question to be determined in this case is that of the jurisdiction of the circuit court, and that depends upon whether or not the case was properly removed from the state court. It will be seen from the foregoing summary of the proceedings that the case, as it stood in the circuit court when it was tried and determined, was there by reason of two removals. One of these removals was by Mrs. Lucretia Schuster on the ground of prejudice and local influence, and the other by Fenton and Graham on the ground of diverse citizenship. We will first consider the removal of Mrs. Schuster. The petition for removal was presented and the removal allowed, it will be perceived, after the case had been tried, and mistrial entered, in the state court. The question as to the stage at which a case may be removed from a state court to the circuit court of the United States under the local prejudice clause of the act of March 3, 1887, seems to have been fully settled by the supreme court in *Fisk v. Henarie*, 142 U. S. 459, 12 Sup. Ct. 207, in which case the language "at any time before the trial thereof" was construed, and its meaning settled. The following quotation from the opinion by the chief justice will show more clearly what the court did decide:

"The act of March 3, 1887, c. 373 (24 Stat. 552), and also as corrected by the act of August 13, 1888, c. 866 (25 Stat. 433, 435), provided that 'any defendant, being such citizen of another state, may remove such suit into the circuit court of the United States for the proper district, at any time before the trial thereof, when it shall be made to appear to the said circuit court that from prejudice or local influence he will not be able to obtain justice in such state court, or any other state court to which the said defendant may, under the laws of the state, have the right, on account of such prejudice and local influence, to remove said cause.' In view of the repeated decisions of this court in exposition of the acts of 1866, 1867, and 1875, it is not to be doubted that congress, recognizing the interpretation placed on the word 'final' in the connection in which it was used in the prior acts, and the settled construction of the act of 1875, deliberately changed the language, 'at any time before the final hearing or trial of the suit,' or 'at any time before the trial or final hearing of the cause,' to read, 'at any time before the trial thereof,' as in the act of 1875, which required the petition to be filed before or at the time at which the cause could first be tried, and before the trial thereof. The attempt was manifestly to restrain the volume of litigation pouring into the federal courts, and to return to the standard of the judiciary act, and to effect this in part by resorting to the language used in the act of 1875, as its meaning had been determined by judicial interpretation. This is the more obvious in view of the fact that the act of March 3, 1887, was evidently intended to restrict the jurisdiction of the circuit courts, as we have heretofore held. *Smith v. Lyon*, 133 U. S. 315, 10 Sup. Ct. 303; *In re Pennsylvania Co.*, 137 U. S. 451, 11 Sup. Ct. 141."

Justice Field and Justice Harlan dissented, but the foregoing extract is from the decision of the majority of the court. According to this decision, the case having been once tried in the state court, it was improperly removed on Mrs. Schuster's petition, and it is unnecessary to go into the sufficiency of the facts alleged to show prejudice and local influence or the other questions raised in the case.

The other removal from the state court to the federal court was by Fenton and Graham on the ground of diverse citizenship. Fenton and Graham bought from Bomar long after the suit by the bank against Bomar and others had been filed, and pending the litigation. The suit was commenced on February 17, 1894, and the conveyances from Bomar, trustee, to Fenton and Graham, were made in October, 1896. Under the authorities, they came into the litigation subject to the disabilities of those who were already parties to the suit. Bomar was not only a party, but a necessary party, to the suit. He was in possession of the land under a deed empowering him to sell the same, and make certain disposition of the proceeds. Being in actual possession and control of the land, and collecting the rents, as stated, it seems clear that he is not only a proper, but a necessary, party in a suit by one asserting title and the right to possession of the land. Bomar being a party to the suit, and a citizen and resident of Texas, and the bank being a Texas corporation, Fenton and Graham came into the case subject to the existing conditions, and to the then disabilities of the parties. One of the conditions and disabilities then existing was that the case was not removable, on the ground of diverse citizenship, to the circuit court of the United States. Bomar's disclaimer did not affect the status of the case in this respect.

In *Cable v. Ellis*, 110 U. S. 389, 4 Sup. Ct. 85, in which there was a similar question, the headnote to the decision is as follows:

"After a suit in equity involving title to real estate and priority of lien had long been pending in a state court, and the highest court in the state had decided some of the points in controversy, and had remanded the cause to the court below to have other issues determined, A. became interested in the property by grant from one of the parties to the suit, and intervened in it by leave of the state court to protect his rights at a time when the right of removing the cause from the state court to the federal court had expired as to all the parties. Held, that under the circumstances the intervention of A. was to be regarded as an incident to the original suit, and that he was subject to the disabilities resting on the party from whom he took title, and that, the time for removal having expired before he intervened, his right of removal was barred by that fact."

To the same effect, see *Railway Co. v. Shirley*, 111 U. S. 358, 4 Sup. Ct. 472.

In *Jefferson v. Driver*, 117 U. S. 272, 6 Sup. Ct. 729, the court, in the opinion, uses this language:

"As to the application of *J. W. Jefferson* for a removal under the act of 1875, the rule in *Cable v. Ellis*, 110 U. S. 389, 4 Sup. Ct. 85, applies. He was brought into the suit as a purchaser pendente lite, and the relief asked against him is only an incident to the original controversy. The proceeding is merely ancillary to the suit pending when he bought the property in dispute, and under which he got possession. It is, in short, only a part of the machinery in the administration of the cause. By purchasing pendente lite he connected himself with the suit, subject to the disabilities of the other parties in respect to a removal at the time he came in."

A similar question was before the circuit court for the Northern district of Georgia in *Railroad Co. v. Findley*, 32 Fed. 641, and the conclusion there reached was in line with the authorities above referred to which were cited and relied on to sustain the decision. See, also, *Wagon Works v. Benedict*, 14 C. C. A. 285, 67 Fed. 1, *Burnham v. Bank*, 3 C. C. A. 486, 53 Fed. 163, and *Railway Co. v. Twitchell*, 8 C. C. A. 237, 59 Fed. 727. If the decision of the court below was wrong in refusing to remand the case because Mrs. Schuster's removal was too late after a trial in the state court, and because Fenton and Graham could not remove on the ground of diverse citizenship, for the reasons hereinbefore stated, then the question of separable controversy discussed by counsel becomes immaterial. It may be proper to remark, however, that we do not understand any of the authorities construing the separable controversy clause of the act of March 3, 1887, to go to the extent that would make the controversy between Graham and the bank on the one hand and Fenton and the bank on the other hand separable controversies in the meaning of that act. It is a single suit by the bank against all of these defendants jointly, to recover the land in controversy, and we do not see in the case, or growing out of it, a separate controversy between either of the defendants and the plaintiff. The general aspect of this case as to the manner of its removal is not such as impresses us favorably. On the 5th of March, 1897, Fenton and Graham were made parties to this litigation. On the 16th of March thereafter Bomar filed his disclaimer, stating that he had only been holding under trust deeds, that he had sold the property to Fenton and Graham, and they would answer, setting up their rights in the premises. On the 27th of March thereafter Fenton and Graham, as has been stated, filed their petition and bond for removal. The courts will not be tenacious of jurisdiction attempted to be conferred upon them in this way. We are not to be understood as reflecting upon parties or counsel personally. We simply mean that in law the method employed cannot be allowed to avail to make a removable case. The stipulation between the parties, above referred to, instead of strengthening the case for the appellees, weakens it. Jurisdiction in the circuit court should grow out of the status of the parties to the cause which exists in due and regular course of the litigation, and not by the withdrawal of parties and the substitution of new parties, as seems to be true here, for the purpose only of making the case one cognizable in the circuit court. The conclusion from the foregoing is that this case was improperly removed to the circuit court, and for that reason the judgment of the court below is reversed, and the case remanded, with directions to the circuit court to remand the case to the state court from which it was removed.

## BALDWIN v. CHICAGO &amp; N. W. RY. CO.

(Circuit Court, W. D. Michigan. March 31, 1898.)

## FEDERAL JURISDICTION—DIVERSE CITIZENSHIP—CONSOLIDATED CORPORATIONS.

Where three railway corporations, organized under the laws of three different states, are consolidated under the laws of each of the states, the consolidated corporation is a citizen of each of the states; and a citizen of one of the states cannot maintain an action in a federal court sitting in that state against the corporation on the ground of diverse citizenship.

Smedley & Powers, for plaintiff.

R. C. Flannigan, for defendant.

SEVERENS, District Judge. The plaintiff, who brings this suit, is a citizen of the state of Michigan. The defendant is a corporation, resulting from the consolidation of three railway corporations previously existing, one in each of the several states of Illinois, Wisconsin, and Michigan, and organized under the laws of said states respectively. The consolidation was also authorized by the laws of each of the said states. The defendant is sued in the state of Michigan, and pleads to the jurisdiction of the court that, being sued here, it must be regarded as a citizen of Michigan, and that, as the plaintiff is also a citizen of this state, the suit cannot be maintained. I am of opinion that this objection must prevail. It is true that the defendant is, for the general purposes of jurisdiction, a citizen of each state by virtue of whose laws it was consolidated; but, when suit is brought against it in any of those states, it is regarded as the creature of the laws of that state, and its corporate existence elsewhere is ignored. Thus, when suit is brought against the defendant railway company, organized as it is, in the courts of Michigan, it is treated as a citizen of that state. The case of *Williamson v. Krohn*, 13 C. C. A. 668, 66 Fed. 655, illustrates this. *Krohn*, a citizen of Ohio, brought suit in the federal court in Kentucky against several defendants, one of which was the Central Railway & Bridge Company, a company constituted by the consolidation of an Ohio corporation with one in Kentucky under laws authorizing it in each of those states. It was held that the suit was rightly brought in Kentucky. So in the case of *Muller v. Dows*, 94 U. S. 444. The suit was brought in the United States circuit court in Iowa, by three persons, two of whom were citizens of New York and one was a citizen of Missouri. One of the defendants, the Chicago & Southwestern Railway Company, was consolidated by the union of two corporations, one of Iowa and the other of Missouri, under the laws of the two states, respectively, authorizing the consolidation. The supreme court held that the suit was properly brought in the federal court of Iowa. In that case reference was made to *Railway Co. v. Whitton's Adm'r*, 13 Wall. 270, where suit was brought in the federal circuit court in Wisconsin, by a citizen of Illinois against the Chicago & Northwestern Railway Company, which is also the defendant in the present suit. Then, as now, it was a corporation consolidated under the laws of Illinois, Wisconsin, and Michigan. The plaintiff's right to bring the suit was contested upon the ground that the defendant was a citizen of Illinois, the same state as that of the plain-

tiff. But the objection was overruled, and on appeal the ruling was confirmed. Mr. Justice Field, in delivering the opinion of the supreme court, after stating the contention of the defendant, said:

"The answer to this position is obvious. In Wisconsin the laws of Illinois have no operation. The defendant is a corporation, and, as such, a citizen of Wisconsin, by the laws of that state. It is not there a corporation or a citizen of any other state. Being there such, it can only be brought into court as a citizen of that state, whatever its status or citizenship may be elsewhere."

This statement of the law contains the gist of the whole matter. These propositions were reaffirmed in *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094. The plaintiff was a citizen of Illinois. The defendant, the Indianapolis & St. Louis Company, was a citizen of Indiana. It was an admitted fact that it was also a citizen of Illinois. This fact was held to create no difficulty. But it was further claimed that the plaintiff was not only a citizen of Illinois, but of Indiana also. Mr. Justice Miller, who delivered the opinion of the court, was at pains to show that this claim was not supported by the facts, but said that, if it were so, it was not settled that the plaintiff could not rely upon its Illinois citizenship to maintain the suit. In the present case the plaintiff has no other citizenship than that of Michigan, where the suit is brought. It may be added that it is the necessary and logical corollary of the doctrine on which the decisions in the above cases rest, namely, that the court looks only to the law of the state in which the suit is brought for the purpose of determining the citizenship of the corporation in such cases, that a citizen of one of the states in which the corporation exists cannot maintain a suit against it in the federal courts of the state whereof he is himself a citizen. The result is that the plea must be sustained, and the cause dismissed, for want of jurisdiction.

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#### NASHVILLE, C. & ST. L. RY. v. TAYLOR et al.

(Circuit Court, M. D. Tennessee. March 15, 1898.)

##### 1. COURTS—JURISDICTION.

Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them.

##### 2. JURISDICTION OF FEDERAL COURTS.

While, in determining a question of jurisdiction in courts of the United States, great care should be exercised not to entertain jurisdiction upon too doubtful ground, yet those courts have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given.

##### 3. SAME.

In that class of cases in which a federal question is involved, and on which jurisdiction in the courts of the United States depends, the character of the question is the same whether the jurisdiction exercised is appellate, original, or by removal, the jurisdiction in either form depending upon the constitutional grant of power.

##### 4. SAME—SUPREME AND CIRCUIT COURTS.

From this principle it follows that decisions of the supreme court of the United States in cases brought before it from the circuit courts, and those on writ of error to the highest court of a state, are equally instructive in determining when there is a federal question such as supports the original juris-

diction of the circuit court as being a suit "arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority" (excluding those which grow out of "a commission held or authority exercised under the United States").

5. SAME.

Whether a suit is one that arises under the constitution or laws of the United States is determined by the questions involved. If from them it appears that its correct decision depends upon the construction of either, then the case is one arising under the constitution or laws of the United States.

6. SAME—QUESTION OF JURISDICTION.

There is a clear distinction between the existence of a federal question, for the purpose of jurisdiction, and the actual decision of that question on its merits. The jurisdiction of the federal courts does not depend upon the validity of the claim set up under the constitution or laws of the United States, but upon the fact that the claim involves a real and substantial dispute or controversy in the suit.

7. FOURTEENTH AMENDMENT—EXECUTION OF STATE STATUTE.

State action, to which the prohibitions of the fourteenth amendment to the constitution of the United States extend, is not limited to a legislative enactment, as it comes from the hands of the legislature, but extends to all instrumentalities and agencies officially employed in the execution of the law down to the point where the personal and property rights of the citizen are touched.

8. SAME—EQUAL PROTECTION OF THE LAWS.

What constitutes a denial of the "equal protection of the laws" depends, in a large measure, upon what rights have been conferred or protection extended under the constitution and laws of the particular state in which the question arises.

9. SAME—OPPRESSIVE DISCRIMINATION.

When a state itself undertakes to deal with its citizens by legislation, it may not single out a class of citizens, and subject that class to oppressive discrimination, especially in respect to those rights so important as to be protected by constitutional guaranty.

10. SAME.

While it may be true that the proposition that a tax statute, or a tax laid under a statute, is in violation of the constitution of the state, is not of itself necessarily sufficient to constitute a violation of Const. U. S. Amend. 14, yet when, in addition, the statute results in an arbitrary and oppressive discrimination in regard to a large class of citizens, or a large species of property, it is such class legislation, and such denial of the equal protection of the laws, as renders it obnoxious to the fourteenth amendment.

11. SAME—PROVISION OF STATE CONSTITUTION.

Where the organic law of a state has brought every citizen in the state into one constitutional class for the purpose of taxation, and has provided that taxes shall be assessed and levied on value as the only basis, and at a rate equal and uniform in proportion to value, it is not competent, under the form of classification, to divide up this class, and violate the constitution.

12. JURISDICTION OF FEDERAL COURT—FOURTEENTH AMENDMENT—STATE TAX LAW.

Complainant brought suit in the federal circuit court in Tennessee against the state board of equalizers, to enjoin the certification by them to the state comptroller of the assessed valuation on complainant's property for taxation for 1897 and 1898, upon the ground, among others, that under the laws applicable to railroad and telephone properties it had been deprived of the constitutional right of equalization provided for and allowed in respect to all other property in the state subject to taxation, and in consequence its property had been assessed at 25 to 40 per cent. more in proportion to value than other classes of property. The state constitution (article 2, § 28) provides that "all property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of prop-

erty . . . shall be taxed higher than any other species . . . of the same value." *Held*, on demurrer, that the suit involved a federal question, under the fourteenth amendment to the federal constitution, which conferred jurisdiction upon the circuit court.

Vertrees & Vertrees, J. M. Dickinson, Smith & Maddin, East & Fogg, and J. D. B. De Bow, for complainant.

G. W. Pickle, Atty. Gen., James C. Bradford, and Granberry & Marks, for defendants.

CLARK, District Judge. This suit is brought against the defendants as the state board of equalizers, to enjoin the certification by them to the state comptroller of the assessed valuation on complainant's property for taxation for 1897 and 1898, and in this method to prevent the comptroller from certifying the apportioned valuations to the various counties and municipal corporations in the state entitled to collect taxes in proportion to the mileage of railway lying in such counties and municipal corporations. It appears from the allegations of the bill in this case, as it did in those in Railroad and Telephone Cases, 85 Fed. 302, that the complainant sought to have the assessments corrected before the board of equalizers, and the bills tender or offer to pay the full amount of the taxes which would be due with complainants' property assessed at the same rate at which other property in the state is assessed. The general grounds of relief stated in the bill are:

"(1) That the assessments were made by the state railroad commissioners, appointed under an act which, it is claimed, is unconstitutional, as violating the state constitution, and the United States constitution, and these assessors could not, therefore, lawfully make the assessments. (2) That the same property had been already validly assessed and certified for the year 1897, and that a reassessment for the year 1897 is unauthorized and void. (3) That discrimination is made against railroad property, which, if sold for unpaid taxes, is not sold subject to redemption, while other property as a species or class is. This, it is claimed, is a denial of the equal protection of the law by the state. (4) Errors in receiving and rejecting evidence by the board are specified. (5) It is alleged that plaintiff has been deprived of the right of equalization under the laws applicable to railroad and telephone properties, while such equalization is provided for and allowed in respect to all other property in the state subject to taxation. It is alleged that, in consequence of the denial of this right, complainant's property is assessed at 25 to 40 per cent. more in proportion to value than other classes of property in the state. This, it is said, is in violation of the state constitution, and also of Const. U. S. Amend. 14, wherein it is provided: 'Nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.'"

The provision of the state constitution is as follows:

"All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state. No one species of property from which a tax may be collected, shall be taxed higher than any other species of property of the same value." Const. Tenn. art. 2, § 28.

In this connection the bill sets out, somewhat in detail, the provisions of the tax laws applicable to railroad and telephone properties as a class, and those which apply to other property as a class, including the features which it is claimed are discriminating in character, stating also the results of these laws in their practical administration.

The case is heard on application for injunction and on demurrer to the bill.

The question as to the jurisdiction of this court, raised by the demurrer, must first be considered and decided, for it depends upon the disposition to be made of that question whether it is within the province of this court to determine any other issue presented in the case. This is the question to which the discussion has been mainly directed, and relates to federal, as distinguished from state, jurisdiction. The argument has taken such a range as renders it necessary to examine at some length into the general jurisdiction of the courts of the United States, original and appellate, over "suits of a civil nature at common law or in equity," as shown by the decisions of the supreme court of the United States and the legislation of congress, first referring to the constitutional grant or declaration of the judicial power, which lies at the very foundation of the whole matter. Among other specified cases, the national constitution declares that "the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States and treaties made, or which shall be made under their authority." Const. art. 3, § 2. The constitution further ordains "that the judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress may, from time to time, ordain and establish." Id. § 1. The constitution expressly extended the original jurisdiction of the supreme court of the United States to certain named cases, and conferred on that court appellate jurisdiction over all other cases coming within the national judicial power, "with such exceptions, and under such regulations, as the congress shall make." The constitution did not otherwise undertake to distribute the jurisdiction,—that subject being left to congress,—the constitution in that respect not being self-executing. It has consequently been held from the beginning that the appellate jurisdiction of the supreme court can only be exercised in accordance with the acts and regulations of congress upon that subject. *Wiscart v. D'Auchy* (1794) 3 Dall. 321; *American Const. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U. S. 378, 13 Sup. Ct. 758; *Mining Co. v. Turck*, 150 U. S. 141, 14 Sup. Ct. 35. Jurisdiction is the power to hear and determine the subject-matter in controversy between parties to a suit, to adjudicate or exercise any judicial power over them. *Rhode Island v. Massachusetts*, 12 Pet. 657. The supremacy of the national constitution and laws was declared in this language:

"This constitution and the laws of the United States, which shall be made in pursuance thereof, shall be the supreme law of the land." Const. U. S. art. 6, cl. 2.

To preserve this supremacy, it was deemed necessary to invest the courts of the United States with the power of original or final determination of all causes of the classes specified in the constitution.

In *Cohens v. Virginia*, 6 Wheat. 380, the supreme court of the United States said:

"The general government, though limited as to its objects, is supreme with respect to those objects. This principle is a part of the constitution, and, if there be any who deny its necessity, none can deny its authority."



And, speaking of the obligation to preserve the principles and supremacy of the constitution, the court observed:

"One of the instruments by which this duty may be peaceably performed is the judicial department. It is authorized to decide all cases of every description arising under the constitution or laws of the United States."

The same proposition was stated in another form by the court in *Whitten v. Tomlinson*, 160 U. S. 238, 16 Sup. Ct. 300, Mr. Justice Gray saying:

"By the judicial system of the United States, established by congress under the power conferred upon it by the constitution, the jurisdiction of the courts of the several states has not been controlled or interfered with, except so far as necessary to secure the supremacy of the constitution, laws, and treaties of the United States."

And so, in *Osborn v. Bank*, 9 Wheat. 818, the court said:

"All governments which are not extremely defective in their organization must possess, within themselves, the means of expounding, as well as enforcing, their own laws. If we examine the constitution of the United States, we find that its framers kept this great political principle in view. The second article vests the whole executive power in the president, and the third article declares 'that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made under their authority.' This clause enables the judicial department to receive jurisdiction to the full extent of the constitution, laws, and treaties of the United States, when any question respecting them shall assume such a form that the judicial power is capable of acting on it. That power is capable of acting only when the subject is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the constitution declares that the judicial power shall extend to all cases arising under the constitution, laws, and treaties of the United States."

In the cases of *Cohens v. Virginia*, 6 Wheat. 264, and *Osborn v. Bank*, 9 Wheat. 738, the reasons for the grant of judicial power to the courts of the United States, and the extent and limits of such power, are explained at length, and with great care; and these leading cases have been often affirmed, followed, and applied down to the present time. *U. S. v. Old Settlers*, 148 U. S. 468, 13 Sup. Ct. 650.

It must be observed in the outset, and never forgotten, that the jurisdiction of the courts of the United States, depending on the subject-matter or character of the case, whether exercised directly as original jurisdiction, or indirectly in the form of appellate jurisdiction over final judgments of the state courts, extends to and is limited by the class of cases specified in the constitution in which the jurisdiction depends upon the character of the case. The application of this proposition will appear further on.

In *Osborn v. Bank*, 9 Wheat. 818, Mr. Chief Justice Marshall, speaking for the court, said:

"Original jurisdiction, so far as the constitution gives a rule, is co-extensive with the judicial power. We find in the constitution no prohibition to its exercise in every case in which the judicial power can be exercised. It would be a very bold construction to say that this power could be applied in its appellate form only to the most important class of cases to which it is applicable. The constitution establishes the supreme court, and defines its jurisdiction. It enumerates cases in which its jurisdiction is original and exclusive, and then defines that which is appellate, but does not insinuate that in any such case the power cannot be exercised in its original form by courts of original jurisdiction. It is not insinuated that the judicial power, in cases depending on the character of the cause, cannot be exercised in the first instance in the courts of

the Union, but must first be exercised in the tribunals of the state; tribunals over which the government of the Union has no adequate control, and which may be closed to any claim asserted under a law of the United States. We perceive, then, no ground on which the proposition can be maintained that congress is incapable of giving the circuit courts original jurisdiction in any case to which the appellate jurisdiction extends."

It is very true that congress, in the distribution of jurisdiction not otherwise distributed and extended by the constitution itself, may confer all or less than all of this jurisdiction on different courts of the Union, and may vest such jurisdiction in those courts in an original or appellate form, as it may think best; but in the distribution of jurisdiction the constitutional limit on jurisdiction must be respected, and cannot be exceeded. So that jurisdiction, original or appellate, as depending on the subject-matter or character of the litigation, must be limited to cases involving a federal question, and cannot be extended to cases nonfederal in their character. Practically, and in suits of a civil nature, the cases coming within the jurisdiction of the courts of the United States divide themselves into two great classes: First, where the jurisdiction is founded on the character of the parties; and, second, where jurisdiction depends on the subject-matter or character of the suit. In regard to these two classes of cases the supreme court, in *Cohens v. Virginia*, supra, said:

"In one description of cases the jurisdiction of the court is founded entirely on the character of the parties, and the nature of the controversy is not contemplated by the constitution. The character of the parties is everything, the nature of the case nothing. In the other description of cases the jurisdiction is founded entirely on the character of the case, and the parties are not contemplated by the constitution. In these the nature of the case is everything, the character of the parties nothing."

In the judiciary act of 1887, as corrected by the act of 1888 (25 Stat. 434), the provision with respect to the original jurisdiction of this court is:

"That the circuit courts of the United States shall have original cognizance concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority."

The original cognizance here is "concurrent with the courts of the several states," for the presumption in all cases is, and justly so, that the courts of the states will do what the constitution and laws of the United States require. *St. Louis, I. M. & S. R. Co. v. Southern Exp. Co.*, 108 U. S. 24, 2 Sup. Ct. 6; *City of New Orleans v. Benjamin*, 153 U. S. 424, 14 Sup. Ct. 905. When the jurisdiction is founded upon the subject-matter alone, regardless of the citizenship of the parties, the case must be one arising under the national constitution or laws, or, as the common expression is, must be a case which involves a "federal question." The early provision made by congress in the judiciary act of 1789 (section 12) for the removal of causes from the state courts to the courts of the United States, re-enacted in substance in Rev. St. § 369, as clause 1, and continued in force until 1875, did not authorize a removal from the state courts to the courts of the United States on account of the presence in the case of a federal ques-

tion. Indeed, the first act of congress which conferred on the circuit courts of the United States general jurisdiction of suits of a civil nature at common law or in equity "arising under the constitution or laws of the United States, or treaties made, or which shall be made under their authority," was the act of 1875 (18 Stat. 470). *Tennessee v. Union & Planters' Bank*, 152 U. S. 459, 14 Sup. Ct. 654. In this judiciary act of 1875 is found the explanation for the enlarged limits of federal jurisdiction, original and by way of removal, noticeable in recent years. Under the act of 1875, which gave to the federal courts original jurisdiction of cases involving a federal question, it was held that this jurisdiction could be exercised only in cases in which the plaintiff's statement of his cause of action showed that he relied on some right under the federal constitution or laws. *Metcalf v. Watertown*, 128 U. S. 586, 9 Sup. Ct. 173; *Mining Co. v. Turck*, 150 U. S. 138, 14 Sup. Ct. 35. But under section 2 of the same act it was sufficient to justify a removal by the defendant on the same ground if the record, at the time of the removal, showed that either party claimed a right under the constitution or laws of the United States. *Tennessee v. Union & Planters' Bank*, 152 U. S. 460, 14 Sup. Ct. 654.

Now, the first section of the act of 1887 relating to the original jurisdiction of the federal courts in this class of cases, where the federal question is the ground of jurisdiction, is identical in language and effect with the corresponding section of the act of 1875, except that the jurisdictional amount is increased; and, of course, the section in each act relating to the original jurisdiction of this court must receive the same construction. Removal of suits by defendants under section 2 of this act of 1887 is limited to suits "of which the circuit courts of the United States are given original jurisdiction by the preceding section." The jurisdiction of the circuit court is therefore limited on removal by the defendant to such suits as might have been instituted in that court by the plaintiff under the first section, and the effect was to change and greatly restrict jurisdiction by removal. The result is that a case not depending upon the citizenship of the parties nor otherwise specially provided for, cannot be removed from a state court into a circuit court of the United States as one arising under the constitution or laws of the United States, unless that appears by the plaintiff's statement of his own claim; and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal, or any pleading subsequent to plaintiff's statement of his own claim, as might have been done under the corresponding clause in the second section of the act of 1875. *Chappell v. Waterworth*, 155 U. S. 102, 15 Sup. Ct. 34. The effect is to decrease the number of cases which may be brought into this court from the state courts by removal, and to increase the number of cases which will be brought before the supreme court on writ of error in the exercise of its appellate jurisdiction over final judgments rendered by the highest courts of the states in which a federal question is involved. Under the existing judiciary act, jurisdiction in this court by removal is limited strictly to cases which might have been brought in this court in the first instance. This restriction, it will be observed, relates to the time and mode in which the federal question is presented,

and not to the character of the question itself as being of a federal nature; that question being the same in respect of both original and removal jurisdiction. The jurisdiction of the circuit courts of the United States was, by this act, contracted in other respects, which need not be noticed, thus manifesting a tendency toward the limits of the original judiciary act of 1789.

Under the judicial system of the United States as now established by congress under the power conferred upon it by the constitution, the courts of the United States, besides their original jurisdiction, exercise jurisdiction in three different methods over proceedings instituted in the courts of the states, and subsequently brought before the courts of the United States: First. Cases may be removed on writ of error to final judgments rendered by the highest court of a state in cases in which there is set up or claimed a right under the constitution, laws, or treaties of the United States, and the decision of the state court is against such right. Rev. St. § 709. In this class of cases the final judgments of the highest courts of the states may be re-examined and reversed or affirmed by the supreme court of the United States. Second. Cases may be removed into the circuit court of the United States from a state court under section 2 of the judiciary act of 1887 "of suits of a civil nature arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority," which has already been sufficiently referred to. Third. In the exercise of the power conferred on them, the supreme, circuit, and district courts may grant writs of habeas corpus for the purpose of inquiring into the cause of restraint of liberty of prisoners held in custody under authority of a state in violation of the constitution, laws, or treaties of the United States, and other specified cases. *Whitten v. Tomlinson*, 160 U. S. 238, 239, 16 Sup. Ct. 297. With respect to the appellate jurisdiction of the supreme court of the United States over final judgments of the highest court of the state on writ of error, it is to be remarked that the re-examination of such judgment extends only to the federal question, and not to other issues in the case of a nonfederal character, and the question must be one of law, and not of fact. *Murdock v. City of Memphis*, 20 Wall. 590; *Dower v. Richards*, 151 U. S. 658, 14 Sup. Ct. 452; *Union Nat. Bank of Chicago v. Louisville, N. A. & C. R. Co.*, 163 U. S. 329, 16 Sup. Ct. 1039. Consequently, if the judgment of the state court was rested on grounds independent of the federal question sufficient in themselves to sustain the judgment, the writ of error will be dismissed. *Hammond v. Johnston*, 142 U. S. 73, 12 Sup. Ct. 141; *Haley v. Breeze*, 144 U. S. 130, 12 Sup. Ct. 836. The court may, of course, examine the case sufficiently to enable it to deal properly with the federal question, and to determine whether there are other grounds sufficient to support the judgment regardless of the federal question.

It is to be further observed that to sustain the original jurisdiction of this court, as well as the jurisdiction by removal of cases from a state court under section 2 of the judiciary act, where the jurisdiction depends on the existence of a federal question, the suit must be one arising directly under the constitution or laws of the United States,

or treaties made or which shall be made under their authority; whereas, under Rev. St. § 709, the appellate jurisdiction of the supreme court of the United States extends to suits in which any right, title, or privilege is claimed under the constitution, or any treaty or statute of the United States, or under "a commission held, or authority exercised under the United States," and the decision is against such right, title, or privilege. So that the appellate jurisdiction extends to cases not only where the federal question arises directly or primarily under the constitution, treaty, or statute, but to cases where the question arises, or is involved indirectly, or secondarily, under "a commission held or authority exercised under the United States." *Carson v. Dunham*, 121 U. S. 422, 7 Sup. Ct. 1030. The court, referring to this distinction in the case just cited, said:

"Before considering further this branch of the case, it is proper to notice the difference between the provisions of the act of 1875 for the removal of suits presenting federal questions, and those in section 709 of the Revised Statutes for the review by this court of the decisions of the highest courts of the states. Under the act of 1875, for the purposes of removal, the suit must be one 'arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority'; that is to say, the suit must be one in which some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the constitution, or a law or treaty of the United States, or sustained by a contrary construction. *Starin v. City of New York*, 115 U. S. 248, 257, 6 Sup. Ct. 28, and cases there cited. But under section 709 there may be a review by this court of the decisions of the highest courts of the states in suits 'where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity, specially set up or claimed by either party under such constitution, treaty, statute, commission, or authority.' For the purposes of a removal, the constitution or some law or treaty of the United States must be directly involved, while for the purposes of review it will be enough if the right in question comes from a 'commission held or an authority exercised under the United States.' Cases, therefore, relating to the jurisdiction of this court for review, are not necessarily controlling in reference to removals."

It is to be observed again that the distinction here pointed out, does not relate to any difference in the nature of the federal question on which jurisdiction depends, exercised in either form, but relates to a difference in the mode in which the question arises, and grows out of the more comprehensive language employed in reference to appellate jurisdiction under section 709 than in the judiciary act in which original jurisdiction is determined and defined. The class of cases, then, to which the appellate jurisdiction of the supreme court of the United States extends, is more comprehensive than the class coming within the original jurisdiction of this court by reason of the manner in which the question is presented. This is so, however, only because congress has made it so, and not because, under the definition of federal jurisdiction, as contained in the constitution, the exercise of jurisdiction in the two methods might not have been made co-extensive as to the class of cases.

In *Mayor v. Cooper*, 6 Wall. 252, Mr. Justice Swayne, giving the judgment of the court, said:

"As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The constitution must have given to the court the capacity to take it, and an act of con-

gress must have supplied it. Their concurrence is necessary to vest it. It is the duty of congress to act for that purpose up to the limits of the granted power. They may fall short of it, but cannot exceed it. To the extent that such action is not taken, the power lies dormant. It can be brought into activity in no other way. Jurisdiction, original or appellate, alike comprehensive in either case, may be given. The constitutional boundary line of both is the same. Every variety and form of appellate jurisdiction, within the sphere of the power, extending as well to the courts of the states as to those of the nation, is permitted. \* \* \* The jurisdiction here in question involves the same principle, and rests upon the same foundation, with that conferred by the twenty-fifth section of the judiciary act of 1789."

It has been seen that, while the appellate jurisdiction extends to a larger class of cases, the actual exercise of that jurisdiction is restricted to the federal question only. On the contrary, while the original jurisdiction of this court under section 1 of the judiciary act and its jurisdiction by removal under section 2 of the same act is limited to cases in which the federal question is directly involved, when the jurisdiction does properly attach, it extends to the whole case, and to all of the issues raised, whether of a federal or nonfederal character, and the court has power to decide upon all questions. *Osborn v. Bank*, 9 Wheat. 738; *Mayor v. Cooper*, 6 Wall. 247; *Southern Pac. R. Co. v. California*, 118 U. S. 109, 6 Sup. Ct. 993; *Ames v. Kansas*, 111 U. S. 449, 4 Sup. Ct. 437; *Railroad Co. v. Mississippi*, 102 U. S. 135. And so in a direct appeal from the final judgment of a circuit court in such cases to the supreme court of the United States the jurisdiction of that court in reviewing the judgment extends to the whole case, and that court may pass by the federal question, which gives jurisdiction, and dispose of the case upon questions of general or local law, independently of the federal question, as was done in the case of *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394, 6 Sup. Ct. 1132, and *Insurance Co. v. Austin*, 168 U. S. 685, 18 Sup. Ct. 223. It is apparent, I think, without extending the discussion further, that in that class of cases in which a federal question is involved, and on which jurisdiction in the courts of the United States depends, the character of the question is the same, whether the jurisdiction exercised is appellate, original, or by removal, the jurisdiction in either form depending on the constitutional grant of power. In this view, decisions of the supreme court of the United States in cases brought before it from the circuit courts of the United States, and those on writ of error to the highest court of a state, are equally instructive in determining when there is a federal question, such as supports the original jurisdiction of this court as being a suit "arising under the constitution or laws of the United States, or treaties made or which shall be made under their authority," excluding, of course, from the original jurisdiction, those which grow out of "a commission held or authority exercised under the United States," as explained in *Carson v. Dunham*, 121 U. S. 422, 7 Sup. Ct. 1030, and again in *Cooke v. Avery*, 147 U. S. 375, 13 Sup. Ct. 340.

This inquiry into the exercise of jurisdiction in different forms, as depending on a federal question, has been thought necessary in view of the ground on which the argument for defendants proceeds. The contention for defendants is that the federal questions on which original and appellate jurisdiction, under section 709, Rev. St., depend, are

different. It is further insisted that color of ground for the federal claim justifies the exercise of the appellate jurisdiction, while the federal claim, to support original jurisdiction, must be well founded. I do not think either position is tenable. It will be well, before dealing more closely with the question of jurisdiction here raised, to note the clear distinction between the existence of a federal question, for the purpose of jurisdiction, and the actual decision of that question on its merits. Whether there is a claim which presents the federal question, and whether that claim is well founded, when considered on its merits, are different and distinct questions. The one goes to jurisdiction, and the other to the merits of the case. It is true, the question must be raised, and it is equally true that the court must take jurisdiction before it can determine whether the right is valid or well founded. This distinction must be attentively observed to avoid confusion. The distinction was referred to in the case of *Mayor v. Cooper*, 6 Wall. 247, the court saying:

"We entertain no doubt of the constitutionality of the jurisdiction given by the acts under which this case has arisen. The validity of the defense authorized to be made is a distinct subject. It involves wholly different inquiries. We have not had occasion to consider it. It has no connection whatever with the question of jurisdiction."

And again, in *Insurance Co. v. Needles*, 113 U. S. 574, 5 Sup. Ct. 681, Mr. Justice Harlan said:

"And our jurisdiction is not defeated because it may appear, upon examination of this federal question, that the statutes of Illinois are not repugnant to the provisions of that instrument. Such an examination itself involves the exercise of jurisdiction. The motion to dismiss the writ of error upon the ground that the record does not raise any question of a federal nature must, therefore, be denied."

So, in *Southern Pac. R. Co. v. California*, 118 U. S. 112, 6 Sup. Ct. 995, Mr. Chief Justice Waite, delivering the judgment of the court, said:

"Applying these rules, which must now be considered as settled, to the present case, it is apparent that the court below erred in deciding that the suit was not removable, for it distinctly appears that the right of the state to recover was made by the pleadings to depend (1) on the power of the state to tax the franchises of the corporation derived from the acts of congress, which were specially referred to, as well as the property used in connection therewith; and (2) on the effect of article 14 of the amendment of the constitution on the validity of the statutes under which the taxes sued for were levied. The first depended on the construction of the acts of congress, and the second on the construction of the constitutional amendment. If decided in one way, the state might recover; if in another, it would be defeated, at least in part. The right of removal does not depend upon the validity of the claim set up under the constitution or laws. It is enough if the claim involves a real and substantial dispute or controversy in the suit. In this case there can be no doubt about that."

The distinction was brought out clearly again in the recent case of *Insurance Co. v. Austin*, 168 U. S. 695, 18 Sup. Ct. 227, in which Mr. Justice White, speaking for the court, said:

"Of course, the claim must be real and colorable, not fictitious and fraudulent. The contention here made, however, is not that the bill, without color of right, alleges that the state law and city ordinances violate the constitution of the United States, but that such claim as alleged in the bill is legally unsound. The argument, then, in effect, is that the right to a direct appeal to this court does

not exist where it is claimed that a state law violates the constitution of the United States, unless the claim be well founded. But it cannot be decided whether the claim is meritorious, and should be maintained, without taking jurisdiction of the case."

The same distinction had been referred to, though in general terms, in *Cohens v. Virginia*, 6 Wheat. 264; the court saying:

"In such cases the constitution and the law must be compared and construed. This is the exercise of jurisdiction. It is the only exercise of it which is allowed in such a case. \* \* \* The whole merits of this case, then, consist in the construction of the constitution and the act of congress. The jurisdiction of the court, if acknowledged, goes no further. This we are required to do without the exercise of jurisdiction. The counsel for the state of Virginia have, in support of this motion, urged many arguments of great weight against the application of the act of congress to such a case as this; but those arguments go to the construction of the constitution, or of the law, or of both, and seem, therefore, rather calculated to sustain their cause upon its merits than to prove a failure of jurisdiction in the court."

In determining a question of jurisdiction in courts of the United States great care should be exercised not to entertain jurisdiction upon too doubtful ground. The principle which should control the court's action in respect to such a question was well stated in the case already referred to more than once, *Cohens v. Virginia*; Mr. Chief Justice Marshall saying:

"It is most true that this court will not take jurisdiction if it should not, but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the constitution. Questions may occur which we would gladly avoid; but we cannot avoid them. All we can do is to exercise our best judgment, and conscientiously to perform our duty."

It is conceded, and could not be controverted, that if the *Railroad Tax Cases*, 13 Fed. 722, and *County of Santa Clara v. Southern Pac. R. Co.*, 18 Fed. 385, are to be accepted as a sound exposition of the law, this court has jurisdiction of the case presented in the bill. The insistence is that these cases can no longer be regarded as authority. This contention is based in part upon the ground that when the latter case went before the supreme court of the United States in *Santa Clara Co. v. Southern Pac. R. Co.*, 118 U. S. 394, 6 Sup. Ct. 1132, that court did not expressly approve the doctrine in relation to the fourteenth amendment as declared in the court below. I am unable to see that there is any force in this contention, as the court passed by, and did not find it necessary, in the view it took of the case, to consider or determine, the federal question involved, and the case was disposed of on other questions of law. So, too, the cases of *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, and *Home Ins. Co. v. New York State*, 134 U. S. 594, 10 Sup. Ct. 593, are relied on as establishing a doctrine in conflict with those cases. Reference will be made to these cases further on, and they are passed by for the present. The cases at circuit, referred to, were decided by Mr. Justice Field of the supreme court of the United States, and Sawyer, circuit judge, upon elaborate argument and full consideration. In view



of the eminent character of the judges, it will be conceded, I think, that these cases must be regarded as of the highest authority which any case decided at the circuit can possess. The cases have been often followed and approved on the circuit, as well as in courts of the highest authority in some of the states.

In *Fraser v. McConway & Torley Co.*, 82 Fed. 257, decided in 1897, the *Railroad Tax Cases*, 13 Fed. 722, were referred to approvingly by Judge Acheson in the following language:

"The court there, in discussing the prohibitions of the amendment, said: 'Unequal exactions in every form or under any pretense are absolutely forbidden, and, of course, unequal taxation, for it is in that form that oppressive burdens are usually laid.'"

The cases have also been cited by recent text writers as authority, without a suggestion anywhere that the doctrine of the cases has been questioned in subsequent decisions. I think it will be admitted that under such circumstances it is doubtful whether I could properly assume to deny the authority of these cases, unless the doctrine of the cases has been disapproved by a circuit court of appeals, or the supreme court of the United States, by clear implication, as it is admitted that no court has done so expressly.

In *Bell's Gap R. Co. v. Pennsylvania*, 134 U. S. 232, 10 Sup. Ct. 533, the question considered was the validity of an assessment on the nominal value of bonds, instead of their real value, held by residents of Pennsylvania; and among the grounds for the appeal it was claimed that the tax was in violation of the fourteenth amendment, because the assessment was upon the nominal value, and not the real value of the bonds, because owners of the bonds had no notice, and no opportunity to be heard, and because the deduction of the tax from the interest due the bondholders in Pennsylvania took their property without due process of law, and denied to them the equal protection of the law. On motion to dismiss the writ of error for want of jurisdiction, it was held that there was clearly a federal question raised, and that the writ could not be dismissed for want of jurisdiction. The judgment of the supreme court of Pennsylvania was affirmed. The court, discussing the fourteenth amendment as affecting the ordinary regulations in a tax system adopted by a state, said:

"All such regulations, and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the state in framing their constitution. But clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject that would include all cases. They must be decided as they arise."

In *Home Ins. Co. v. New York State*, 134 U. S. 594, 10 Sup. Ct. 593, the question was as to the validity of a tax imposed by statute upon the corporate franchise or business of all corporations doing business in the state of New York, or incorporated under the laws of that state. The tax was measured by the extent of the dividends of the corporation in the current year. The contention of the plaintiff in error was that the tax in question was levied upon its capital stock, and therefore invalid, so far as the bonds of the United States constituted a

part of that stock, which the court said would render the tax invalid if that contention were well founded. It was decided, however, that the tax was one upon the right or privilege to be a corporation, and to do business within the state in a corporate capacity, and not a tax upon the privilege or franchise which the company, when incorporated, might exercise; and that the statute as thus construed did not violate the provision of the statute of the United States exempting bonds of the United States from taxation. The case, like all cases, must be read in the light of its own facts, and the language of the opinion must be construed in connection with the subject under consideration. I cannot perceive that anything said in that case conflicts with the decision in the Railroad Tax Cases, Mr. Justice Field himself having written the opinion in both cases.

The early cases of *Cohens v. Virginia* and *Osborn v. Bank* stated at great length the jurisdiction of the courts of the United States as depending on the subject-matter and arising under the constitution and laws of the United States. The former was a case of appellate jurisdiction on error to the state court, and the latter a case of original jurisdiction, brought before the supreme court by appeal from the circuit court of Ohio. Those cases made no distinction in the character of the federal question involved in the two distinct forms of exercising jurisdiction, nor has any distinction or difference been suggested in subsequent cases in which those cases have been repeatedly cited indiscriminately as defining a federal question either for original or appellate jurisdiction. In *Cohens v. Virginia*, 6 Wheat. 264, it was said:

"If it be, to maintain that a case arising under the constitution or a law must be one in which a party comes into court to demand something conferred on him by the constitution or a law, we think the construction too narrow. A case in law or equity consists of the right of the one party, as well as of the other, and may truly be said to arise under the constitution or a law of the United States whenever its correct decision depends on the construction of either. Congress seems to have intended to give its own construction of this part of the constitution in the twenty-fifth section of the judiciary act, and we perceive no reason to depart from that construction."

In *Tennessee v. Davis*, 100 U. S. 257, Mr. Justice Strong, speaking for the court, and referring to cases involving federal questions, said:

"What constitutes a case thus arising was early defined in the case cited from 6 Wheat. 264. It is not merely one where a party comes into court to demand something conferred upon him by the constitution or by a law or treaty. A case consists of the right of one party as well as the other, and may truly be said to arise under the constitution or a law or a treaty of the United States whenever its correct decision depends upon the construction of either. Cases arising under the laws of the United States are such as grow out of the legislation of congress, whether they constitute the right or privilege, or claim or protection, or defense of the party, in whole or in part, by whom they are asserted. Story, Const. § 1647; *Cohens v. Virginia*, 6 Wheat. 379. It was said in *Osborn v. Bank*, 9 Wheat. 738: 'When a question to which the judicial power of the Union is extended by the constitution forms an ingredient of the original cause, it is in the power of congress to give the circuit courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.'"

In the case of *U. S. v. Old Settlers*, 148 U. S. 427, 13 Sup. Ct. 650, Mr. Chief Justice Fuller, speaking for the court, said:

"As a case arises under the constitution or laws of the United States whenever its decision depends upon the correct construction of either (*Cohens v. Vir-*

ginla, 6 Wheat, 264, 379; *Osborn v. Bank*, 9 Wheat. 737, 824), so a case arising from or growing out of a treaty is one involving rights given or protected by a treaty. *Owings v. Norwood's Lessee*, 5 Cranch, 344, 348."

In *Hamblin v. Land Co.*, 147 U. S. 531, 13 Sup. Ct. 353, the court, through Mr. Justice Brewer, said:

"It is doubtful whether there is a federal question in this case. A real, and not a fictitious, federal question is essential to the jurisdiction of this court over the judgments of state courts. *Millingar v. Hartupée*, 6 Wall. 258; *New Orleans v. New Orleans Waterworks Co.*, 142 U. S. 79, 87, 12 Sup. Ct. 142. In the latter case it was said that 'the bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.'"

And in the case before referred to of *Insurance Co. v. Austin*, 168 U. S. 695, 18 Sup. Ct. 223, the court enunciated the same rule as to what constitutes a federal question. See, also, *New Orleans v. Benjamin*, 153 U. S. 411, 14 Sup. Ct. 905.

In *Cooke v. Avery*, 147 U. S. 384, 13 Sup. Ct. 344, Mr. Chief Justice Fuller, giving the judgment of the court, used this language:

"Whether a suit is one that arises under the constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege, or immunity on which the recovery depends will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the constitution or laws of the United States. *Osborn v. Bank*, 9 Wheat. 738; *Starin v. City of New York*, 115 U. S. 248, 257, 6 Sup. Ct. 28. In *Carson v. Dunham*, 121 U. S. 421, 7 Sup. Ct. 1030, it was ruled that it was necessary that the construction either of the constitution or some law or treaty should be directly involved in order to give jurisdiction, although for the purpose of the review of the judgments of state courts under section 709 of the Revised Statutes, it would be enough if the right in question came from a commission held or authority exercised under the States."

*City R. Co. v. Citizens' St. R. Co.*, 166 U. S. 557, 17 Sup. Ct. 653, was a case of original jurisdiction, brought before the supreme court of the United States on appeal from the circuit court for the district of Indiana. Both parties were corporations and citizens of Indiana, and the federal question was whether the Citizens' Railroad Company had a valid contract with the city of Indianapolis which was impaired by a subsequent contract with the City Railway Company. It was held that the circuit court had original jurisdiction of the case; Mr. Justice Brown, speaking for the court, saying:

"There can be no doubt that the circuit court had jurisdiction of the case, notwithstanding the fact that both parties are corporations and citizens of the state of Indiana. It should be borne in mind in this connection that jurisdiction depended upon the allegations of the bill, and not upon the facts as they subsequently turned out to be. The gravamen of the bill is that under the act of the general assembly of 1861, and the ordinances of January 18, 1864, and April 7, 1880, the Citizens' Railroad Company had become vested with certain exclusive rights to operate a street railway in the city of Indianapolis, either in perpetuity or for the term of thirty years or thirty-seven years, which the city had attempted to impair by entering into a contract with the City Railway Company to lay and operate a railway upon the same streets. All that is necessary to establish the jurisdiction of the court is to show that the complainant had, or claimed in good faith to have, a contract with the city, which the latter had attempted to impair."

*Hamilton Gaslight & Coke Co. v. Hamilton City*, 146 U. S. 258, 13 Sup. Ct. 90, was a case on appeal from the circuit court of the United States for the Southern district of Ohio, and the question presented was whether a certain ordinance of the city of Hamilton, a municipal corporation of Ohio, impaired the obligation of contract rights, and deprived the complainant, a corporation of Ohio, of property without due process of law. The jurisdiction was sustained, although the case on its merits was decided against the complainant. In *Water Co. v. Keyes*, 96 U. S. 199, the court, in determining whether the removal of a suit from a state court to a federal court was sufficient, as well as the form in which the federal question should appear, used this language:

"Before, therefore, a circuit court can be required to retain a cause under this jurisdiction, it must in some form appear upon the record, by a statement of facts 'in legal and logical form,' such as is required in good pleading (1 Chit. Pl. 213), that the suit is one which 'really and substantially involves a dispute or controversy' as to a right which depends upon the construction or effect of the constitution, or some law or treaty of the United States. If these facts sufficiently appear in the pleadings, the petition for removal need not restate them; but, if they do not, the omission must be supplied in some form, either by the petition or otherwise."

In *Spencer v. Merchant*, 125 U. S. 345, 8 Sup. Ct. 921, the validity of an assessment upon land under a statute of the state was called in question, it being alleged that the statute was unconstitutional and void, because it afforded the owners no opportunity to be heard upon the whole amount of the assessment. It was alleged that this was taking property without due process of law. Mr. Justice Gray, in disposing of the jurisdictional question, said:

"The question submitted to the supreme court of the state was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881 was unconstitutional and void, because it was an attempt by the legislature to validate a void assessment, without giving the owners of the lands assessed an opportunity to be heard upon the whole amount of the assessment. He thus directly and in apt words presented the question whether he had been unconstitutionally deprived of his property without due process of law, in violation of the first section of the fourteenth amendment to the constitution of the United States, as well as of article 1, § 7, of the constitution of New York; and no specific mention of either constitutional provision was necessary in order to entitle him to a decision of the question by any court having jurisdiction to determine it. The adverse judgment of the supreme court, affirmed by the court of appeals of the state, necessarily involved a decision against a right claimed under the fourteenth amendment to the constitution of the United States, which this court has jurisdiction to review."

Other cases might be referred to, but I do not regard this as necessary in view of the principle clearly deducible from these cases, and in view of which, as applied to the facts found in the statement of this case, I feel constrained to hold that there is here really and substantially involved such a federal question as supports the jurisdiction of this court over the case, both in respect of the right claimed and the mode in which the right is set up in the bill.

It was said in the discussion at bar that the prohibitions of the fourteenth amendment are directed against state action only, and the correctness of this proposition is fully conceded, but a too limited definition and a too narrow view of what constitutes state action

must not be entertained. State action, to which the prohibitions of the fourteenth amendment extend, is not limited to a legislative enactment as it comes from the hands of the legislature, but extends to all instrumentalities and agencies officially employed in the execution of the law down to the point where the personal and property rights of the citizen are touched. Under any other interpretation it would be practically possible to reduce the constitutional guaranty to a mere brutum fulmen. A statute might be framed entirely fair upon its face, which, by the omission of necessary affirmative provisions, and a failure to contain needed restrictive directions, would furnish color of authority for practices thereunder which would be destructive of rights most carefully guarded by the constitution. Such a result would be still more easily accomplished by legislation in respect to one class of citizens or property and separate legislation in regard to another class in relation to the same subject, containing such differences in provisions as to necessarily bring about "clear and hostile discriminations against particular persons and classes," and resulting in oppressive and forced contributions from one class as compared with the other; and such is, or may be practically the result of the legislation in this state in respect to tax assessments, according to the construction put upon that legislation by the defendants, for, while boards of equalization are created with express power to equalize assessments in regard to other species of property, and required to do so, the separate enactments in relation to railroad and telephone properties confer upon the assessors and board of equalization no such power, according to their construction of the acts and their action thereunder. The board of equalizers construe the statute as requiring them to take the curious and self-inconsistent position that they are created a board of equalization, but without power to equalize.

In *Osborn v. Bank*, 9 Wheat. 737, it was said by Mr. Chief Justice Marshall:

"It is not unusual for a legislative act to involve consequences which are not expressed."

In *Scott v. McNeal*, 154 U. S. 45, 14 Sup. Ct. 1112, the supreme court of the United States said (Mr. Justice Gray giving the opinion):

"The fourteenth article of amendment of the constitution of the United States, after other provisions which do not touch this case, ordains: 'Nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.' These prohibitions extend to all acts of the state, whether through its legislative, its executive, or its judicial authorities. *Virginia v. Rives*, 100 U. S. 313, 318, 319; *Ex parte Virginia*, Id. 339, 346; *Neal v. Delaware*, 103 U. S. 370, 397. And the first one, as said by Chief Justice Waite in *U. S. v. Cruikshank*, 92 U. S. 542, 554, repeating the words of Mr. Justice Johnson in *Bank v. Okely*, 4 Wheat. 235, 244, was intended 'to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice.'"

So, too, in the late case of *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U. S. 226, 17 Sup. Ct. 581, Mr. Justice Harlan, speaking for the court, said:

"But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the state,—to its legislative, executive, and judicial au-

thorities,—and, therefore, whoever by virtue of public position under a state government deprives another of any right protected by that amendment against deprivation by the state ‘violates the constitutional inhibition; and, as he acts in the name and for the state, and is clothed with the state’s power, his act is that of the state.’ This must be so, or, as we have often said, the constitutional prohibition has no meaning, and ‘the state has clothed one of its agents with power to annul or evade it.’ *Ex parte Virginia*, 100 U. S. 339, 346, 347; *Neal v. Delaware*, 103 U. S. 370; *Yick Wo v. Hopkins*, 118 U. S. 356, 6 Sup. Ct. 1064; *Gibson v. Mississippi*, 162 U. S. 565, 16 Sup. Ct. 904.”

This doctrine is now fully established. *Reagan v. Trust Co.*, 154 U. S. 390, 14 Sup. Ct. 1047; *Road Co. v. Sandford*, 164 U. S. 578, 17 Sup. Ct. 198; *Hodgson v. Vermont*, 168 U. S. 272, 273, 18 Sup. Ct. 80.

It is not necessary, for the purpose of the present question, to review the decisions of the supreme court of the United States in relation to the proper construction of the fourteenth amendment and its application to the varying facts of different cases. That court itself, as has been seen, expressly declined to give an exhaustive definition of the amendment, preferring to deal with the cases as they arise, and allow the construction in this way to develop as the cases call for judgment.

In *Mobile & O. R. Co. v. Tennessee*, 153 U. S. 486, 14 Sup. Ct. 968, the court, through Mr. Justice Jackson, said:

“We do not deem it necessary to consider the further point urged by counsel for defendants in error that the exemption clause in question is in conflict with the fourteenth amendment of the constitution of the United States. That amendment conferred no new and additional rights, but only extended the protection of the federal constitution over rights of life, liberty, and property that previously existed under all state constitutions.”

In a recent case (*State v. Holden*, 14 Utah, 71, 46 Pac. 756) the Utah supreme court had under consideration the fourteenth amendment. Zane, C. J., said:

“The last clause of section 1 of amendment 14 of the federal constitution declares that no state shall ‘deny to any person within its jurisdiction the equal protection of the laws.’ The slaves in the various states in which slavery existed having been liberated during the late war, congress deemed it necessary to make them citizens of the United States, and forbade the states the denial to them the equal protection of the law. At that time the laws of all the states in terms gave equal protection to all white persons. This amendment, however, is general, and forbids the denial to any class of persons the equal protection of the laws by any state; and we have no doubt that class legislation is forbidden.”

See, also, *Munn v. Illinois*, 94 U. S. 123.

What must constitute a denial of the equal protection of the law will depend, in this view, in a large measure, upon what rights have been conferred, or protection extended, under the constitution and laws of the particular state in which the question arises. As the constitution and laws of the states vary, the proposition that each case must, to an extent, depend upon its own facts, is specially applicable to this class of cases. When the state itself undertakes to deal with its citizens by legislation, it does so under certain limitations, and it may not single out a class of citizens, and subject that class to oppressive discrimination, especially in respect to those rights so important as to be protected by constitutional guaranty. That the prohibitions of that amendment are now regarded as protecting the citizen against a denial of the equal protection of the law, and against

taking property without due process of law, under the power of taxation, is a proposition clearly deducible from the many causes in which that question has been considered. And it does not militate against this view that on account of the importance of taxation to the existence of government the supreme court of the United States has bestowed upon the amendment and its proper interpretation the greatest consideration and much care in relation to that subject. Whether the question be considered upon principle or upon judicial authority, it might be well said, I think, that no power is more liable to abuse, or more destructive in its effect when exercised with an unequal and uneven hand, than the power of taxation. It has been declared by the supreme court of the United States that "the power to tax involves the power to destroy." *McCulloch v. Maryland*, 4 Wheat. 429.

In *Loan Ass'n v. Topeka*, 20 Wall. 655, that court said:

"Of all the powers conferred upon government that of taxation is most liable to abuse. Given a purpose or object for which taxation may be lawfully used, and the extent of its exercise is, in its very nature, unlimited. \* \* \* The power to tax is therefore the strongest, the most pervading, of all the powers of government, reaching directly or indirectly to all classes of the people. It was said by Chief Justice Marshall, in the case of *McCulloch v. Maryland*, that the power to tax is the power to destroy. A striking instance of the truth of the proposition is seen in the fact that the existing tax of ten per cent. imposed by the United States on the circulation of all other banks than the national banks drove out of existence every state bank of circulation within a year or two after its passage. This power can as readily be employed against one class of individuals and in favor of another, so as to ruin the one class and give unlimited wealth and prosperity to the other, if there is no implied limitation of the uses for which the power may be exercised."

It may be true that the proposition that a tax statute, or the tax laid under a statute, is in violation of the constitution of the state, is not of itself necessarily sufficient to constitute a violation of the fourteenth amendment; but when, in addition to the violation of the state constitution, the statute results in an arbitrary and oppressive discrimination in regard to a large class of citizens, or a large species of property, it is such class legislation and such denial of the equal protection of the laws as renders it obnoxious to the fourteenth amendment. And the state constitution is important in determining what the rights of the citizen are, and whether equal protection of the law is being denied. If this be not so, the result is that the fourteenth amendment must be regarded as failing to afford protection in respect of the most important of all property rights, and the most dangerous of all powers.

In *California v. Pacific R. Co.*, 127 U. S. 1, 8 Sup. Ct. 1073, the court observed:

"Taxation is a burden, and may be laid so heavily as to destroy the thing taxed, or render it valueless. As Chief Justice Marshall said in *McCulloch v. Maryland*, 'the power to tax involves the power to destroy.' Recollecting the fundamental principle that the constitution, laws, and treaties of the United States are the supreme law of the land, it seems to us almost absurd to contend that a power given to a person or corporation by the United States may be subjected to taxation by a state."

So, in *County of Santa Clara v. Southern Pac. R. Co.*, 18 Fed. 385, Mr. Justice Field said of this same power of taxation:

"It is a matter of history that unequal and discriminating taxation, leveled against special classes, has been the fruitful means of oppressions, and the cause of more commotions and disturbance in society, of insurrections and revolutions, than any other cause in the world. It would, indeed, as counsel in the County of San Mateo Case, 13 Fed. 145, ironically observed, be a charming spectacle to present to the civilized world, if the amendment were to read as contended it does in law: 'Nor shall any state deprive any person of his property without due process of law, except it be in the form of taxation, nor deny to any person within its jurisdiction the equal protection of the laws, except it be by taxation.' No such limitation can be thus ingrafted by implication upon the broad and comprehensive language used. The power of oppression by taxation without due process of law is not thus permitted, nor the power by taxation to deprive any person of the equal protection of the laws."

In *McCulloch v. Maryland*, 4 Wheat. 427, Chief Justice Marshall said:

"The only security against the abuse of this power is found in the structure of the government itself. In imposing a tax the legislature acts upon its constituents. This is, in general, a sufficient security against erroneous and oppressive taxation."

This view of the subject necessarily assumes that the tax burden is laid on all equally and evenly, for otherwise the theory can no longer be sustained. If class discrimination can be accomplished directly or indirectly, the majority can easily destroy the minority, assuming that corporations are so far "constituents" as not to be distinguished in this regard. It is not difficult, then, to see the wisdom of the state constitution in requiring equality in the burden of taxation. The organic law of Tennessee has brought every citizen in the state into one constitutional class for the purpose of taxation, and provided that taxes shall be assessed and levied on value only as the basis, and at a rate equal and uniform in proportion to value. It is not competent, under the form of classification, to divide up this class and violate the constitution. If the state has, then, by its own constitution, guarantied certain rights to all of its citizens alike, without discrimination, what just or valid objection can be offered to a restraint which deprives the state of the power to deny to a class of citizens the equal protection thus afforded? Is it to be assumed that the good of the state will ever require that it should do so, or that its people, through the legislative department, would ever understandingly undertake to adopt measures which would have that effect? To do so would not only be a great wrong, but violative of sound public policy and sound political economy. It would hardly be insisted that the good of any state requires that it should be left free to deny to its citizens the equal protection of its laws in the form of taxation, or to deprive any person of property without due process of law in that form. If the fourteenth amendment, as construed and applied, goes no further than to prevent such a result as this, what valid objection can be assigned to its application, to this extent, to the power of taxation as well as to state action in other respects? It seems to me that the argument for defendants in the denial that there is here a federal question proceeds upon grounds which deny the application of the fourteenth amendment to the state's power of taxation in any form and to any extent whatever. It will appear from what has been said that I do not think this view can be maintained. Certainly, the state is left



free to apply different methods of ascertaining value, and different methods and remedies for the collection of taxes when properly assessed. For these purposes, the differences in the nature and uses of property may be taken into account; but all questions of this character relate to methods of procedure, and not the fundamental right involved. It will be observed by the reading of the provisions of the state constitution, in relation to the power of taxation, that the principle of equality and uniformity is declared in this language: "No one species of property from which a tax may be collected shall be taxed higher than any other species of property of the same value." Const. Tenn. art. 2, § 28. But the constitution contains a like limitation on any method of procedure which may be adopted by the state in the exercise of this power, for it further provides: "All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform throughout the state." *Id.* The legislature is not left with an unlimited or untrammelled power in the method of procedure adopted to ascertain value, but is under a mandatory injunction to ascertain or fix this value, "so that taxes shall be equal and uniform throughout the state." The constitution, in giving effect to the principle of uniformity and equality, is self-executing, and operates on the mode of procedure as well as the result. To say that this obvious and easily understood guaranty can be denied, because (in the very face of an undisputed and great wrong) a class of taxpayers are not able to prove affirmatively that different boards of assessors acted by concert or fraudulently, would be a confession of weakness not commendable in a judiciary organized under a nation declaring constitutional rights, and founded on that equality in right, in governmental protection, and in governmental burden which constitutes the very life of a government like ours, and is the great principle which runs through all of its institutions and constitutional enactments. The truth is that the tax system of the state, executed through different boards, prescribing duties for one board not prescribed for another, is just such a system as would, in its execution, not probably result in an equal and uniform assessment, but in an unequal and unconstitutional one; and the expected has actually happened, according to the allegations of the bill.

The conclusion that the prohibitions of the fourteenth amendment apply to the taxing power to the extent indicated, and that there is a federal question which gives jurisdiction, still leaves for disposition the questions here involved on their merits, which will be treated separately, it being intended in this opinion to deal only with the question of jurisdiction.

## MARSH v. KINGS COUNTY EL. RY. CO. et al.

(Circuit Court of Appeals, Second Circuit. April 7, 1898.)

No. 86.

## 1. ELEVATED RAILROAD—INJUNCTION—DEPRECIATION OF ABUTTING PROPERTY.

An injunction against the operation and continuance of an elevated road, in the city of Brooklyn, should not be granted on the suit of an abutting owner who, though proving that the operation of the road obstructs the circulation of air, and is attended with noise, smoke, and loss of light, and that his abutting property has decreased in rental value, fails to further show that such decrease was the result of the existence of the railroad or its operation.

## 2. SAME—REMEDY.

Where the abutting owner fails to show that the decrease in the rental value of his property is the result of the construction or operation of the road, and his bill for an injunction is dismissed, his rights are properly protected where the dismissal is without prejudice to an action at law.

## Appeal from the Circuit Court of the United States for the Eastern District of New York.

The complainant, a citizen of New Jersey, brought a bill in equity in the circuit court for the Eastern district of New York, against the Kings County Elevated Railway Company, a New York corporation, located in the city of Brooklyn, which alleged that the defendant, by the use of an elevated steam railway in Fulton street, in front of the complainant's block of houses, was committing a permanent and continuing injury to his property, through the noise of the trains, the obstruction to the circulation of air, the shutting off and darkening the light, the road's interference with the free use of the street, and by the emission from its engines of smoke and noxious vapors, whereby the defendant appropriated and injured, and was continuing to injure, the easements appurtenant to this property, without compensation. The bill prayed for an injunction against the operation and continuance of the elevated structure in front of the complainant's premises. The circuit court dismissed the bill without prejudice to an action at law, from which decree the complainant appealed to this court.

Theodore E. Gates and William H. Ingersoll, for appellant.

Charles H. Russell and Wm. C. Perry, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts). The complainant purchased, on June 1, 1887, for \$87,000, 30 lots on Fulton street, in Brooklyn, each of about 20 feet in front, and containing in all a frontage of 629 feet. The 9 lots described in the complaint were sold to Thomas Donahue in December, 1887. Eight of them were reconveyed on January 29, 1890, and one was reconveyed on October 31, 1891, each being subject to a mortgage to an insurance company for \$8,500. Marsh sold the lots with a contract to make a loan to the purchaser, to be expended in buildings, made such a loan, and retook the property subject to the mortgages, without foreclosure, because of the inability of the purchaser to carry his investment. The buildings were finished in the latter part of 1888, and the elevated road began to run on August 20, 1888. The buildings are nine in number, each of 20 feet in front and 50 feet in depth, each of four stories, with brown-stone fronts, and each con-

taining a store upon the street and three flats above. The rental value of each store was intended to be at least \$25 per month, and the rental value of the flats was, at first, \$20, \$18, and \$16, respectively. They are not, and never were, apartment houses of the first class, or with all the incidents of modern flats of a fine class in that neighborhood. A depreciation of the rental value of this property, and of that class of property in Fulton street, began to be noticeable in 1892, and there are more frequent vacancies in the flats and stores than when they were first built. The rental value of the stores is from \$20 to \$25 per month. The depreciation in the rental character of the apartments has been due to three causes: (1) A better class of flats has been built on side streets in that vicinity; (2) a greater number of new flats have been built in Brooklyn; and (3) from 1892 and thereafter a general depreciation in the value of Brooklyn real estate took place. While the land is worth more than it was in 1887, the market value of the entire property has receded from its market value when the buildings were completed, owing to the same causes which have just been mentioned. At the point where the property is situated, it is conceded that "Fulton street is eighty feet wide from house line to house line, the roadway being forty-two feet wide, and sidewalks nineteen feet wide on each side; that the elevated railroad is built over the middle of the street, and is supported by a row of columns placed along the edge of the curb along the sidewalk, seventeen feet from the house line, and that said columns are sixteen inches in diameter, and that there are four of them in front of the row of buildings owned by plaintiff, they being forty and fifty feet apart; that a train passing on the structure is twenty-nine feet from the front of plaintiff's buildings; and that the tracks of the road are twenty-one feet above the ground." Some testimony was given in regard to the injury to the flats from the noise of the railroad trains and the exclusion of the light; but there was no substantial testimony that these circumstances diminished the rental value of these flats, or of other flats of a like class, although it is obvious that flats of a first class, which would ordinarily rent for \$50 per month or more, would be injured by the immediate proximity of an elevated steam road. While there can be no question that the noise, steam, smoke, and perhaps odors which come from the passing trains of an elevated road in front of a dwelling house diminish the enjoyment, and to a certain extent the comfort, of the inmates of the house, it cannot be found that the proximity of this elevated road to these buildings of the complainant diminished his income. It was diminished because, as testified by one witness, "there has been an overproduction of stores and flats on the line of the elevated roads, to such an extent that they have reduced the rental values considerably." The same thing is true in regard to the market value of the property.

The theory upon which the interference of a court of equity is asked in this class of cases is that it alone can furnish the appropriate remedy to prevent a continuing injury to the easements of air,

light, and access, which are appurtenant to complainant's land; in other words, can prevent a continuing injury to the value of his land. *Bohm v. Railway Co.*, 129 N. Y. 576, 29 N. E. 802. In this case the complainant shows that an elevated road abuts upon his land, and that its use is attended with noise, smoke, and interference with light, and he seeks to show the extent of this injury by the loss of income and the depreciation in the value of his property. It is true that his property has depreciated in value, but he has failed to show that the loss and depreciation were due to the existence of the defendant's structure, or to the operation of the road, or that the structure or the trains have prevented an increase of value which would otherwise have taken place. The link which connects the loss of value with the use of the road is lacking. Donahue built these buildings contemporaneously with the construction of the road, in the expectation of pecuniary benefit from it. Other citizens of Brooklyn prepared to enjoy the benefit to real estate situated at a distance from the centers of trade, which it was anticipated would follow the erection of cheap and rapid modes of transit, and also built stores and flats along the lines of the roads, and built flats on the adjoining streets. There was an overproduction, and there was, from some cause, a general depreciation of real estate in the city, the effects of which were felt in the cheaper class of tenements and of stores. The elevated road's part in the result was in the fact that it had helped to stimulate overproduction.

The subject of the duty of a court of equity to grant relief by injunction against the operation of an elevated steam road which had injured the enjoyment of easements of air, light, and access appurtenant to a complainant's land, but which had resulted in no injury to the market value or rental value of the premises, was considered with great care by the court of appeals of New York, which spoke through Judge Gray, in the test case of *O'Reilly v. Railroad Co.*, 148 N. Y. 347, 42 N. E. 1063. The decision refusing to grant a remedy for an injury of this technical class was based, among other considerations, upon the substantial and firm ground stated in *Gray v. Railway Co.*, 128 N. Y. 499, 28 N. E. 498, as follows:

"An equity court is not bound to issue an injunction where it will produce a great public or private mischief, merely for the purpose of protecting a technical or unsubstantial right."

In the *O'Reilly Case*, by reason of the presence and operation of the elevated road, the value of the complainant's property had increased. We do not think that it can be determined accurately from this record whether, by the construction and operation of the defendant's road, the real value and the rentable value of the plaintiff's premises were worth more than they would have been had it not been built, because the buildings were built at about the same time with the construction of the road, and probably in consequence of the certainty that it was to be built; and what would have been the financial condition of that class of real estate if the

road had not been put in operation is not evident. It is, however, manifest that the road has not financially injured the complainant, and has not prevented an increase of value, and thus far the circumstances correspond to those which were the subject of the O'Reilly decision, the syllabus of which is as follows:

"An injunction against the operation of an elevated railroad, constructed in a public street in the city of New York, by authority of law, should not be granted at the suit of an abutting owner, on proof of the wrongful appropriation of the appurtenant easements of light, air, and access, when the plaintiff fails to show any substantial monetary damage to his property, or loss suffered, by reason of the defendant's acts, but it appears that, by reason of the presence and operation of the elevated railroad in the street, the value of the plaintiff's property has increased, and that it has shared equally with all the property in the vicinity in the general increase of values." "The dismissal, on failure to prove substantial monetary damage, of a complaint seeking to enjoin the operation of an elevated street railroad, on the ground of the wrongful appropriation of easements appurtenant to abutting private property, is not open to the objection that the continued tortious acts will eventually give the defendant company title to the property rights wrongfully appropriated, when the judgment states that it is without prejudice to the right of the plaintiff to bring such action as he may thereafter be advised, based upon facts not inconsistent with those herein adjudged."

We concur both in the reasoning of Judge Gray and in the result to which he came. The decree of the circuit court is affirmed, with costs.

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### MALCOMSON v. WAPPOO MILLS.

(Circuit Court, D. South Carolina. March 21, 1898.)

#### 1. LICENSE TO MINE AND REMOVE PHOSPHATIC DEPOSITS — ROYALTIES—TITLE TO PRODUCT.

Rev. St. S. C. § 102, authorizes the phosphate commissioners to issue licenses to mine and remove phosphatic rock and deposits from the bed of the Coosaw river, etc., and provides that parties so licensed shall be deemed agents of the state, and each ton of the product of such mining operations shall be deemed the property of the state, "until the said parties shall have paid the royalty thereon fixed by the board." A licensee mortgaged its mined product; owing the state the royalty thereon, and a large amount for unpaid royalty on product sold. *Held*, that such mortgage was a superior lien to the claim of the state for the royalty on the product sold; the mortgagee having no knowledge of such claim.

#### 2. SAME—RIGHTS OF THE STATE—PAST-DUE ROYALTY — CONTROL OF PRODUCT.

Under Rev. St. S. C. § 102, which provides that mining licensees of phosphatic territory shall be deemed agents of the state, and that each ton of the product of mining operations shall be deemed the property of the state until the royalty thereon is paid, the state can refuse, except as against bona fide purchasers without notice, to surrender its control of any portion of such product until all past-due royalty under the license, on product disposed of, is paid.

#### 3. MECHANICS' LIENS — CONSTRUCTION OF STATUTE — "LABORERS" AND "EMPLOYEES."

Const. S. C. art. 3, § 17, provides that every act shall relate to but one subject, and that shall be expressed in the title. 22 S. C. St. at Large, p. 502, is entitled "An act to provide for laborers' liens." The word "laborer" is not used in the body of the act, giving to employés of factories, mines, etc., a lien for their wages or salaries. *Held*, that the word "employés" must be restricted to mean only such as are laborers, and neither the superintendent nor bookkeeper of a mining company comes within this term.

Wm. A. Barber, Atty. Gen., for petitioner.

Smythe, Lee & Frost, in charge of cause.

Charles Inglesley, for the Bank of Charleston, mortgagee.

Mordecai & Gadsden, representing labor liens.

SIMONTON, Circuit Judge. This case comes up on the intervention of the state of South Carolina. The Farmers' Mining Company obtained a license to dig and mine phosphate rock and phosphate deposits in the waters of Coosaw river, a navigable stream in South Carolina, under the act of assembly of 1890 (Rev. St. S. C. § 102). The Farmers' Mining Company went into the hands of the receiver in this case on the 18th day of October, 1897. At that date there were in the hands of the company 5,584 tons of phosphate rock, mined and removed. At that date the Farmers' Mining Company owed the state, for royalty due and unpaid on rock dug, mined, and shipped, the sum of \$12,883.50. The royalty on these 5,584 tons has not yet been paid. This royalty is at the rate of 25 cents per ton. On the 4th day of October, 1897, the Farmers' Mining Company executed to the Bank of Charleston as collateral security for a loan of \$5,000, 5,000 tons of these 5,584 tons, which mortgage is still unsatisfied. One or more facts must be stated, to understand properly the issues now raised: There were on hand on 1st October, 1897, 4,389 tons of rock. Between the 1st and 15th October were mined 2,195 tons of rock,—in all, 6,584 tons. Of these were shipped 1,000 tons, leaving 5,584 tons. The laborers and employes engaged in producing this rock claim a lien for their wages for the period between the 1st and 15th October,—one-half month. There is a large number of unsecured creditors of the Farmers' Mining Company, and it is insolvent. The paramount right of the state to the royalty of 25 cents on each ton of these 5,584 tons is recognized and admitted.

The intervention raises the question as to the disposition of this rock, or of the proceeds of its sale. The attorney general, on behalf of the state, contends that this rock is subject, not only to the payment of the royalty to be paid on each ton thereof, but also to the payment of the sum due to the state by the Farmers' Mining Company on rock heretofore dug, mined, and shipped by that company, upon which it has not been paid any royalty, and that this is a preferred claim over all other claims whatever. In effect, this is setting up a lien, "for whenever the law gives the creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt." Chase, C. J., in *Re Wynne*, Fed. Cas. No. 18,117. The Bank of Charleston sets up the recorded legal lien of its mortgage, and claims priority of payment, subject to the royalty of 25 cents per ton, of the 5,000 tons in its mortgage. The laborers and employes, whose respective demands will be detailed hereafter, claim the lien for wages secured under the act of assembly of South Carolina of 1897 (22 St. at Large, p. 502). The general unsecured creditors deny the lien of the state for anything else than the royalty of 25 cents per ton on each ton of the 5,584 tons, and insist that as to the royalty un-

paid on rock heretofore dug, mined, and shipped, the state ranks only as a general creditor.

1. Does the statute of South Carolina secure to the state the lien it claims? The claim of the laborers and employes will be stated hereafter. Has the state the right to obtain priority of payment in the proceeds of this rock for so much of its claim as arises from unpaid royalty on other rock dug and mined in Coosaw river under the same license? The solution of this question must be found in the statute providing for the license. The statute gives the board of phosphate commissioners authority and direction to take possession and control of the Coosaw river phosphate territory, and to issue licenses to mine therein and remove phosphate rock and phosphatic deposits therefrom in like manner as is now provided by law for other navigable streams and waters of the state. Then comes this proviso, which evidently is not used in its ordinary sense, excepting the clause covered by it from the provisions of the statute, but to qualify the operation of the statute, and as a conjunction to the preceding paragraph (*Railroad Co. v. Smith*, 128 U. S. 174, 9 Sup. Ct. 47):

"Provided that such parties so licensed or authorized shall be deemed agents of the state, and each ton of phosphate rock or phosphatic deposits, the product of such mining operations, shall be deemed the property of the state until the said parties shall have paid thereon a royalty to be fixed by the board at not exceeding \$2 per ton on each ton of phosphate rock or phosphatic deposit dug, mined and removed."

The royalty, as has been seen, was fixed at 25 cents per ton.

The state is the absolute owner of the beds of all the navigable streams and waters of the state (*State v. Pacific Guano Co.*, 22 S. C. 50), and of their contents (*Id.*). Coosaw river is a navigable stream. Under this statute the state carefully conserves its right and title to the phosphate rock and phosphatic deposits in the bed of Coosaw river—First, by granting a license to mine therein only to its own agents; and, second, by asserting its ownership in the product of their work,—this ownership to continue until the parties shall have paid thereon a royalty as fixed by law. Then the ownership of the state ceases. As no precise time is set for the payment of this royalty, it can be paid at any time; and its payment extinguishes the title of the state, unless, from a change of circumstances, some right or equity intervened. The statute uses these words:

"And each ton of phosphate rock or phosphatic deposit, the product of such mining operations, shall be deemed the property of the state until the said parties shall have paid thereon a royalty."

There are three words which contain the essence of this statute,—“each,” “until,” “thereon.” What is the subject-matter? Each ton. What is said of it? It is deemed the property of the state. How long? Until the royalty has been paid thereon. “Each” is defined thus:

“Every one of any number or numerical aggregate, considered individually, equivalent to the adjectival phrase ‘each one,’—as, each went his way; each had two; each of them was of a different size (that is, from all the others, or from every one else in the number).” Cent. Dict.

The language "each ton," then, means each ton, taken severally, individually, shall be deemed the property of the state until the said parties have paid the royalty thereon; that is, on that individual ton. The royalty is on each ton, is measured on each ton as the unit, and that ton is the property of the state until this specific royalty is paid on it. Then it ceases to be property of the state. If this be so, then nothing remains to divest the right of property of the state in each of the tons mined and removed but to pay the royalty on it. That would be the effect of the other construction. This phosphate rock is dug, mined, and removed for commercial purposes. It is a large factor in the exports of the state. It is dug, mined, and prepared for sale, and for sale, not in bulk (that is, not of the whole product at one time to one purchaser), but in parcels. Out of a pile of 5,000 tons, 1,000 tons are sold, and are put in progress of loading for export. According to the view expressed by the attorney general, these 1,000 tons do not cease to be the property of the state, and become the undisputed property of the miner, or his assigns, until not only the royalty on each ton of the 1,000 tons is paid, but until all dues to the state by the mining company are fully paid and satisfied. The property thus being in the state, it could assert its right anywhere, and retake the rock into possession. Who then could safely purchase phosphate rock, if a safe title depended upon the release and satisfaction of a claim unadjusted, perhaps disputed? Such a construction would destroy commercial dealings in phosphate rock, and defeat the whole purpose of the statute, which was to utilize the phosphate property of the state by inducing persons to mine it. If, however, it be said that one can purchase phosphate rock, and if the royalty be paid, or provision be made for its payment, he could get a good title, without more, then the position taken by the Bank of Charleston can be sustained. A mortgagee is a purchaser, and can occupy the position and be entitled to the protection of a bona fide purchaser without notice. *Haynsworth v. Bischoff*, 6 S. C. 159. It is said that the bank does not occupy this favored position, because it was put on notice by the statute. But the statute declares that the state is the owner of the property until the royalty has been paid. What that royalty is, is matter of public record. Of that the mortgagee must take notice, and so holds its mortgage subject to it. But what notice had it of an outstanding claim for royalty on other rock not in possession of its mortgagor, and long since shipped by the mortgagor? How could it ascertain the amount and character of this? A special agent is appointed by the state for the purpose of supervising these phosphate companies. The board of phosphate commissioners (high functionaries) are charged with the protection of the interests of the state. How could the bank know, or be presumed to know, or be made to lose for not knowing, that the Farmers' Mining Company, instead of paying the royalty on the rock removed by it, was indulged by the state officials, and given credit for large sums, the payment of which the law made a condition precedent to their handling this rock? To hold a purchase, absolute or qualified, affected by the lien of a claim like this, would be protecting a secret lien,—a practice the law abhors. The attorney general, in his argument, took the position first that the



rock, the declared property of the state, having been mined by the agents of the state, and so in their possession as its agents and therefore in the possession of the state, it has the right to maintain that possession and to hold it until all the royalty on this specific rock, and all other claims it has on any account against this same agent, are fully satisfied. What force will be given to this position as against the Farmers' Mining Company and its unsecured creditors will be considered hereafter. But the controversy between the state and the bank of Charleston is between a bona fide purchaser, without notice, holding a legal, recorded lien, and the state, which sets up a secret lien; or, to put it in another way, the controversy is between a legal, recorded lien and an equity or an equitable lien. Even were the equities equal, the law must prevail. The attorney general presses the analogy between the position occupied by the state in this case and that of a mortgagee of a chattel, who has foreclosed his mortgage, sold the property, and is in possession of the proceeds. He has unquestionably a right to use these proceeds first for the extinguishment of the mortgage debt, and then for the payment of any lawful debt held by him against the mortgagor. *McLendon v. Wells*, 20 S. C. 514; *Reese v. Lyon*, Id. 17; *Walling v. Aiken*, *McMul. Eq.* 1. The ratio decidendi of these causes is this: By a chattel mortgage the legal title passes to the mortgagee. On breach of condition the whole title passes. By foreclosing, the mortgagee exercises his right of property. Thenceforward his relation to the mortgagor changes. He becomes the debtor to the mortgagor for the surplus remaining after paying the mortgage. This is a money demand, and subject to all defenses by way of set-off or counterclaim which any other money demand has. But if, upon the execution of the chattel mortgage, or soon thereafter, before foreclosure, the mortgagor has executed a second mortgage, or has assigned to a third party, for value, his interest in the surplus, and of this had given notice to the first mortgagee, it is clear that the latter could not retain such surplus. It is difficult to see any analogy between this condition of things and the relation between the miner and the state. The state has not sold, has taken no steps to sell, has no provision made for the sale by it of, the rock. The miner is compensated for work done in utilizing and making merchantable the property of the state, with the privilege, on paying a royalty, of making it his property. The priority of the mortgage of the Bank of Charleston is recognized.

2. A very difficult question, dependent on very different principles, arises upon the controversy between the state and the general creditors. These creditors have no lien or special interest in the property. They have a claim upon the mining company,—an open claim. The only connection they have with this rock or its proceeds is through the mining company, and their only claim is against its rights in this rock. A judgment cannot take precedence of an unrecorded mortgage. *Hampton v. Levy*, 1 *McCord*, Ch. 107. The reason is that an unsecured creditor, even after judgment, cannot take any greater right than the judgment debtor could. And, as the debtor is bound by the mortgage, so the creditor is, also. The payment of the money under these circumstances to the judgment creditor would be in ex-

operation and relief of the debtor, and for his benefit, in despite of the mortgage contract which bound him. Could the Farmers' Mining Company, if no receiver had been appointed, resist this claim of the state? Could this court aid the company if it did resist the claim? The rock mined was the property of the state. When the mining company got it out, it was the agent of the state, and the rock continued, under the terms of the license, to be the property of the state until the royalty was paid. The appointment of the receiver makes no change in the title or rights of property. It only puts him in possession for the benefit of the party ultimately entitled. *Union Nat. Bank of Chicago v. Bank of Kansas City*, 136 U. S. 223, 10 Sup. Ct. 1013. The royalty has not yet been paid. The rock being in possession of the state through its agent, and the possession of the receiver being for the real owner, the state has an equity, before surrendering the possession, to require its agent to settle up all outstanding accounts between them,—especially so as the agency now ceases and determines. If the Farmers' Mining Company were not insolvent, and were seeking the possession of this rock, at the same time being largely indebted to the state for other rock, would it not be inequitable to require the surrender of this rock, the other accounts being unpaid, and allow the mining company to spend the proceeds, leaving the state unpaid? If in the case at bar the proceeds of this rock be turned over to general creditors, we would be taking the property of the state, and applying its proceeds to the exoneration of its debtor, and compelling it to come in and take a share with others in the proceeds of the sale of its own property; these others having no lien upon or claim on the property, nor in any way protected by an estoppel working against the state, if any such estoppel could exist. It is familiar law that an agent in possession of the property of his principal can retain possession of that property until his money demands upon the transactions between himself and his principal have been adjusted and settled. Is there not a correlative right in the principal, in control of property in which his agent has an interest growing out of the agency, to maintain that control until the money demands in the transactions between himself and his agent are adjusted and settled? This right cannot strictly be called a lien in favor of the state. The conclusion proceeds on the idea that the rock in place was, and after the mining is, the property of the state. No one can be said to have a lien on his own property. But it is more correct to say that, when the licensee seeks to obtain control of the rock and its proceeds under the license contract, it is perfectly competent for the state to refuse to surrender its control of the rock until the licensee shall pay up all past-due royalty which, in breach of this same contract, he has heretofore omitted to pay. This conclusion in no wise conflicts with that reached in the matter of the mortgage of the Bank of Charleston. There the mining company, in due course of business, mortgaged the rock to the bank. It thus became a bona fide purchaser for value, with no notice of any other claim on the part of the state but for the 25 cents a ton royalty. This prevailing equity secures it. In the branch of the case now under discussion there is no lien and no equity antagonizing the state.

And, even were there an equal equity with that of the state, the equities being equal, the law must prevail for the state. When the lien of the mortgage of the Bank of Charleston is satisfied, the remainder of the proceeds of the sale of this rock must be applied towards the debt due to the state, less any lien the laborers may have.

As to the laborers: There is no question that all who come within this term, "laborers," are by the express language of the act entitled to a lien for the wages due. These are from the 1st to 15th October, —one-half month. This is not denied. But it appears that in the list is the name of Mr. Lawton, who was the superintendent of the mining operations, and of Mr. Titsell, who was assistant in the office as bookkeeper. Are they within the protection of the act? What was the intent of this act? The constitution of the state of South Carolina has rendered unnecessary much of the research formerly needed in order to discover the intent of a statute. The refined and complicated rules laid down by Dwarris and other text writers need not be closely examined. The state constitution gives a key to the statute, and that is its title. "Every act or resolution having the force of law shall relate to but one subject and that shall be expressed in its title." Art. 3, § 17. We look, then, to the title of the act, and the enactment must express the same purpose as the title, or the act is void. The title of this act is, "An act to provide for laborer's lien." The body of the act gives to all employés in factories, mines, and so forth, a lien, whether they be employed either by the day or month, whether the contract be in writing or not, to the extent of the salary or wages that may be due. The word "laborer" does not appear in the body of the act. To sustain the act,—and that is a primary law of interpretation ("Ut res magis valeat quam pereat"),—the word "laborers" must be synonymous with the word "employés"; and, as the word "laborers" is used in the title, the word "employés," used in the body of the act, must be so restricted as to mean such employés as are laborers. This being so, neither the superintendent nor the bookkeeper comes within this term. Let a decree be prepared in accordance with this opinion.

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KUNSEMILLER et al. v. HILL.<sup>1</sup>

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 917.

APPEAL AND ERROR—FINDINGS AND DECREE.

In determining whether the evidence justifies the finding and decree, they are to be taken as presumptively correct, and, unless it clearly appears from the record that some mistake has been made in the consideration of the evidence, the decree should not be disturbed.

Appeal from the Circuit Court of the United States for the District of Colorado.

Charles Hartzell (George P. Steele, on the brief), for appellants.  
John T. Bottom, for appellee.

Before SANBORN and THAYER, Circuit Judges, and RINER, District Judge.

<sup>1</sup> Rehearing denied May 2, 1898.

RINER, District Judge: This is a suit in equity, brought by Zeph T. Hill, as receiver of the German National Bank of Denver, against Charles Kunsemiller, Jr., and Lilla G. Kunsemiller, his wife, to subject certain real estate described in the bill, the title to which stands in the name of Lilla G. Kunsemiller, to the satisfaction of a judgment recovered by Hill, as receiver, against Charles Kunsemiller, Jr. It is alleged in the bill that for more than 10 years prior to the appointment of the receiver, Charles Kunsemiller, Jr., had been in the employ of the German National Bank as bookkeeper, assistant cashier, and cashier; that while he was employed as assistant cashier and cashier of the bank, by means of overdrafts and loans to himself, he had wrongfully taken money from the bank, with which he purchased the property sought to be subjected to the payment of the judgment, and caused the same to be conveyed to his wife, without consideration, for the purpose of placing it beyond the reach of his creditors. The answer of the defendants admitted that a small portion of the money expended in the erection of the house built upon the lands was borrowed from the bank, but, with this exception, denied the allegations of the bill respecting the purchase of the lands and the improvements made thereon. It also denied that Lilla G. Kunsemiller was without estate, but, on the contrary, alleged that the property in controversy was purchased, and the improvements thereon made, almost entirely with her individual money. It was further denied that during the time Kunsemiller contracted the indebtedness to the bank he was unable to pay his debts, but his insolvency at the time the answer was filed was admitted. It was also denied that the property was acquired or that it was held in the manner or for the purpose alleged in the bill of complaint. At the final hearing a decree was entered in favor of the receiver, from which decree this appeal has been taken.

The first paragraph of the decree is as follows:

"(1) That the lands and premises conveyed by George J. Kindel to the defendant Lilla G. Kunsemiller on the 29th day of April, A. D. 1890, mentioned in the complainant's bill of complaint, and described as follows: 'Lots twenty-four (24), twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), and twenty-nine (29), in block ten (10) of Tabor & Kindel's resubdivision of blocks ten (10) and eleven (11), in Sloan's Lake subdivision, as laid down in a certain map or plat on file in the office of the clerk and recorder of that said county of Arapahoe, and state of Colorado,'—together with all improvements thereon, are held by the said Lilla G. Kunsemiller as trustee for her co-defendant, Charles Kunsemiller, Jr., and are subject, in equity, to the payment of the judgment heretofore, and on, to wit, the 13th day of December, A. D. 1895, recovered in this court by the complainant against the said Charles Kunsemiller, Jr., for the sum of nine thousand seven hundred and forty-seven dollars and twenty cents (\$9,747.20), after the said defendant Lilla G. Kunsemiller shall have first been paid out of the first proceeds of the sale of the said lands and premises the sum of eight hundred and seventy dollars and fifty-five cents (\$870.55), as hereinafter mentioned."

The decree then provides for the advertisement and sale of the premises under the direction of a master, and for the application of the proceeds thereof in conformity with the finding made therein.

It is insisted by the appellants that the decree was in favor of the wrong party; that the finding and decree of the circuit court were

in favor of the appellee, when they should have been in favor of the appellants. The only question presented by the record is a question of fact,—did the evidence considered by the circuit court justify the finding and decree? In determining this question the finding and decree must be taken as presumptively correct, and, unless it clearly appears from the record that some mistake has been made in the consideration of the evidence, the decree should not be disturbed. The rule to be applied is clearly stated in the case of *Crawford v. Neal*, 144 U. S. 585, 596, 12 Sup. Ct. 759, where it is said:

"The cause was referred to a master to take testimony therein, and to report to this court his findings of fact, and his conclusions of law thereon. This he did, and the court, after a review of the evidence, concurred in his finding and conclusions. Clearly, then, they are to be taken as presumptively correct, and, unless some obvious error has intervened in the application of the law, or some serious or important mistake has been made in the consideration of the evidence, the decree should be permitted to stand."

See, also, *Tilghman v. Proctor*, 125 U. S. 136, 8 Sup. Ct. 894; *Kimberly v. Arms*, 129 U. S. 512, 9 Sup. Ct. 355; *Warren v. Burt*, 12 U. S. App. 591, 7 C. C. A. 105, and 58 Fed. 101; *Paxson v. Brown*, 27 U. S. App. 49, 10 C. C. A. 135, and 61 Fed. 874.

We do not deem it at all necessary to here review the testimony at length. It is sufficient to say that, after a thorough examination of the record, with the aid afforded by the arguments and briefs of counsel, we are unable to hold that the evidence did not justify the finding and decree made and entered by the circuit court. The decree, therefore, will be affirmed.

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#### ALTSCHUL v. GITTINGS, Sheriff.

(Circuit Court, D. Oregon. April 1, 1898.)

No. 2,236.

#### 1. TAXATION—EQUALIZATION—SUIT TO ENJOIN COLLECTION.

Where the law creates a board of equalization, and provides that "it shall be the duty of persons interested to appear at the time and place appointed for the meeting of the board, \* \* \* and if it shall appear that there are any lands \* \* \* assessed under or beyond their actual value such board shall make the proper correction," a person aggrieved by the wrongful act of the assessor cannot maintain a suit in equity to enjoin the collection of any portion of the tax unless he first seeks redress at the hands of the county board of equalization.

#### 2. SAME—POWER OF BOARD OF EQUALIZATION.

The board of equalization created under the laws of Oregon is empowered to correct all errors of assessment,—as well those where the property or rights are not the subject of taxation as those where the assessment is unequal or excessive.

#### 3. SAME—EXCLUSIVE REMEDY—FEDERAL QUESTION.

Where the laws of a state create tribunals for the correction and equalization of assessments, and confer upon such tribunals power to grant relief to aggrieved persons, it is for the supreme court of the state to determine whether the statutory remedy is exclusive, or whether it is only cumulative; and the supreme court of Oregon having held that the jurisdiction given county boards of equalization is exclusive, and that the court is without jurisdiction to grant relief from the erroneous exercise of the taxing power except in cases of fraud, such decision raises no federal question.

Williams, Wood & Linthicum, for plaintiff.  
Milton H. Smith, for defendant.

BELLINGER, District Judge. This is a suit to restrain the collection of taxes upon certain lands belonging to the complainant, situated in Harney county, upon the ground that the assessment complained of is excessive, unequal, and disproportionate, in that all of the said lands are unfenced and uncultivated, but were assessed, nevertheless, as other lands, which were fenced and cultivated and of better quality, situated in the neighborhood; and upon the further ground, in effect, that the assessment includes large quantities of lands inuring to the complainant under the wagon-road grant made to aid in the construction of a wagon road from Albany, Or., to the eastern boundary of the state, not yet patented, and therefore not liable to assessment and taxation. The complainant excepts to certain portions of the answer filed herein, as follows: First, to the allegation that the defendant does not know, and cannot set forth, as to his belief or otherwise, whether or not the complainant and his predecessors have duly and regularly paid all or any taxes assessed and levied upon said land for which patents have been so issued; second, to the allegation that the plaintiff and his predecessors in interest have, at various times prior to the imposition of this tax, leased portions of the lands described in said notice of sale, and received rents therefor, and have held themselves out as the owners of said lands, and therefore should be estopped now to say that they are not the owners in fee; third, to that part of the answer which alleges that the selected lands should be designated only as therein before set forth in said answer; and, finally, to so much of the answer as alleges that by the laws of Oregon provision is made for the creation of a board of equalization for the county of Harney, for the purpose of equalizing assessments imposed on all lands in said Harney county for the year in question, and that said board had its meetings and sessions for that year, of which the usual notice was given, and that it was incumbent upon the complainant or his predecessors to apply to said board for the relief sought in this action, etc. Of the several exceptions, all except the last have heretofore been disposed of. By the last exception is presented the important question whether the complainant is precluded to seek the relief prayed for in this suit by his failure to apply to the board of equalization for Harney county for the relief which he seeks in this action, or, more properly speaking, whether the board of equalization for Harney county had jurisdiction to grant the remedy to the plaintiff which he seeks in this suit, and, if so, whether that remedy is an exclusive one.

The statute provides that it shall be the duty of persons interested to appear at the time and place appointed for the meeting of the board of equalization of the county; and if it shall appear to such board of equalization that there are any lands, lots, or other property assessed twice, or in the name of a person or persons not the owner thereof, or assessed under or beyond its actual value, or any lands, lots, or other property not assessed, said board shall

make the proper corrections. It was held in this court in the case of *Investment Co. v. Charlton*, 13 Sawy. 25, 32 Fed. 192, that a person who is aggrieved by the wrongful action of an assessor in the valuation of his own or other's property for taxation cannot maintain a suit in equity to enjoin the collection of any portion of the tax resulting from such action unless he first seeks redress at the hands of the county board of equalization as provided by statute. Where the laws of a state create a tribunal for the correction and equalization of assessments, and confer upon such tribunal power to grant relief to aggrieved persons, it is for the supreme court of the state to determine whether the statutory remedy is exclusive, or whether it is only cumulative, and its action in that respect raises no federal question. *Railroad Co. v. Patterson*, 154 U. S. 130, 14 Sup. Ct. 977. In the case of *Association v. Kelly*, 29 Or. 412, 45 Pac. 901, it was held, in effect, that the jurisdiction given to the county boards of equalization is exclusive, and that the court is without jurisdiction to grant relief from the erroneous exercise of the taxing power, except in cases of fraud. It is claimed on the part of the complainant, among other things, that the remedy provided by this statute does not extend to the case made here, where one of the grounds of the complaint is that property or interests have been assessed that are not the subjects of taxation. I am of the opinion that this board of equalization is empowered to correct all errors of assessment,—as well those where the property or rights are not the subject of taxation, as those where the assessment is unequal or excessive. Moreover, this allegation in the answer, in any view of this question, is material as an answer to so much of the complaint as charges that the valuations in the assessment in question are excessive, unequal, and disproportionate to those made upon other lands of like character in the vicinity. The fourth exception therefore is overruled.

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CARSON v. COMBE.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1898.)

No. 640.

1. APPEAL FROM PRELIMINARY INJUNCTION — JURISDICTION OF CIRCUIT COURT.

On appeal from an order granting a preliminary injunction in aid of the appointment of a receiver, where the question as to the jurisdiction of the circuit court was of a grave and vital character, *held*, that the circuit court of appeals would not then determine it, but would decide the question of the propriety of the injunction on its merits, and leave the jurisdictional question until after final decree below, so that the parties, if they so desired, might take it direct to the supreme court.

2. PRELIMINARY INJUNCTION.

A preliminary injunction in aid of the appointment of a receiver, and to prevent the defendants from fraudulently using a judgment rendered in their favor by consent, *held* to have been properly granted.

Appeal from the Circuit Court of the United States for the Western District of Texas.

T. H. Franklin and Duval West, for appellant.

C. L. Bates and W. N. Parks, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

**McCORMICK, Circuit Judge.** The following is a substantial statement of the allegations of the bill:

(1) This bill, filed by appellee on June 14, 1897, in the United States circuit court at Brownsville, Tex., against appellant and James Stillman and 19 other persons, defendants, is an ancillary bill, filed as ancillary or auxiliary to suit No. 248 (Heirs of Miguel Salinas v. William Kellogg et al.) on the law docket of the same court. With the exception of the United States and Kellogg, the same parties to this suit were parties to the former suit, and the rights and interests and issues of fact and title involved in the former suit at law are further litigated in this suit in equity; and the present suit seeks, as against Carson and Stillman, to obtain, and render available to plaintiff and some of defendants, the advantage, fruits, and benefits of the proceedings and judgment in the former suit, and to enjoin Carson and Stillman from making fraudulent use of that judgment, and to enforce and adjust certain equitable rights and interests of plaintiff and some of the defendants, arising out of, and inseparably connected with, the proceedings and judgment in, and subject-matter of, the former suit.

(2) It is averred in the bill that on or about May 1, 1846, Zachary Taylor, then a brigadier general of the army of the United States, commanding a military force of the United States army in the state of Texas, on the lower Rio Grande, and acting for and under the authority of the United States, at the city of Brownsville, Cameron county, Tex., forcibly entered upon and took possession of a tract of land containing about 358.8 acres, and established thereon, for the United States, a military fort and garrison, called "Ft. Brown," and forcibly occupied the same by and with a military force of the United States, and that said tract of land has been in the actual and exclusive possession of the United States, as a military fort, from May 1, 1846, down to the present time, and that at the time of the seizure the tract of land was private property belonging to Miguel Salinas and others, then resident citizens of Texas, to whom no compensation was ever made for the land, and the title to which was never acquired by the United States, except at the time and in the manner set out in the bill. It is further alleged in the bill that appellee's testator, Stephen Powers, in his lifetime acquired a perfect and valid legal and equitable title in fee simple to an undivided one-half of said tract, by a complete chain of title from the sovereignty of the soil to himself, and that on February 5, 1882, he died seised of the same, and that the plaintiff is now his sole executor.

(3) From May 1, 1846, the date of the seizure, to the present, the persons and estates named as parties to this suit, and those under whom they claim, have asserted claim to parts of said tract of land, and sought payment for same, and for its use and occupation, from the government; and to pay the owners for the land and its use and occu-



pation, and to extinguish their claims and vest a good and valid title to the land in the government, the congress of the United States on March 3, 1885, made an appropriation in these words:

"To enable the secretary of war to acquire a good and valid title for the United States to the Fort Brown reservation, Texas, and to pay and extinguish all claims for the use and occupancy of said reservation by the United States, the sum of one hundred and sixty thousand dollars; provided, that no part of this sum shall be paid until a complete title is vested in the United States, and the full amount of the price, including rent, shall be paid directly to the owners of the property."

(4) On June 29, 1886, nine of the heirs of Miguel Salinas filed suit (trespass to try title) in the district court of Cameron county, Tex., against William Kellogg, colonel of the United States army, commanding officer of Ft. Brown, to recover the title and possession of said tract of land; and on June 30, 1886, defendant Woodhouse filed his petition of intervention in the suit in the state court, claiming to be the owner of the share of four of the Salinas heirs in the land.

(5) On application of defendant Kellogg, the suit instituted in the state court was removed to the United States circuit court for the Western district of Texas, Brownsville division, the transcript from the state court having been filed in the federal court on November 3, 1886, and entered on the law docket of that court, No. 248 (Heirs of Miguel Salinas v. William Kellogg et al.), and was proceeded with as a suit pending in that court.

(6) On December 27, 1886, Rudolph Kleberg, district attorney for the Western district of Texas, acting under instructions from the attorney general of the United States, intervened for the government in suit No. 248, and had the United States made party defendants therein, and filed answers for Kellogg and the United States, and pleaded not guilty, and set up outstanding title to Ft. Brown Reservation in a large number of persons,—among them, the defendants Carson, administrator, and Stillman, and the heirs, devisees, legatees, and estate of Stephen Powers, deceased, the appellee's testator, and also all the other parties to the present suit who were not plaintiffs in the former suit; and upon motion of the district attorney all of said persons were made parties defendant to that suit, and citation ordered to be issued for them, but defendants Stillman and Carson and others, in writing, waived the issuance of citation, and voluntarily entered their appearance and submitted themselves to the jurisdiction of the court in that suit, and those not appearing were served with citation.

(7) The object and purpose of the United States in intervening in the former suit, pleading outstanding titles in said persons, and having them made parties to that suit, as shown by their pleadings and the allegations of the bill in the present suit, were to secure a final and speedy adjudication of the true title to Ft. Brown reservation, and to have that title vested in the United States by a judgment to be rendered in said former suit, and then to make compensation to the owners of the land. It appears from the averments of the bill that the true intendment of the act of congress in making the appropriation to pay for Ft. Brown is: First, that the United States should part with

no portion of said fund until a good, valid, absolute, and indefeasible title to Ft. Brown reservation should be vested in the United States; and, second, that the full price for said reservation, including rents, should be paid directly to the real, bona fide owners of the property. The government desired to speedily acquire a clear title to the property, and pay the owners for it, and it (the government) sought to consummate this purpose and carry out the policy of the statute by intervening in the former suit.

(8) It appears from the bill and exhibits that to the former suit (No. 248) at law there were 24 defendants, all of whom answered, and all of them, except the United States and Col. Kellogg, filed pleas in reconvention, claiming title to portions of said tract of land, which claims all conflicted with each other. The pleadings of the parties are, in substance, set out in the bill, and the portions of the land claimed by each of the claimants is stated. It is averred in the bill that the pleadings in suit No. 248 presented to the court, for its examination, consideration, and adjudication, a case of facts and of law of the greatest intricacy, difficulty, and complexity, requiring great skill, labor, care, patience, and perhaps years of litigation, for its final solution; and, without some compromise or agreement whereby an indefeasible title to said property could be at once vested in the United States, there was great danger that the appropriation could not be made available, or would be ultimately consumed in litigation, or in some manner lost to the owners of the property, and that in view of the great number of persons claiming an interest in the property, the nature of the facts and circumstances upon which alleged titles were based, and the ancient character of some of the alleged titles, and the frequent and complicated character of the transfers of said property during 40 years, and the long duration of the controversy between the United States and the owners and claimants of the property, and the great number of deaths and descents cast and devises made, and the difficult and complicated questions of law arising upon the facts, it was absolutely impossible to make a valid title to said reservation to the United States, except through the judgment of the court in said suit No. 248; and when the issues were fully made by the pleadings in said suit the parties and their counsel at once became fully impressed with these difficulties, and the great importance and necessity of removing them, and became and were exceedingly desirous of agreeing upon some plan whereby a valid title to said reservation could be immediately vested in the United States in and by means of a judgment of the court in said suit, followed by proper conveyances, with the view of having the real issues made by the pleadings settled after the title should be vested in the United States, and the appropriation secured to those parties who should thereafter be found entitled to receive the same.

(9) It is averred in the bill, and fully shown by Exhibit D, that on July 13, 1887, the plaintiff, defendants Stillman and Carson, and 19 other parties to said former suit (No. 248), executed, acknowledged, and delivered an agreement in which it was recited as follows: First, that it was likely that the said suit would be called for trial the following day, and the then present term of the court would not con-

tinue further than that week; and, second, that there was little probability of working out a complete and accurate adjudication of the rights of the parties to the suit (who claimed fractional interests in said land) by the judgment of the court, "based on the verdict of the inevitable jury"; and, third, that it was apprehended that unless in that court, and by its judgment, a perfect title could be adjudicated to certain of the parties, so as to meet the requirements of the Washington authorities, there was danger of losing altogether the appropriation of \$160,000 made to pay for Ft. Brown reservation; and, fourth, it was primarily desirable and necessary to have such a verdict and judgment in said suit as would be attended with no complication, and would be satisfactory to the department at Washington; and, fifth, it was secondarily desirable to agree upon a method of working out and ascertaining the exact rights and interests of each party to the suit after the judgment and conveyances to the government by the parties so adjudicated to be the owners, and the payment of the \$160,000 therefor. And in said agreement it was stipulated to the following effect, viz.: First. That in the trial of said suit the issues made by the pleadings therein should not be litigated or adjudicated, but that a verdict and judgment should be rendered and entered therein, vesting the complete title to Ft. Brown reservation, and all money owing by the United States for its use and occupation, in defendants James Stillman and Thomas Carson, administrator. Second. That, upon procuring such verdict and judgment, Stillman and Carson should make the appropriate deed of conveyance, vesting a good and valid title in and to said reservation and the rents in the government of the United States, and a warrant should be procured and obtained by them from the secretary of war upon the treasurer of the United States for the said fund of \$160,000 appropriated as aforesaid, and \$20,000 of said fund should be immediately paid to certain agents at Washington, D. C., for services in procuring said appropriation, and that the balance of said fund (\$140,000) should without delay be deposited in the bank of Ball, Hutchings & Co., of the city of Galveston, Tex., to the credit of Messrs. William P. Ballinger, T. N. Waul, and David B. Culberson, arbitrators selected in and by said agreement for the purposes in said agreement stipulated, and to the effect in the bill set out. Third. That the parties to said suit by said agreement submitted their respective claims to said Ft. Brown reservation, and to said fund of \$160,000, and the avails thereof, to the arbitration, determination, and award of said Ballinger, Waul, and Culberson, or any two of them, which should be final and conclusive of all such claims and rights, and the issues made by the pleadings in said suit No. 248, and that upon the decision of said arbitrators the said fund, less certain expenses in said agreement provided for, should be immediately paid by the arbitrators to the prevailing parties, according to their respective rights as found and determined by the decision and award. Fourth. It was provided in the agreement that, if either or any of said arbitrators should fail or refuse to act, others should be appointed in the manner therein stated. Fifth. That the arbitrators should go to the city of Brownsville as soon as practicable, and there try, arbitrate, award, judge, and determine each and every of said re-

spective claims and demands, and order the payment and distribution, and make distribution accordingly, of said fund, and the award of any two of the arbitrators should be binding and conclusive upon said parties and fund.

(10) It is averred in the bill that on July 14, 1887, a verdict and judgment were, by the consent of parties, and in conformity to said agreement, rendered and entered in said suit, in and by which defendants Stillman and Carson recovered the title and possession of the whole of Ft. Brown reservation, and the claims for use and occupation against all of the parties to said suit, including Col. Kellogg and the United States.

(11) It is averred in the bill that on the formal trial in suit No. 248 the issues made by the pleadings were not contested or litigated, nor the rights of the parties adjudicated; that no evidence was offered upon said trial upon any of the issues made by the pleadings.

(12) It is averred in the bill that the title to Ft. Brown reservation was by said judgment vested in Stillman and Carson in trust for the use and benefit of all the parties to suit No. 248, and for the purposes stipulated in said agreement, and that Stillman and Carson accepted the title to said property as trustees for said use and purposes.

(13) It is alleged in the bill that Mr. Kleberg, United States district attorney, though he did not sign the same, was nevertheless a party to the agreement of July 13, 1887, for the United States, and consented to the judgment of July 14, 1887, and the United States have accepted the benefit of said agreement and judgment, and that it was the understanding of the court which rendered the judgment, as well as all parties to the suit, and their counsel, that the title to said property should be by said judgment vested in Stillman and Carson in trust for the purposes mentioned in said agreement, and for none other.

(14) It is averred in the bill that on April 26, 1895, pursuant to the agreement and judgment, Stillman and Carson delivered to the United States their deeds and releases to Ft. Brown reservation, and the claims for use and occupation, and received from the United States treasury the full amount of \$160,000 appropriated to pay the same, and that they received said sum in trust, and as trustees, as provided in said agreement.

(15) It is alleged that Stillman and Carson fraudulently concealed from plaintiff and the other claimants the fact that they had collected the fund, and fraudulently appropriated and converted the whole of the \$160,000 to their own use and benefit, and are fraudulently using the judgment of July 14, 1887, by which the title to the land was vested in them in trust, for the purpose of defrauding all the claimants of any and all benefit of said judgment, and of their interest in said fund, and claim and right to said land, and are conspiring with each other and with other persons for the purpose of fraudulently preventing and defeating a decision and settlement of the conflicting claims to said land and funds, and a distribution of the fund to the true owners thereof by arbitration; that Mr. Ballinger, one of the arbitrators, has departed this life, and another one has declined to act, and Stillman and Carson decline to supply their places and proceed

with the arbitration as provided in the agreement, and refuse to account for the trust fund of \$160,000, and refuse to recognize the rights of the other claimants in said fund, and refuse to give plaintiff and the other claimants any information whatever concerning said fund.

(16) It is shown by the averments of the bill and exhibits that the conflicting claims to Ft. Brown reservation and said fund, and the various issues raised in regard thereto by the record and pleadings in suit No. 248, are now, and remain, wholly undetermined, undecided, and unadjusted; that Stillman and Carson have by their wrongful acts defeated the plan for arbitration, and rendered necessary an application to this court for a continuation and completion and final adjudication of all the issues raised and the matters partly litigated in the former suit, and for an adjudication of the respective claims to said fund.

(17) It is averred in the bill that defendant Carson is a citizen of the state of Texas, and resides at Brownsville, Cameron county, Tex.; that, so far as visible property is concerned, he is insolvent, and has no visible property in this state, except such as is by law exempt from seizure and sale under execution or attachment, and that he (Carson) is the duly and lawfully authorized agent of defendant Stillman in Texas, and represents their mutual interests in resisting all efforts of the said claimants to compel an accounting by them of the trust fund of \$160,000.

(18) The bill states the names of the attorneys of record of all the parties in the former suit, and it is shown that in that suit defendant Stillman was represented by Mr. James R. Cox, of New York, and Messrs Ballinger, Mott & Terry, of Galveston, Tex., and that the last-named firm also represented defendant Carson.

(19) The prayer of the bill is: First. That an interlocutory decree be made, requiring defendants Stillman and Carson to deposit the fund of \$160,000 in the registry of the court, or pay it to a receiver, as the court might direct; second, that all the conflicting claims of the claimants to said land and fund, as the representatives of the land, be investigated, considered, adjudicated, and settled in this suit; third, that defendants Stillman and Carson be enjoined from making fraudulent use of said judgment, and be compelled to account to the court for the fund of \$160,000, with interest, and that the trust created by the said agreement and judgment be enforced by the court; fourth, that on final hearing plaintiff have a decree against Stillman and Carson and the estate of Cavazos for one-half of the fund, interest, and cost, and that the other one-half be paid to the claimants found by the decree of the court entitled to the same; (5) there is the usual prayer to make parties defendant, and for process and service, and for general relief.

On June 25, 1897, an order for substituted service, at the application of complainant, was issued by the court, granting that subpoena issue, directed to James Stillman, to be served by the marshal of the Eastern district of Texas upon M. F. Mott, the attorney of record of Stillman in the action at law (No. 248), and granting further that subpoena issue, directed to James Stillman, to be served upon him by the marshal of the Southern district of New York. The marshal's return

on the subpoena served upon M. F. Mott shows that Mott requests the marshal to state in his return that he does not represent James Stillman. In accordance with the order of court, James Stillman was served with subpoena by the marshal of the Southern district of New York. On June 14, 1897, complainant applies by motion to the court for an interlocutory decree, requiring said fund of \$160,000 to be paid into court, or for a receiver, to be appointed by the court, and for the issuance of temporary writs of injunction as prayed for in his bill. The hearing of this motion was set down for July 15, 1897, at Austin, Tex., and service of the motion and time of hearing was served through the post office, by registered mail, on M. F. Mott and James Stillman. On July 15, 1897, Thomas Carson, for himself and as administrator, etc., filed his reply to the motion for injunction and receiver, and, showing cause why the motion should not be granted, states under oath that no part of said \$160,000 was ever received by him, or held by any one under his direction or control. He further answers and shows, but not under oath, that all of the parties are not before the court; that James Stillman is beyond the jurisdiction of the court; that the original action at law (No. 248), and all the issues raised therein, have been determined and adjudicated by a final judgment duly rendered and enforced; that the agreement to arbitrate was not filed in the action at law; that there was no fund in the court, and the court knew of no such fund, at the time when title was adjudicated; that no fund has ever been within the custody of the court, or within this district; that a breach of the independent agreement can only be remedied by an independent suit; that complainant and defendant Carson are citizens of Texas; that the court is without jurisdiction; that the fund sought is not within the custody of the court, or subject to its process; that the suit is not dependent or ancillary, or a continuation of the action at law (No. 248); and that the bill is without equity.

The foregoing statement shows the case as it was presented to the circuit court, and on which that court passed its decree adjudging that it had jurisdiction of the cause as being a suit ancillary to case No. 248 on the law docket of the court, and proceeded to appoint a receiver to take charge of the fund, under the direction of the court, pending the progress of proceedings in the suit, and, in connection therewith, enjoining the defendants Carson and Stillman from using the judgment in the law case for the purpose of depriving the plaintiff and the other defendants in the suit of their interest in the fund, and from refusing to pay the same into the hands of the receiver, and from refusing to account to the court therefor. The errors assigned are, first, that the court erred in holding that it had jurisdiction in this suit; naming four grounds to support this assignment. The second, third, and fourth errors assigned are to the effect that the court erred in granting the injunction herein, and in appointing a receiver.

The case presented by the bill and its exhibits shows a large trust fund held by the defendants Carson and Stillman as trustees for the other defendants and for the complainant; that the trustees have renounced their trust, and are refusing to execute it, or take steps to cause it to be executed; that the original provisions for its execution

through the aid of arbitrators cannot now be effective, and that, to fix the distributive shares of the beneficiaries, it becomes necessary to resort to a court of equity; that the nature of the claims of the beneficiaries is such that it will require a considerable time to adjust and fix the respective shares of the distributees; that, pending the progress of this proceeding, adequate measures should be taken for the safe-keeping and control of the fund, under the direction of the court. In such a state of case, it cannot be seriously questioned that the chancellor would be authorized, if not required, to take care to preserve the fund. Nor can it be seriously urged that the appointment of a receiver, to be the hand of the court in doing that work, was an unusual or improvident exercise of the chancellor's authority; and the injunction granted in aid thereof, if not necessary, was not hurtful. An interlocutory decree appointing a receiver will not support an appeal. *Highland Avenue & Belt Railroad Company v. Columbia Equipment Company* (decided by supreme court Jan. 3, 1898) 18 Sup. Ct. 240. And when such a decree appointing a receiver embraces, as in this case, the granting of an injunction, there may be no necessary connection between these different parts of the decree, and the part granting the injunction may be reversed without affecting the other part. It is true that on appeal the circuit court of appeals will consider the whole case, and will determine upon the whole case whether it should take further action than the disposition of the injunction on the merits requires. *Atlanta & F. R. Co. v. Western Ry. of Alabama*, 2 U. S. App. 227, 1 C. C. A. 676, and 50 Fed. 790; *Smith v. Iron Works*, 165 U. S. 518, 17 Sup. Ct. 407.

It is clear, upon the face of this record, and from all the argument of counsel, both by brief, and orally in the presence of the court, that the real question involved in this appeal, and underlying the whole assignment of errors, and giving the only substantial support that any of the specifications can rest upon, is the question of the jurisdiction of the circuit court for the Western district of Texas to entertain the complainant's bill. The circuit courts of the United States being courts of limited jurisdiction, the matter of jurisdiction is in every case one of supreme concern. In some cases, however, the jurisdiction of the court, or the want of it, is so apparent as to be beyond serious question, and in very many cases a question of jurisdiction is attempted to be raised on wholly unsubstantial ground. This case does not fall within either of these classes, but is clearly one where the matter of jurisdiction is not only, as always, of paramount concern, but the question arising with reference to it is grave. It is of such gravity and vital character that in our opinion the appeal allowed from the interlocutory decree should not be suffered to become the vehicle of bringing it up for premature determination. In any case in which the jurisdiction of the court is in issue, the wisdom of our laws gives a direct appeal to the supreme court. It is true that we could avoid the very delicate responsibility of provisionally deciding this issue of law, that must ultimately appeal to the supreme court, by certifying the question to that court, and asking for its instruction. It is true, also, that, unless the question is carried to the supreme court by our request for instruction, it cannot reach that

high tribunal until after final hearing of the suit in the circuit court. *McLish v. Roff*, 141 U. S. 661, 12 Sup. Ct. 118. But the reason which makes this delay the established procedure in a direct appeal to the supreme court in any case in which the jurisdiction of the court is in issue is strongly persuasive to our minds that in such a case as this we should not pass on that issue on an interlocutory appeal, but should dispose of the matter of injunction on the merits, and suffer the issue as to the jurisdiction of the court to rest on the decision of the circuit court until the suit shall proceed to the hearing, and to the passing of the final decree, when the parties aggrieved can have their election of appeals, as clearly pointed out to them in *McLish v. Roff*, *supra*.

If it does not clearly appear upon the face of the record that the action (No. 248) was begun, conducted, and concluded on an agreement of all parties that the legal title to the land of the Ft. Brown reservation, and the rents due for its occupation, should be as speedily as possible assured to the United States, in order that the contesting claimants should transfer their claims from the land, which they did not expect or wish to recover, to the appropriation which had then recently been made by congress after long and active solicitation by or on behalf of the parties, it is at least strongly implied, from the conduct of all the parties, as shown by the face of the record, that the allegations of the bill in this case in that regard are true; and, without the allegations of the bill, such a state of case would have been presumed by any one conversant with the conduct of litigated controversies affecting such numerous parties and large values. A strong conclusion of fact would take hold of the experienced observer, that there was underlying the judgment in that case an agreement substantially similar to that which the bill in this case shows to have been made. The act making the appropriation was a public act, of which the court had judicial cognizance, and doubtless actual knowledge. The court was held at a point on, or in sight of, the Ft. Brown reservation; and the manner of its original occupation, and of its continued use by the government, was matter not only of local, but of public, history. The action that the United States district attorney had taken in the case, and the elaborate pleadings of the numerous parties, filed in court only one day before the final judgment, exclude all doubt as to that officer's knowledge of the existence and substantial terms of the agreement that was the true basis of the judgment. If the circuit court for the Western district of Texas had not jurisdiction of the complainant's bill, such want of jurisdiction does not spring from the nature of the obligations charged to have been assumed by certain of the defendants in the bill, and the rights claimed by the complainant for himself and for the other defendants, or from the nature of the relief sought to be obtained, but from the state of the parties, and from some force claimed to inhere in the nature of a judgment at law. To the eye of natural justice it would seem that if that court has not jurisdiction of the parties to the agreement that was in truth the basis of its judgment in cause No. 248, with power to protect the beneficiaries in the trust clearly created by that agreement, and which has so far borne fruit as to bring into the possession of the



trustees the fund which was the material subject, not only of the agreement, but of that litigation, its jurisdiction, proceeding, and processes have been successfully misused by the parties sought by this bill to be charged as trustees. Under all the circumstances of the condition of this case, and the allowance of this appeal, suggested in our foregoing remarks, we deem it best, pending proceedings to a final hearing in the circuit court, to concur for the time being with that court on this question of jurisdiction, and leave it to the parties, after the passing of a final decree, to take the question of jurisdiction, if they so desire, to the supreme court, in the manner provided by law. On the grounds stated, and for the reasons suggested, the decree appealed from is affirmed.

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CALIFORNIA FIG-SYRUP CO. v. CLINTON E. WORDEN & CO. et al.

(Circuit Court, N. D. California. March 22, 1898.)

No. 12,378.

1. TRADE-MARK—INJUNCTION—SYRUP OF FIGS.

Upon a bill and affidavits showing that "Fig Syrup" or "Syrup of Figs" was not known in connection with a liquid laxative medicine until it was prepared by the complainant; that the good will in its manufacture is of great value; and that defendants, desiring to perpetrate a fraud and deceive the public, are making and selling a laxative under that name,—a preliminary injunction will be granted.

2. SAME—RIGHT TO INJUNCTION—MISREPRESENTATION.

The use of "Fig Syrup" or "Syrup of Figs" to designate a laxative compound the basis of which is senna, and which is correctly described in the labels or circulars as being composed of the juice of figs combined with the medicinal virtues of various plants, is not a misrepresentation as to the character of the compound such as will deprive complainant of the right to equitable relief.

3. EQUITY—MULTIFARIOUSNESS.

The question of multifariousness is largely within the discretion of the court. As a general rule, whenever the matters set up require entirely distinct and different kinds of relief, the bill is multifarious; but, if the relief sought is the same as against all the defendants, a demurrer will not be sustained.

This is a suit in equity by the California Fig-Syrup Company to enjoin the defendants from making, selling, or offering for sale any liquid laxative preparation under the name "Syrup of Figs" or "Fig Syrup," or under any name in colorable imitation of the name "Syrup of Figs" or "Fig Syrup." The cause was heard on a motion for a preliminary injunction.

Olney & Olney, for complainant.

John H. Miller and Purcell Rowe, for defendants.

MORROW, Circuit Judge. This is an order to show cause why a preliminary injunction should not be granted as prayed for in the bill of complaint. The motion was heard upon the bill of complaint and affidavits in support thereof, and upon a demurrer to the complaint and counter affidavits. The bill alleges, among other things: That the complainant is a corporation created and existing under the laws of the state of Nevada. That the defendant Clinton E. Worden & Co. is a corporation created and existing under the laws of the state

of California, a citizen of the state of California, and having its chief office and place of business in the city and county of San Francisco, state of California; and that the other defendants are each and all citizens of the state of California, residing and doing business within the Northern district of California. That in 1879 one Richard E. Queen invented a certain medical preparation or remedy for constipation, and to act upon the kidneys, liver, stomach, and bowels, which medical compound is a combination in solution of plants known to be beneficial to the human system, forming an agreeable and effective laxative to cure habitual constipation and many ills depending upon a weak and inactive condition of the liver, kidneys, stomach, and bowels; and that this preparation has found favor with physicians throughout the country, and with the public at large, and is, and for many years last past has been, sold in large quantities throughout the United States, Canada, England, and other countries, and throughout the state of California. That, shortly subsequent to the aforesaid invention, a company was incorporated, and thereupon the said Richard E. Queen sold, transferred, and assigned all his right, title, and interest in and to the said medical compound, and in and to the trade-name, trade-marks, and good will of said compound, to the complainant. That ever since said incorporation, and continuously up to the present time, the complainant has been, and now is, engaged in the manufacture and sale of said medical preparation or remedy. The complainant alleges: That this laxative medical compound or preparation, made and put up as aforesaid, has always been marked, named, and called by the complainant "Syrup of Figs," being advertised under that name by the complainant; the name "Syrup of Figs" being printed or otherwise marked upon every bottle of this preparation made and sold by the complainant, this name being also printed upon the boxes, packages, or wrappers in which the bottles of this preparation are packed for shipment and sale. That it has been the practice of the complainant to put the bottles containing this preparation in oblong pasteboard boxes or cartons, so that they will reach the consumer in that form. That in all instances, not only the bottle which contains this preparation, but the box or carton which contains the bottle of this preparation, is marked with the words "Syrup of Figs," and also contains printed matter stating that this preparation is a medical laxative preparation, and also giving a general idea of its uses and purposes. That the complainant has spent large sums of money, to wit, more than \$1,000,000, in advertising said preparation, always under the name of "Syrup of Figs" or "Fig Syrup," throughout the United States and other countries, thus making the same and its merits known to the public to such an extent that it has become a household word. That this preparation, in consequence, has become known as a liquid laxative medicine, so as to be distinguished from all other medicines of the same general character under the name of "Syrup of Figs"; and that its merits and popularity are so well established that many millions of bottles of complainant's preparations have been sold, always under the name of "Syrup of Figs" or "Fig Syrup"; and that in the last 12 months more than 2,000,000 bottles of said preparation have been sold. That the good name of

the preparation is gaining in popularity and in the confidence of the public to such an extent that the demand for the same is increasing each day; and that now, and for several years past, this preparation of Syrup of Figs or Fig Syrup has been one of the principal articles of sale, and a part of the stock of almost every druggist in the United States. That on account of the care, skill, and fidelity with which complainant has and does prepare this laxative preparation or medicine, and by reason of the steady and increasing demand for the same, and the large sums of money spent in advertising and in introducing the same, and making it known to the public, the complainant's good will in its manufacture is of great value, to wit, of the value of \$1,000,000. That the defendant Clinton E. Worden & Co., well knowing all the premises, and that complainant's preparation had attained a great popularity and a large sale on account of its merits as a liquid laxative compound for the human system, and desiring and intending to perpetrate a fraud upon complainant's rights, and to trade to its own profit and advantage upon the reputation created by complainant, and desiring to impose a worthless production upon the public as and for complainant's preparation, has prepared, as complainant is informed and believes, a preparation, and put it up in packages resembling in form complainant's preparation, and has called said preparation "Syrup of Figs," and is palming off the same, or causing the same to be palmed off, upon the public, as and for complainant's preparation, and is profiting from the valuable reputation which complainant has created for its medical laxative preparation. That on some bottles of such preparation the statement is made that the preparation is made by the San Diego Fig-Syrup Company, San Francisco, Cal.; on others, that it is made by the Fig-Syrup Company, San Francisco; on others, by the San Francisco Fig-Syrup Company, San Francisco, Cal.; on others, by the New York Fig-Syrup Company, New York City, N. Y.; on others, by the Laxative Fig-Syrup Company, New York City, N. Y.; and again on others it is stated that it is prepared by Yeteva Drug Company, Louisville, Ky. That there is no corporation, co-partnership, or firm except the complainant doing business under the name of "Fig-Syrup Company." That the statements made upon the bottles containing the preparation put up by the defendant Clinton E. Worden & Co. are intended to deceive the public, and induce them to believe that the compound prepared by the said defendant is prepared by the complainant. That the other defendants are druggists, doing business in the city and county of San Francisco, state of California, who, knowing that the compound put up and sold by the defendant Clinton E. Worden & Co. is not manufactured, put up, or sold by the complainant, with the intent and purpose of deceiving their customers, are selling to customers the liquid laxative compound prepared by the defendant Clinton E. Worden & Co. as and for the medical preparation made and sold by the complainant. That the complainant has been greatly injured by the defendant in the manufacture of this liquid laxative preparation, Syrup of Figs or Fig Syrup; the amount the complainant is unable to state, but it believes it has suffered damage and injury to the extent of \$10,000. That this is a continuing wrong; and one that it is impossible to exactly calculate,

and one which, if permitted to continue, will work irreparable injury to the complainant.

Two exhibits, marked "A" and "B," were filed with the complaint. Exhibit A represents the box or carton used as a wrapper for the bottle containing the preparation, and Exhibit B the bottle as marked and put up for sale. The affidavits introduced by the complainant fully support the allegations of the bill. The demurrer to the bill raises the question as to its sufficiency. It is also objected that the bill is multifarious, in this: that several separate and distinct causes of action are charged against several separate and distinct defendants. The affidavits introduced by the defendants refer to the case of Syrup Co. v. Stearns, 67 Fed. 1008, decided adversely to the complainant upon a bill charging the infringement of a trade-mark. They also deny that the defendant Clinton E. Worden & Co. has placed on its bottles any statement intended to deceive the public, or to induce them to believe that the compound prepared by them is prepared by complainant, and deny that it has put up these bottles and packages in such close imitation of those of the complainant as to cause retail purchasers who call for complainant's article to conclude, when they are handed a bottle of defendants' article, that they have the article manufactured by complainant. The bill of complaint in this case proceeds upon the theory that the rights of the complainant have been infringed by the defendants by unfair competition. It is not strictly a charge of an infringement of a trade-mark, although it has many of the elements of such a case; but the facts alleged by the complainant are plainly set forth for the purpose of establishing the charge that the defendants are engaged in an unfair and fraudulent competition against the business of the complainant, conducted with the intent on the part of the defendants to avail themselves of the reputation of the complainant to palm off their goods as the goods prepared and put up by the complainant. The main question is therefore one of fact, since the law upon this subject has been settled by numerous authorities. A reference to a few of these authorities will show, however, what facts have been deemed sufficient to establish the unfair and fraudulent character of the competition.

In *McLean v. Fleming*, 96 U. S. 245, the court held:

"It is not necessary, in order to give the right to an injunction, that the specific trade-mark should be infringed, but it is sufficient if the court should be satisfied that there was intent on the part of the respondent to palm off his goods as the goods of complainant, and that he persists, after being requested to desist."

The case of *California Fig-Syrup Co. v. Improved Fig-Syrup Co.*, 51 Fed. 297, was a case in which the defendants were charged with an infringement of a trade-mark, and it was held that the complainant was entitled to an injunction protecting it in the use of the words "Fig Syrup" or "Syrup of Figs," conjoined with the other words and devices used by it, as set forth in the bill. An interlocutory decree granting the injunction prayed for was affirmed by the circuit court of appeals. 4 C. C. A. 264, 54 Fed. 175. The court, in commenting upon the name of the article, said:

"The phrase 'Syrup of Figs' is in no sense a generic one. It is not a name for the natural product, or of a class of natural products. If such an article

exists, it must be the result of a manufacturing process. So far as we are advised, the name never existed, nor was it applied to any natural or artificial product, until formulated by appellee of words of no prior association, and by it used to designate its preparation. Even if such were made entirely of figs, it is still a new name, applied to a manufactured, and not a natural, product; hence indicates rather its origin than its quality, or even its nature."

The complainant in that case is the complainant in this case, but the contention in the present case, as before stated, is that the defendants have, in the use of the name "Fig Syrup" or "Syrup of Figs," appropriated a name which the public believe to be the property of the complainant; that the complainant is injured by this deception; and that it is entitled to protection against such an injury.

In *Walter Baker & Co. v. Sanders*, 26 C. C. A. 220, 80 Fed. 889, the suit was brought by the proprietors of the original "Baker's Chocolate," to restrain unfair competition by defendants in the sale of a rival chocolate manufactured and put up in the city of New York, in the name of W. H. Baker, of Winchester, Va. It was held by the circuit court of appeals that one entering into competition with another person of the same name, who has an old and established business, is bound to distinguish his goods from those of the latter, so as to prevent confusion, and that where, by long use, the words "Baker's Chocolate" had come to mean, in the minds of the public, complainant's goods, a subsequent maker of chocolate, with the same name, was not entitled to use that name, whether with his given name or its initials, in such manner as to announce that the goods he sold were "Baker's Chocolate."

In *Gage-Downs Co. v. Featherbone Corset Co.*, 83 Fed. 213, the complainant had long been in the business of making and selling corset waists at Chicago, and marking them "Chicago Waists"; and, being the only person marking its manufactures thus, the complainant had come to be known as the originator by manufacture of the goods thus branded. In the course of its business, the complainant employed Buyer & Reich as its agents on the Pacific Coast, and the latter sold these goods thus marked. After the termination of their agency for the complainant, Buyer & Reich continued to sell "Chicago Waists" made, not by the complainant, but by the defendants, residing and doing business at Kalamazoo, Mich. The court held that:

"It is a fundamental principle that a man cannot make use of a reputation which another manufacturer has acquired in a trade-mark or name, and, by inducing the public to act upon a misapprehension as to the source of the origin, deprive the other party of the good will and reputation which he has acquired, and to which he is entitled. Now, there are many cases in which it has been held that the name of the place where goods are manufactured is not the subject of appropriation; and this may be said to be the general rule, and to be applicable where that is the sole feature of the trade-mark or trade-name, and where the name of the place is used in its primary signification. But the use of the name of a place may, under circumstances, be such as to denote to the eye and mind of the public the name of the person who has, perhaps, by long-continued business in that place, or long appropriation of that name, and being the only person there who has thus appropriated and used that name, produced goods which have gained their favor. In such circumstances the name of the place may acquire a secondary signification, and become, instead of denoting the place where the goods are manufactured, a mark denoting the manufacturer, and in such case, and in the circumstance where the name has thus acquired a

secondary signification, a party may use it, and may be entitled, possibly, to its exclusive use."

In *Johnson v. Bauer*, 27 C. C. A. 374, 82 Fed. 662, the complainant, a corporation, had long been engaged in the manufacture and sale of medical and surgical plasters of various kinds, put up in various descriptions of boxes, and had adopted as a trade-mark, in addition to other insignia, a red Greek cross. The defendant, also a corporation, had been engaged in a like business; but it placed upon its plasters a Maltese cross in white and gilt, with a red circle thereon, and the words and letters "B. & B. Trade-Mark." The evidence disclosed the fact that the plasters of the complainant had become known and were ordered and sold as "Red Cross Plasters." Otherwise than the resemblance in the two crosses, there was little, if any, similarity between the packages containing the goods of the complainant and those containing the goods of the defendant. Judge Jenkins, speaking for the circuit court of appeals in the Seventh circuit, said:

"It may be true that those engaged in the trade and acquainted with the manufacture of both parties could not be deceived; but as the goods of the appellant have come to be known as 'Red Cross Plasters,' and notwithstanding a discriminating examination would detect the distinction in the trade-mark, the casual observer might easily be mistaken, and imposition would be easy. The red cross speaks to the eye, and the article, being known by that designation, speaks also to the ear by that name."

It was accordingly held that the use of the red Maltese cross upon the goods of the defendant was wrongful. It is evident that, while the facts in this case were deemed sufficient to establish an infringement of a trade-mark, the decision of the court was placed upon a broader foundation than the mere imitation of a label, when it said that the name "Red Cross" spoke to the ear, and cited the case of *Pillsbury v. Mills Co.*, 24 U. S. App. 395, 12 C. C. A. 432, 64 Fed. 841, as an authority, where it was held that the right of the complainant to relief did not rest "upon any notion of right to or property in a technical trade-mark, but upon principles applied by courts of equity in cases analogous to cases of trade-marks, where the relief is afforded upon the ground of fraud, which in turn rests upon the hypothesis that the party proceeded against has deliberately sought to deceive the public, and to defraud another, by palming off his own goods as the goods of that other."

The law in England on this subject is also well established. Two late cases will illustrate the scope of its application.

In *Reddaway v. Banham* [1896] App. Cas. 199, the plaintiff had for some years made belting, and sold it as "Camel Hair Belting," a name which had come to mean in the trade the plaintiff's belting, and nothing else. The defendant began to sell belting made of the yarn of camels' hair, and stamped it "Camels' Hair Belting," so as to be likely to mislead purchasers into the belief that it was the plaintiff's belting, endeavoring thus to pass off his goods as the plaintiff's. The lord chancellor, in moving the judgment of the house of lords, stated the law upon the subject in a single sentence: "Nobody has any right to represent his goods as the goods of somebody else." It was accordingly held that the plaintiff was entitled to an injunction restrain-

ing the defendant from using the words "Camel Hair" as descriptive of or in connection with belting made or sold or offered for sale by him, and not manufactured by the plaintiff; without clearly distinguishing such belting from the plaintiff's belting. The injunction was therefore qualified to the extent of permitting the defendant to manufacture and sell camels' hair belting, providing the article so manufactured and sold was clearly distinguished from plaintiff's belting. The qualification arose out of the fact that, for many years, belting made of camels' hair yarn had been known in the markets of the world, and it was asked: "What right can an individual have to restrain another from using a common English word because he has chosen to employ it as a trade-mark?" The answer was that "he had no such right, but he had a right to insist that it shall not be used without explanation or qualification, if such a use would be an instrument of fraud."

In the present case it will be observed that complainant's right is more closely identified with the name of the article. The name of "Fig Syrup" or "Syrup of Figs" was not known to the world as a liquid laxative medicine until it was prepared by the complainant, and it was not then known as such an article in any way distinguished from its production by the complainant. This is an important fact to be taken into consideration in determining whether the defendants are engaged in unfair competition.

In *Saxlehner v. Appollinaris Company* [1897] 1 Ch. 893, it was held that the principle that "nobody has any right to represent his goods as the goods of somebody else" has no limit as regards name, origin, honesty of manufacture, or sale, or otherwise; that a trader whose goods have acquired a reputation under a particular name can restrain the user of that name in any way whatever by a rival trader in connection with the latter's own goods, even though that reputation has been acquired by the exertions or enterprise of the rival trader as an importer and vendor on behalf of the plaintiff.

It is claimed, however, that the complainant does not come into equity with clean hands; or, as the maxim is otherwise expressed, "He that hath committed iniquity shall not have equity." The iniquity of the complainant that has been urged upon the court's attention is that the article manufactured and sold by it, and for which it seeks protection, is not, in fact, a "Fig Syrup" or "Syrup of Figs," but a compound the basis of which is senna, a well-known standard laxative medicine, henbane, and ground Jamaica ginger, together with sugar and alcohol, and, for the purpose of giving a flavor to the preparation, the extracts of peppermint, cloves, cassia, and anise. This objection if true would doubtless be effective as against the original article placed upon the market by the complainant, when it was advertised as being "the laxative and nutritious juice of the figs of California, combined with the medical virtues of plants known to be most beneficial to the human system," etc. This objection prevailed against the claim of the complainant in the case of *Syrup Co. v. Stearns*, 67 Fed. 1008. But the article which the complainant offers for sale is not now put forth under that claim. The statement now placed upon the bottles and boxes containing the preparation is that the "remedy presents in the most acceptable form the medicinal laxative principles

of plants known to act most beneficially to cleanse the system effectually. \* \* \* The juice of figs in the combination is to promote a pleasant taste." Again it is stated that "its efficacy and delicacy of flavor are due to the medicinal and agreeable qualities of plants and aromatic carminatives skillfully combined with pleasant liquids, among which may be mentioned the juice of figs." It appears to be a fact that the preparation does contain a small quantity of the juice of figs, which is combined with other ingredients for the purpose of promoting a pleasant taste in the compound, and that senna and aromatic plants form the basis of the preparation. I do not discover anything in the statement on the boxes or bottles, or in the picture of figs displayed upon the boxes, or in the picture of the young lady holding a branch of the fig tree laden with the fruit also displayed upon the boxes, that can be properly characterized as a fraudulent representation. Dealers are allowed to make their goods appear attractive, and place upon them such pleasing figures and devices as will make them salable; and, when this is done without fraudulent representation, the law will not refuse relief because the "poster is more attractive than the performance." Upon the facts presented in the application for an injunction in this case, it appears to me that the complainant is entitled to relief against the defendants in the manufacture and sale of the preparation of "Syrup of Figs" or "Fig Syrup" under the name and in the form and style shown by Exhibits D, E, F, G, H, I, S, and T.

With respect to the technical objection that the bill is multifarious, it is perhaps sufficient to say that the bill alleges that the defendants, knowing the premises, have fraudulently conspired together to perpetrate the frauds set forth in the bill. Moreover, whether an objection of this kind should be entertained depends largely upon the discretion of the court. As a general rule, it may be said that, whenever the several matters set up in the bill require entirely distinct and different kinds of relief, the bill is multifarious; but, if the relief sought is the same as against all the defendants, it does not appear that the objection should be considered sufficient to sustain the demurrer. *Merrins*, Eq. § 926. A preliminary injunction will issue, as prayed for in the bill of complaint.

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#### WHELAN V. MANHATTAN RY. CO.

(Circuit Court, S. D. New York. April 1, 1898.)

#### 1. COSTS—SECURITY—SUING IN FORMA PAUPERIS.

Under Act July 20, 1892, §§ 1, 4, plaintiff may be permitted to sue in forma pauperis on filing a proper affidavit of poverty, and also an affidavit of facts sufficient to show that the cause of action is not frivolous.

#### 2. SAME—ASSIGNMENT OF ATTORNEY.

When one shows a right to sue in forma pauperis, the court will appoint an attorney for him, whose fee will be contingent on success, and, in any event, will not be larger than the quantum meruit.

Motion to vacate an order heretofore made, requiring plaintiff to file security for costs. The action is brought to recover damages for



personal injuries sustained, as is alleged, through defendant's negligence.

Edwin G. Davis, for the motion.

Joseph A. Adams, opposed.

**LACOMBE**, Circuit Judge. This motion is made upon an affidavit made by the plaintiff, which sets forth that she is a citizen of the United States, resident in the state of New Jersey; that she is wholly destitute of means; that, because of her poverty, she is unable to pay the costs of this suit, or to give security for the same; and that she believes she is entitled to the redress she seeks by this action. This affidavit conforms to the requirements of section 1 of the act of July 20, 1892. That act, however, does not secure an unrestricted right to prosecute as a poor person. A preliminary investigation by the court is also provided for by section 4, which reads:

"Sec. 4. That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious."

Upon attention being called to this provision, a further affidavit has been filed, which sets forth the facts which plaintiff expects to prove upon the trial. From this statement it appears that plaintiff was about to step on board the platform of one of defendant's cars which had stopped at a station; that there was room for her upon the platform; that (the guard holding the gate open) she placed her right foot upon the platform, and had just raised her left foot from the station platform when the guard suddenly, and without warning, violently shoved the gate against the plaintiff, thrusting her from the platform of the car, and inflicting severe injuries. If this story be uncontradicted, plaintiff would be entitled to go to the jury, and the alleged cause of action would certainly not be "frivolous." It seems, therefore, to be "worthy of a trial," within the language of section 4. The order requiring plaintiff to file security for costs should therefore be vacated. It remains, however, for the court to provide an attorney to represent the poor person. The act is most carefully framed to deal fairly with both sides. It will not allow an irresponsible person to prosecute, without incurring liability for costs, some frivolous or malicious cause of action; but once it is shown to the court that there is a cause of action "worthy of a trial," which plaintiff, a citizen of the United States, cannot prosecute without incurring indebtedness, which such citizen is too poor to pay, then congress provides a way whereby such poor citizen may have his day in court without incurring such indebtedness. Not only is he to be relieved from securing the costs of his adversary, but an attorney is to be provided for him by the court, who will prosecute his cause of action without stipulating for some compensation in the event of success larger than the quantum meruit. In other words, the "poor citizen" will not be compelled, by reason of his poverty, to enter into any contract more oppressive than such as could be made by his more fortunate fellow citizen. The attorney assigned by the court, in the

event of nonsuccess, will, of course, receive nothing; in the event of final success, he may apply to the court for an order fixing a fair compensation for the services he may actually render, which will be paid to him out of the fund recovered, and the balance only paid over to plaintiff.

If the attorney who brought the action is willing to continue the litigation on those terms, he will be assigned to represent plaintiff; if not, the court will find some other attorney to prosecute her case.

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BRYAN v. CONGDON.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 1,009.

**1 FALSE IMPRISONMENT—IRREGULAR PROCESS.**

The law lying at the foundation of actions for false imprisonment based on irregular process is that, if a person has been arrested and imprisoned under color of legal process, which is thereafter set aside for irregularity, the person who set that process in motion is responsible in damage to him upon whom the indignity and deprivation of liberty have been visited.

**2 SAME—MINISTERIAL ACT OF OFFICER ISSUING WARRANT.**

A clerk of the district court of Kansas, in issuing a warrant of arrest in a civil action, acts in a ministerial manner only, and his acts are no protection to the person promoting the proceeding, where the affidavit or warrant is defective, and is thereafter set aside for irregularity in its inception.

**3. SAME.**

If a motion to set aside a warrant of arrest on the ground of irregularity is denied by a court of competent jurisdiction, it does not thereby protect the complainant against responsibility for damages, where the order denying the motion is afterwards reversed on appeal, and the warrant vacated.

**4. SAME—PETITION IN ACTION.**

The plaintiff's petition alleged that the defendant caused his arrest under a warrant in a civil action issued by a clerk of the district court of Kansas, which was afterwards vacated on the ground of irregularity, and while he was in jail under said order, and after the defendant had recovered judgment against him in the civil action for money had and received, again caused his arrest on a warrant charging him with embezzlement of the same property for which the judgment was rendered. After he had given bail and been released on the charge of embezzlement, the defendant induced the sheriff to rearrest him under the original arrest proceedings. From this arrest he was released by the supreme court, for the reason that the affidavit in the original proceedings did not state facts sufficient to authorize the warrant. *Held*, that the petition stated facts sufficient to constitute a cause of action.

In Error to the Circuit Court of the United States for the District of Kansas.

A. L. Greene, for plaintiff in error.

C. S. Bowman (Charles Bucher, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. This is an action for false imprisonment. The defendant in error instituted suit by attachment against the plaintiff in error in the district court of Harvey county, Kan., to recover the sum of \$1,167.51 for money had and received. In connec-

tion therewith he filed with the clerk of said court his affidavit and bond for a civil order of arrest, as provided by the statute of Kansas, in which it was charged, *inter alia*, that the debt in question was fraudulently contracted. Thereupon the clerk issued a warrant of arrest, upon which the defendant therein (plaintiff here) was taken into custody by the sheriff, and in default of bail lodged in jail, where he was so imprisoned from the 18th day of August, 1893, until the 19th day of December, 1893, at which last date he was taken from jail by the sheriff and brought before the district court aforesaid to attend upon the hearing of a motion filed in his behalf to set aside said writ of arrest, and to attend upon a trial of the merits of the cause. This motion was denied, and judgment rendered against him for the sum of \$866.78. In default of payment of said judgment he was again imprisoned at the instance of the defendant in error until May 19, 1894, when, without the solicitation or inducement of any of the officials of said county, the defendant in error made another affidavit before a justice of the peace charging the plaintiff in error with embezzling the same property for which the judgment was rendered. The justice of the peace bound him over under this charge for his appearance before said district court to answer thereto. He gave bail bond under this charge, and was set at liberty. Thereupon the defendant in error persuaded and induced the sheriff, without any additional process or authority, to rearrest the plaintiff in error, and place him in jail, under the original arrest proceedings. On writ of error to the supreme court, the action of the district court in refusing to discharge him on said motion was reversed, and the order of arrest was vacated for irregularity. During the pendency of the petition in error aforesaid in the supreme court, and before it was determined, he applied to the supreme court for a writ of habeas corpus to discharge him from the reincarceration made after the sheriff had once taken him out of jail for said hearing before the justice of the peace. The writ was granted, and he was discharged by the supreme court, which had held that the affidavit for arrest in the original proceeding was insufficient, in that it did not state facts sufficient to authorize the warrant. To the petition in this action the defendant in error demurred, on the principal ground that the petition "does not state facts sufficient to constitute a cause of action." The court sustained the demurrer and dismissed the action. To reverse this judgment the plaintiff prosecutes his writ of error.

The established law lying at the foundation of this action is that, if a person has been arrested and imprisoned under color of legal process, which is thereafter set aside for irregularity, the person who set that process in motion is responsible in damages to him upon whom the indignity and deprivation of liberty have been visited. Where the process is set aside for mere error committed by the court in the progress of the action, in contradistinction to irregular or void process, no responsibility may attach to him who caused its issue; but when it is vacated because it was irregular in its inception, responsibility at once attaches. "In the one case a man acts irregularly and improperly, without the sanction of any law, and he therefore takes the consequences of his own unauthorized act. But, where he relies on the judg-

ment of a competent court, he is protected." 1 Add. Torts, 151; *Parsons v. Lloyd*, 2 W. Bl. 844; *Barker v. Braham*, Id. 865; *Collett v. Foster*, 2 Hurl. & N. 361; *Williams v. Smith*, 14 C. B. (N. S.) 599; *Cooper v. Harding*, 7 Q. B. 928.

The principle of law expressed in *Kerr v. Mount*, 28 N. Y. 666, by Johnson, J., has been repeatedly recognized by the highest American courts, and applied to actions in trespass to property and person. It is this:

"Conceding it [the writ] to have been issued by proper authority in respect to jurisdiction, still, it having been set aside as irregular, it afforded no justification afterwards for acts previously done under it by the party in whose favor it was issued. If issued by competent authority and regular upon its face, it might afford protection to the officer for his acts previously done under it, but none whatever to the party. As to him, it was then as though no process whatever had been issued, and the goods had been taken and detained by his order without any process. The moment it was set aside the party became a trespasser *ab initio*." *Chapman v. Dyett*, 11 Wend. 31-33; *Otis v. Jones*, 21 Wend. 394; *Hammer v. Wilsey*, 17 Wend. 91; *Higgins v. Whitney*, 24 Wend. 379; *Lyon v. Yates*, 52 Barb. 243; *Webb v. Bailey*, 54 N. Y. 166.

The whole doctrine is concisely summed up in *Day v. Bach*, 87 N. Y. 56, 60, and in *Fischer v. Langbein*, 103 N. Y. 84, 8 N. E. 251, substantially as follows: He who causes void or irregular process to be issued, whereby injury comes to another against whom it is enforced, is liable in damages therefor. Where the process is void, the right of action for the injury attaches when the wrong is committed, and no judgment vacating the process is required. "Process, however, that a court had general jurisdiction to award, but which is irregular by reason of nonperformance by the party procuring it of some preliminary requisite, or the existence of some fact not disclosed in his application therefor, must be regularly vacated or annulled by an order of court before an action can be maintained for damages occasioned by its enforcement. In such cases the process is considered the act of the party, and not that of the court, and he is therefore made liable for the consequences of his act."

Void process is defined to be such as was issued without power in the court to award it, or which the court has not acquired jurisdiction to issue in the particular case, or which fails in some material respect to comply with the requisite form of legal process. "Irregular process is such as a court has general jurisdiction to issue, but which is unauthorized in the particular case by reason of the existence or nonexistence of some fact or circumstance rendering it improper in such a case." The order made or judgment rendered by a court, which is simply reversed as erroneous, nevertheless affords protection to all persons acting under it. Error, as thus applied, consists in nonconformity to the rules of procedure in an action which the court is authorized to hear, "but not affecting any jurisdictional fact which can be taken advantage of only by appeal or motion in the original action." It will be found, on examination of well-considered cases, that where the courts have, in a case akin to this, held that no action for damages for arrest and false imprisonment will lie, it was predicated of the fact that the arrest was made under legal process, issued by some court or officer of the law invested with judicial power in the first instance to

pass upon and decide whether or not the jurisdictional facts are presented in the application to warrant the issuance of the writ. And even where such officer sanctions the writ, if the essential or substantive facts constitutive of jurisdiction are wholly wanting in the preliminary affidavit or statement, the rule is, nevertheless, that the process is void, and it affords no protection to him who promotes the proceeding. *Miller v. Munson*, 34 Wis. 579; *Mudrock v. Killips*, 65 Wis. 622, 28 N. W. 66; *Loder v. Phelps*, 13 Wend. 46; *Bowman v. Russ*, 6 Cow. 234; *Hauss v. Kohlar*, 25 Kan. 644. But where some requisite jurisdictional fact is stated, but imperfectly in form, or wanting in completeness or definiteness, and the like, which, however, prior to the issuance of the warrant, has received the approval of a judicial officer, the process will protect the prosecutor against an action for false arrest, although the same may subsequently be held to have been erroneous.

In *Gillett v. Thiebold*, 9 Kan. 427, Judge Brewer, with apparent misgiving, reached the conclusion that a justice of the peace under the constitution and statutes of Kansas was a judicial officer, and that in passing upon the sufficiency of the affidavit the question passed under judicial investigation in the first instance, as it was "never to be resubmitted to another officer nor examination by another mind." And, therefore, such a writ sheltered the affiant from liability as a trespasser ab initio. But the broad import of his language must be restrained to the matter in hand, for in the later case of *Hauss v. Kohlar*, supra, it was expressly held, in an action for false imprisonment under an order of arrest issued in a civil action by a justice of the peace, that, as the affidavit did not state any of the grounds required by the statute, the proceedings thereunder were bad, and the writ afforded no protection to the party who set it in motion. The court said:

"Courts are not in the habit of extending by construction either laws or affidavits so as to impose restraints upon personal liberty. \* \* \* The creditor being his own witness for the purpose of obtaining the order of arrest, he furnishing the affidavit upon which the order of arrest was issued, it is not too much to require that he make out a plain case."

Applying these established rules of law to the case under review, how can the conduct of the defendant in pursuing the plaintiff as he did be justified in law? An examination of the constitution and statutes of Kansas satisfies us that the clerk of the district court who issued the warrant of arrest was not clothed with any judicial power. His functions in this matter were simply ministerial. It has been expressly stated by the highest judicial authority of the state that the clerk in issuing the writ of attachment performs "unquestionably a ministerial act." *Gillett v. Thiebold*, supra; *Bryan v. Congdon*, 54 Kan. 109, 37 Pac. 1009. Mr. Justice Brewer said:

"The clerk performs no other function than that of approving and filing the bond, filing the affidavit, and issuing the order of arrest. The control of proceedings, so far as discretion is concerned, is with the judge."

Therefore, the issuance of the writ by the clerk of the district court is merely a perfunctory act on his part, and he is neither required nor expected to bring to bear upon it the eye of judicial investigation.

But it is insisted by defendant in error that, as the district court

afterwards denied the motion to vacate the writ, in contemplation of law that act had relation back to the time of the issuance of the writ, and protected the defendant against any act done thereunder. The statute provides that:

"A defendant may at any time before judgment apply on motion to the court in which the suit is brought, if in session, and in vacation to a judge thereof, to vacate the order of arrest or reduce the amount of bail."

As said by Judge Brewer, in *Gillett v. Thiebold*, *supra*, the legislature might have required a judge or justice to examine into and pass upon the evidence and facts before issuing an attachment; but such is not the statute. It simply authorizes the district court, after the party has been arrested and put in jail, if he is unable to give bond, "to vacate the order of arrest or to reduce the amount of bail." The injury to the party wrongfully arrested has already been done. And when the action of the district court in refusing to vacate the order of arrest has been reversed by the judgment of the supreme court, and the writ vacated, it has relation back to the issuance of the writ by the district clerk, and stands as if it had never been issued.

The conduct of the defendant in pursuing the plaintiff, as disclosed by the petition, is entitled to little sympathy, as he manifested the spirit of revenge, if not of persecution. As if himself aware that the first writ of arrest was insufficient to justify the imprisonment of the plaintiff, he swore out another warrant, charging him with embezzlement of the same property for which he had obtained judgment, and had him brought from jail to answer thereto. And when he had placed upon plaintiff the burden of furnishing a bond to prevent his recommitment to jail, he pursued him further by inducing the sheriff, without any new process of law, to go upon the plaintiff, and again subject him to the ignominy of incarceration in jail, and compelled him to incur the trouble and expense of applying to the supreme court of the state for protection by the writ of habeas corpus. Since the concession of Magna Charta it has been one of the canons of personal privilege of the citizen that the sovereign himself shall neither "go upon nor send upon" him without due process of law. Certainly this vital principle has lost none of its virtue in the progress of Anglo-Saxon civilization.

The judgment of the circuit court is reversed, and the cause is remanded for further proceedings in conformity with this opinion.

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SAUNDERS v. SHORT et al.

(Circuit Court of Appeals, Ninth Circuit. April 4, 1898.)

No. 381.

**CONTRACT—PART FULFILLMENT—SALE.**

A contract for the delivery of a certain number of cattle, unlike one for the building and completion of a house, is severable in its nature, and, if the vendee accepts and appropriates to his own use a portion of the property so contracted for, he must pay the stipulated price for such portion, less the damages sustained by reason of the failure of the vendor to make complete delivery.

**In Error to the Circuit Court of the United States for the District of Idaho.**

On the 16th day of March, 1896, the parties to this suit entered into a written contract, by which, in consideration of \$4,000 at the time paid by the plaintiff in error to the defendants in error, and in consideration of further payments thereby stipulated for, the defendants in error agreed "to sell and deliver to the said B. F. Saunders eighteen hundred head of steers of the following ages: About nine hundred head yearlings, about nine hundred two year olds, about — three year olds, and about — four year olds, at the following prices, to wit: Yearlings, twelve dollars per head; two year olds, eighteen dollars per head. Said cattle to be delivered at Payette, Idaho, and Ontario, Oregon, free on board cars, from twentieth day of May to the fifth day of June, 1896, at option of buyer, he to give twenty days' notice of time of delivery." The contract proceeded to provide for the condition in which the cattle should be delivered,—that is to say, that they should be sound, healthy, fit for driving or shipment, etc.,—and were to be delivered in not less than train-load lots of 15 cars. It provided for the payment of the balance of the purchase price on delivery of the cattle and completion of the contract, and also that, if the vendors offered more than 1,800 head, the vendee would take the same, up to 2,000 head, at the same prices, and upon the same terms as to delivery; and it concluded with the provision that "the said B. F. Saunders hereby agrees not to place any other buyers in this territory for this class and age of cattle during the months of March, April, and May, A. D. 1896." The defendants in error brought this suit in the court below as plaintiffs, upon this written contract, which was annexed to and made a part of the complaint, alleging in their complaint that the defendant to the suit disregarded and broke the clause of the contract last above quoted, to the effect that he would not place other buyers in the territory referred to during the times stated, thereby rendering it impossible for the plaintiff to purchase within that territory at the prices stated in the contract a greater number of cattle, for sale and delivery to the defendant, than is in the complaint afterwards stated. The complaint next alleges "that plaintiffs have duly and diligently performed all the conditions of said contract on their part, and have sold and delivered on the 31st day of May, 1896, to defendant five hundred and twenty-four yearling steers at twelve dollars per head, seven hundred and fourteen two year old steers at eighteen dollars per head, and eighty-eight three year old steers at 22 dollars per head, the aggregate value and purchase price being \$21,076.00; that defendant has not paid said purchase price, nor any part thereof, except the sum of \$4,000.00, on March 19th, 1896, advance and forfeit money as per said contract, and \$16,061.00, on June 1st, 1896." The prayer is for judgment against the defendant for the sum of \$1,015 and costs.

The answer of the defendant to the suit admits the making of the written contract set out in the complaint, denies any breach of its conditions on the part of the defendant, and denies the performance of all the conditions on the part of the plaintiffs. It denies that 88, or any other number, of three year old steers were delivered to or accepted by the defendant pursuant to the written contract, but makes no other denial of the allegations of the complaint respecting them. It alleges that the plaintiffs failed and refused to deliver to the defendant 562 head of one and two year old steers agreed to be sold to him in and by the written contract mentioned. And by way of counterclaim the defendant sets up the same written contract declared on, and alleges his performance of all the terms and conditions on his part provided for, and a partial performance of the plaintiffs' obligations thereunder, to wit, the delivery of 1,238 head of the cattle mentioned in the contract on the 1st day of June, 1896, at which time the counterclaim alleges the defendant, at the request of the plaintiffs, agreed to receive the remainder of the cattle stipulated for, to wit, 562 head, at any time during the month of June, 1896, and the plaintiffs agreed to complete the delivery thereof, under the terms of the contract, during that month. The counterclaim further alleges that at the time of the delivery of the 1,238 head of cattle on June 1, 1896, the defendant, at the request of the plaintiffs, paid to them, on account of the cattle so delivered and to be delivered under the contract, the sum of \$14,122, and that "by express agreement between the plaintiffs and this defendant the further sum of one thousand dollars (\$1,000), which, upon the

completion of said contract, would become due and owing to said plaintiffs on account of the cattle then and there delivered by them, was to be held by defendant to insure the complete fulfillment of said contract"; that subsequently, to wit, on the 6th day of June, 1896, the plaintiffs abandoned the contract, and refused to further comply with its terms, by which failure the defendant was damaged in the sum of \$2,100.

The bill of exceptions shows that the only evidence offered and received on the trial on the part of the plaintiffs was the written contract sued on, and the testimony of the plaintiffs to the effect that under the contract they delivered to the defendant, at Caldwell and Payette, on the 31st day of May, 1896, "certain cattle, among which were 88 head of three year old steers; that upon the next day the parties met, and calculated the number of head delivered, and their value at the agreed contract price, which amounted to the sum of \$21,015; that defendant paid them, in addition to the sum of \$4,000 before paid as specified in the contract, the further sum of about \$16,000, leaving the balance on the cattle so delivered of \$1,015 unpaid, and no part of which has since been paid; that the number of one year olds and two year olds delivered was 562 head short of the 1,800 head called for in the contract; that during the delivery of these cattle plaintiffs informed defendant that they could not get or deliver any more cattle; that the defendant still wanted the rest of the cattle delivered; that the plaintiffs accepted the money paid to them as partial payment on the cattle delivered, because their obligations were out, and they needed the money to meet them, but that they did not consent to the retention of the balance of \$1,015 as a guaranty for the delivery of more cattle, and that they did not promise to deliver any more cattle under the contract."

The defendant testified in his own behalf, in substance, that he attended, on the 31st day of May, at Caldwell, Idaho, for the purpose of receiving from the plaintiffs the cattle to be delivered under the contract introduced in evidence by the plaintiffs, and that a part of the cattle were at that time delivered at Payette, Idaho, some miles distant, to the defendant's agent; that upon the following day the defendant and the plaintiffs met at Payette, and ascertained that only 524 yearling steers and 714 two year old steers had been delivered; that the defendant then and there notified the plaintiffs that he insisted upon the completion of the contract by the delivery to him of the remaining steers, and that he then informed the plaintiffs that he would make them a further partial payment under the contract, though not obliged to do so, and that, if they desired further time in which to complete the delivery, they might have until June 15, 1896, in which to do so; that he would retain until the final delivery, from the sum to which the cattle already delivered would amount at the contract price, \$1,000 as a guaranty of the completion of the contract, to which arrangement the plaintiffs assented, and that the defendant thereupon made the payment mentioned; that subsequently, and about the 5th day of June, he received from the plaintiffs the following letter:

"Payette, 6, 4, '96.

"B. F. Saunders, Esq., Salt Lake City—Dear Sir: Mr. Short came back to-day from looking for cattle for you with the report that he had seen all the principal cattle men in the country, and is unable to get cattle for you. He says the cattle men tell him they could not make another gather and deliver any number of cattle by June 15. That it is useless to try. That he regrets being unable to get you the 400 head you still want, and he further requests me to say to you that he has made drafts on you through the Payette Valley Bank for the thousand dollars you still owe them for cattle already received, and not paid for, and requests that this letter should be answered by wire to-morrow, whether you will pay draft or not. A failure to so answer will be taken for a refusal to pay.

"Yours, truly,

Short & Moss."

The defendant further testified that on or about June 13, 1896, he received from the plaintiffs the following letter, to wit:

"Payette, 6, 12, '96.

"B. F. Saunders, Esq., Salt Lake City: Replying to your favor of 6-10, will say that we cannot get the cattle men in this territory to make another gather of cattle, even at fancy prices that we have offered. Their ideas of values of



cattle become inflated. They say another year cattle will be worth much more money than they are even now offered for them, and base their judgment on the idea that they were so many buyers in the field here this year, all wanting all the cattle they could get, and paying from eleven to thirteen dollars along at the last for year olds. You cannot touch them now here, and can't get them to even try and gather again. They feel very independent. We have done all that any men could do to get you the cattle you wanted. Was forced to pay full contract price for over half the cattle we did buy for you, and rode the country from date of contract to delivery, almost night and day, from Harvey, Oregon, to Salmon River, Idaho, and got you all the cattle we were able to in the country about Payette. We were badly handicapped by the Colorado yearling buyers, Shang, and so forth. Had all the parties directly and indirectly interested with you kept out of here, or kept from buying and making offers, we could have filled your number. Regretting that there has been any disappointment to you as well as ourselves in any manner, we are,

"Truly, yours,

Short & Moss."

The defendant further testified in respect to the additional amount he was compelled to pay for similar cattle to those plaintiffs contracted but failed to deliver to him, needed by him to make good his own contracts.

In rebuttal the plaintiffs testified that at the time the defendant paid them the \$18,061 they did not consent that he might retain any part of the contract price of the cattle delivered as a guaranty for the delivery of the remainder of the cattle called for by the contract, and that the defendant paid the sum mentioned after being informed by the plaintiffs that they were unable to procure any more cattle for delivery under the contract.

Upon this state of the pleadings and evidence the counsel for the defendant requested the court below to give this instruction to the jury: "In this form of action the plaintiffs, Moss and Short, are not entitled to recover, not having made out a case alleged by them in their complaint. They have alleged in their complaint a contract made with the defendant, Saunders, and fully completed and carried out by them except so far as its completion was prevented by Saunders. This they have failed to prove, and, whatever their rights in any other action, they cannot recover in this action." The court refused to charge the jury as thus requested, to which refusal the defendant, by his counsel, duly excepted. The record proceeds: "As a part of the instructions the court gave the following, which was the only instruction upon the question involved in such instruction, to wit: The court further charged the jury that in returning a verdict in this action they might ascertain the amount which would be due from the defendant, Saunders, to the plaintiffs upon the amount and number of cattle delivered by them to the said Saunders at the contract price, and should also ascertain the amount of the damages due to the defendant, Saunders, from the plaintiffs on account of the breach of said contract; and that the difference between said amounts would constitute the amount of the verdict in favor of the plaintiffs or in favor of the defendant, as the case might be." To which instruction of the court the defendant, by his counsel, duly excepted. A verdict was returned in favor of the plaintiffs for \$757.94, for which amount, with costs, judgment was given against the defendant.

E. B. Critchlow, John Chetwood, and Wyman & Wyman, for plaintiff in error.

J. H. Richards, for defendants in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

It is a mistake to say that the complaint is confined to cattle covered by the written contract. That embraced only one and two year old steers. The number contracted for by the written contract was 1,800, consisting of about 900 head of yearlings and 900 head of two year old steers at certain specified prices, and sub-

ject to certain conditions, with a provision that, should the vendors tender more than 1,800, they would be accepted by the vendee to the number of 2,000 head, at the same prices, and upon similar conditions. But the complaint, in addition to its allegations respecting the one and two year old steers, also alleged that on the 31st day of May, 1896, the plaintiffs sold and delivered to the defendant 88 three year old steers at \$18 per head. This allegation is not denied by the answer. The denial in that regard, if denial at all, is only to the effect that none of the three year old steers were delivered to or accepted by the defendant under the terms of the written contract. Two causes of action are, therefore, indiscriminately jumbled together in the complaint. No objection thereto, however, appears to have been taken in the court below by demurrer or otherwise. The cause of action upon the written contract proceeds upon its part performance by the plaintiffs and the alleged prevention by the defendant of the plaintiffs' complete performance thereof. Unless the allegations of the complaint in respect to the defendant's prevention can be treated as surplusage, the judgment must be reversed, since those allegations are denied by the answer, and there is no proof to sustain them. Whatever was necessary for the plaintiffs to allege was necessary to be proved. We are, therefore, to inquire whether the allegations of the complaint in regard to prevention by the defendant of the full performance by the plaintiffs of their written contract can be regarded as surplusage. The action being an action at law, the pleadings and proceedings in the federal court were required to conform, as near as practicable, to those of the courts of the state in which it was held. Rev. St. § 914. By statute, as well as by the constitution of Idaho, it is declared that there shall be in that state but one form of action for the enforcement or protection of private rights or the redress of private wrongs. Const. art. 5, § 1; Rev. St. Idaho, § 4020. Section 4168 of the same statutes provides that "the complaint must contain a statement of the facts constituting the cause of action in ordinary and concise language." Probative facts, of course, should not be stated, but every ultimate fact essential to the cause of action is required to be alleged in the complaint. In respect to all such facts the defendant is entitled to take issue. But facts not entering into the constitution of a cause of action need not be alleged, and, if alleged, may be properly treated as surplusage. Recurring to the complaint in the case at bar, it is to be observed that the plaintiffs sue only for the balance due for the number of cattle actually delivered to and received by the defendant at the prices the defendant is alleged to have agreed to. In respect to the effect of the acceptance of a delivery of a part of personal property contracted for under an entire contract the American cases are conflicting. In some of the states it has been held that nothing can be recovered for part performance of an entire contract unless full performance was waived or prevented. *Champlin v. Rowley*, 18 Wend. 194; *Smith v. Brady*, 17 N. Y. 173; *Catlin v. Tobias*, 26 N. Y. 217; *Jennings v. Lyons*, 39 Wis. 553; *Mill Co. v. Westervelt*, 67 Me. 449. In *Avery v. Willson*, 81 N. Y. 341, however, it was

held that, if the vendee evinces by his acts a waiver of a complete delivery, by the receipt and appropriation to his own use of a portion of the goods contracted for, he thereby becomes liable to pay for what was actually delivered. The modern American rule seems to be that a party who has failed to perform in full his contract for the sale and delivery of personal property may recover compensation for the part actually delivered and received thereunder, less the damages occasioned by his failure to make the complete delivery. Many of the cases establishing this principle will be found cited in note 19, § 1032, 2 Benj. Sales. In *Richards v. Shaw*, 67 Ill. 222, in which the contract was to deliver 500 bushels of corn at a specified price per bushel, and the seller delivered only 391 bushels, for which he brought suit, the court said that, if the vendee received part of the goods sold under an entire contract, and retained that part after breach, this was a severance, and a suit would lie for the price, but the buyer might deduct damages for the failure to fulfill the residue of the contract. A contract for the sale and delivery of a certain number of cattle, unlike one for the building and completion of a house or other structure, is severable in its nature, and there is no just reason why, if the vendee accepts and appropriates to his own use a portion of the property so contracted for, he should not pay the stipulated price for such portion, less the amount of damages sustained by him by reason of the vendor's failure to make complete delivery. Under this rule,—in accordance with which are the instructions of the court below,—the allegation of prevention contained in the complaint may be properly disregarded as surplusage. The judgment is affirmed.

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NORTHERN PAC. R. CO. v. KROHNE.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1898.)

No. 382.

1. NEGLIGENCE—PERSONAL INJURY—CHARGE TO JURY.

Where there is evidence tending to show that the plaintiff was not negligent, and that the defendant was negligent, it is the province of the jury to weigh the evidence, and determine the probable facts.

2. RAILROADS—PRECAUTIONS AS TO BELL.

It is the duty of a railroad to supply an engine with a bell which is adequate for the purpose, and its duty in this regard is not discharged if the bell is cracked, or otherwise defective, and does not sound loud enough to warn persons under ordinary circumstances.

3. APPEAL AND ERROR—INSTRUCTIONS TO JURY.

The plaintiff in error cannot urge objections to the instructions different from those to which the exceptions were confined in the lower court.

In Error to the Circuit Court of the United States for the District of Montana.

William Wallace, Jr., for plaintiff in error.

Richard R. Purcell and Thomas J. Walsh, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

GILBERT, Circuit Judge. The defendant in error was the plaintiff in an action against the Northern Pacific Railroad Company to recover damages for personal injuries received by him while crossing the tracks in the company's yard at Livingston, Mont. A number of tracks extended through the yard from east to west. On the north side of the tracks were the railroad machine shops, in which the plaintiff worked for the company as a machinist from June, 1888, down to January 12, 1892, the date of his injury. Along the south side of the yard ran a fence. The streets of the city running north terminated at the fence, but at the end of G street some boards had been taken from the fence, making an aperture through which the men working in the shops had since the year 1888 entered the yard from the south, on their way across the tracks to their work. About 50 men traveled across by this path daily, four times a day, on their way to and from their work. No notification of any kind was ever given to any one not to cross the tracks at this point. On the morning on which the accident occurred, the plaintiff left his home at about 7 minutes to 7 o'clock, to go to the shops. Snow had fallen during the night, and the wind was blowing from the west, drifting the snow. He entered the yard through the opening in the fence at G street, and proceeded along the path across the yard till he came to a freight train standing upon one of the tracks. He then turned eastward, to go around the train. He passed across the track in front of the engine, turned back westward towards the path which he usually traversed, and at some point left the freight train, and turned northward towards the shops, and proceeded until he was struck by the switch engine in the yard.

It is contended by the plaintiff in error that the court should have instructed the jury to return a verdict for the defendant, upon the ground, not only that the evidence failed to show negligence on the part of the defendant, but that it affirmatively proved contributory negligence on the part of the plaintiff. It is urged that the court should have so charged, because the record discloses the following facts: That the plaintiff knew all about the switch engine, and knew that it began its work at 7 o'clock a. m., and that it would leave the roundhouse long enough before that time to run to the main track, and west on the same, through the yard, past the place of the accident, to report at the depot, one-fourth of a mile further west, and that they were constantly engaged in switching in the yards, using all the tracks for that purpose; that in crossing the yard, going to the machine shop, the plaintiff had to cross at least 10 tracks, and that the headlight of the yard switch engine was never lighted on coming out on the day shift, and the blowing of a whistle on the yard engine was forbidden excepting as an emergency signal; that the plaintiff left his house that morning at the usual hour, wearing an overcoat, with the collar turned up, and a Scotch cap pulled down over his ears; that when he came to the freight train headed east he turned, and left the path on which he was licensed to go, walked east along the train, passing two or three freight cars to reach the engine, passed around it, then turned,

and went down along the engine till he got opposite the engine cab or tender, or the end of the first car, when he turned, and started diagonally across the tracks, in a direct line for the shops, never stopping or turning until he was struck by the switch engine, and keeping his face all this time towards the west, or away from the direction in which he knew the engine was to be expected; that the brakeman on the freight train saw the plaintiff from the time he turned in front of the engine until he was struck, and the engineer of the same train saw the plaintiff pass the engine gangway, and the fireman saw him when he was struck and a moment before; that when the brakeman on the freight engine saw the probability of a collision he shouted from two to four times to the plaintiff to "look out there," and that, if the plaintiff had not had his ears muffled with cap and overcoat, he would have heard the warning in time to have escaped the injury; and that, if he had turned and looked, he would have seen the approaching engine; and that to walk diagonally across the tracks, with his face turned towards the west, without stopping to listen or turning to look, was gross negligence upon his part.

If the facts as they are stated in this argument were undisputed, there could be no doubt that the plaintiff's contributory negligence was such as to prevent his recovery. There is in the record, however, evidence tending to contradict nearly all of the material facts so stated. It is not our province to weigh the evidence, and determine what are the probable facts. That was the province of the jury. The case was properly submitted to the jury if there was in the evidence before it any testimony tending to show that the plaintiff was not negligent, and that the defendant was negligent as alleged in the complaint. We find evidence in the case tending to show that at the time when the plaintiff was injured it was still dark; that the freight train which first obstructed his path had its head lamp lighted, and it had tail lights on the cab, and the brakemen of that train still carried their lanterns; that it was not possible to see an approaching engine at a greater distance than 15 or 20 feet unless it carried a light; that, after he crossed the track in front of the freight train, the plaintiff proceeded westward alongside of the train to a point somewhere opposite the water tank or tender, or the first car, where he changed his course, leaving the freight train, crossed the track with his face towards the machine shops, which were to the northwesterly; and that at the time when he was struck he was crossing the main track, right on the path leading from the aperture in the fence at G street across the tracks to the machine shop; that the headlight of the switch engine was not lighted; that a rule of the company required that headlights on engines must always be burning when running, with or without a train, after dark; that it was the general custom in the yard to ring the bell in running up and down through it, and the rules of the company so required; that the bell was not ringing when it passed the witness Crandall, about 150 steps east of the place of the accident, nor when it passed the witness Barlow, west of the place of the accident; that the plaintiff himself did not hear the

bell ring, nor did the engineer of the freight train, who was in the cab of his engine. There was evidence that the bell on that engine did not ring as clear or as loud as others, and that it sounded as if it were cracked. There was evidence that the switch engine was going at about 12 miles an hour when it passed the witness Crandall, and at about 15 miles an hour when it passed the witness Barlow, and that the engineer in charge of the switch engine was accustomed to run the same in the yard at great speed, sometimes at as great a speed as 30 miles an hour. There was evidence that the plaintiff had on an overcoat, with the collar turned up,—how far it reached is not stated,—and that his cap was pulled down so as to catch his ears, or, as one witness said, to cover half his ears.

Counsel for the plaintiff in error relies upon the admissions of the plaintiff in his testimony, as follows: "From the time I turned from beside the freight to start across the track I kept a direct line, never stopping, with my face toward the machine shop; and after I turned around the freight engine my face was toward the west." This testimony is elsewhere explained by the plaintiff, and he testified that at the time when he had reached the main track he had also struck the path which he usually traveled, and that while crossing the main track at that place he was struck by the engine. He testified that when he came to the main track, for the purpose of protecting himself from any engine that might be coming up or down the track, he did the same thing as when he used to cross,—he looked around to see if there was any engine, and listened. The jury had the right to believe this testimony of the plaintiff, notwithstanding that the clear weight of the evidence may have been opposed to it. Counsel for the plaintiff in error contends that conclusive proof is found that the plaintiff had so muffled his ears as not to hear an approaching train, or the warning thereof, in the fact that he paid no heed to the shouts of the brakeman of the freight train, who testified that he shouted three times; but it appeared in evidence that the brakeman was in the cab of the engine, which was headed east, and that the windows of the cab were closed, and had some frost upon them, and that the cab had a storm door on. Under these circumstances, and with a strong wind blowing, it might be that a person of good hearing, and with no covering upon his ears, would have failed to hear the warning. There is other evidence, which went to the jury, tending to indicate that there was not sufficient time between the shouts of warning and the accident to render the warning of any avail; that the accident followed almost immediately upon the alarm being given. One witness testified that he heard the brakeman shout "Look out!" three times, and that he looked up, and saw a man on the tracks, and by that time the engine struck him. If it was true that it was dark at the time of the accident, so that an engine could not be seen at a distance of more than 15 or 20 feet, and the engine in question was running at a speed of from 12 to 15 miles an hour, at a place in the yards where it was known that workmen might be crossing the track with the license of the company, and it was running without a headlight, and without ringing a bell,

while a strong wind was blowing, carrying drifting snow, we cannot say, in the light of these facts, that the defendant was not guilty of negligence. And if it was true that the plaintiff undertook to cross the tracks on such a morning, with a coat collar turned up, and a cap pulled down so as to half cover his ears, and that at the time of the accident he was upon the path usually followed by him and his co-employés, and that before stepping upon the track on which he received his injury he turned and looked and listened, we would not be justified in saying that the court should not have submitted the question of the plaintiff's contributory negligence to the jury.

It is assigned as error that the court instructed the jury as follows:

"It is further claimed on the part of the plaintiff that the bell on the engine with which it was supplied for the purpose, among other things, of warning people who might be upon the track of the approach of the engine, was either cracked or otherwise defective, so that it sounded with an absence of 'ring.' You are instructed that the defendant was required to supply the engine with a bell which was adequate to such purpose, and that its duty in this regard was not discharged if the bell on the engine did not sound loudly enough to warn persons of the approach of the engine under ordinary circumstances; and if you find that the injuries which the plaintiff received were the result of the failure of the defendant to supply the engine with a proper bell, or if you find that the negligence of the defendant in this particular was one of the causes which occasioned the injury to the plaintiff."

It is urged that the doctrine announced in this instruction is contrary to the opinion of the court in the case of *Aerkfetz v. Humphreys*, 145 U. S. 418, 12 Sup. Ct. 835, where it was said:

"The ringing of bells and the sounding of whistles on trains going and coming and switch engines moving forwards and backwards would have simply tended to confusion. The person in direct charge had a right to act on the belief that the various employés in the yard, familiar with the continuously recurring movement of the cars, would take reasonable precaution against their approach."

The language of the opinion so quoted refers to a state of facts very different from that which, according to some of the evidence, were the facts in the case at bar. In the *Aerkfetz Case* the injured workman was engaged in repairing the track. His duty required him to be upon the track throughout the day. He was injured in the daytime by a slowly-moving engine, while he was engaged in his usual work, with his back turned to the engine. It was not the rule of the yard to give warning of the approach of the engine by the ringing of its bell, and the injured workman had no right to expect or rely upon such warning. But there is a further reason why the instruction is not open to the objection which is now urged against it. When that portion of the charge was given to the jury, it was excepted to by the defendant only upon the ground that it assumed that the duty of the defendant required it to give warning by means of a bell, without regard to other means of warning used. The objection so taken by the defendant was not upon the ground that the defendant was not required to ring a bell upon its switch engine while moving it about the yard, but that the charge of the court in substance informed the jury that the ringing of a bell was the only means that could be used for that purpose. This objec-

tion was not well taken, so far as the record informs us. The whole of the charge to the jury is not contained in the record. We may infer that in the portion which is omitted the court further instructed the jury, if necessary, and permitted it to determine whether or not a warning had been given by means of a whistle or a bell, or by other means. *Bennett v. Harkrader*, 158 U. S. 441, 15 Sup. Ct. 863; *Nelson v. Flint*, 166 U. S. 276, 17 Sup. Ct. 576. The plaintiff in error cannot now urge objections to the instruction different from those to which it confined its exception at the trial below. *Davis v. Town of Fulton*, 52 Wis. 657, 9 N. W. 809.

It is further assigned as error that the court sustained the plaintiff's objection to the following question put to one of the defendant's witnesses: "Did you ever know of the headlight being lighted on the switch engine in the yard when it came out at that hour of the morning?" The error in excluding this testimony, if error there were, was cured by the admission of other testimony by the defendant's witnesses, proving the fact which it was the purpose of the interrogatory to establish. One witness testified that "no headlights were put on the day engines for use in the yards; it was not required." Another said, "It was never done." There was no testimony whatever tending to contradict this evidence.

We find no error in the record for which the judgment should be reversed. It is therefore affirmed.

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SPEED v. ST. LOUIS M. B. T. R. CO.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 1,017.

**1. DEED—CONSTRUCTION—INTENTION OF GRANTOR.**

When the language and terms employed in a written instrument are explicit, or have a generally accepted meaning, or have acquired a technical application, the letter of the instrument must control; but when the language is ambiguous or vague, or the terms employed create uncertainties as to intent, the safe rule is to read and apply every part as a whole, and, thus discovering what the real mind of the party was, to follow that to its practical conclusion.

**2. SAME.**

A son conveyed property to trustees, to be held for the sole use and benefit of his father during his natural life, to be managed with advice and consent of the father, and at his death to the use and benefit of the mother of the grantor during her natural life, and to be managed with her advice and consent, and at her death to hold for the joint use and benefit of the children of the joint bodies of the father and mother during their natural lives, and to rent and manage it with the advice and consent of the grantor, and in case of the death of "said children" to hold for the sole use and benefit of the grantor, his heirs and assigns, forever. *Held*: (1) That the deed conveyed, first, a use for life to the father and mother, then a use for life to their children excepting the grantor, and thereafter the remainder to the grantor, his heirs and assigns, forever; (2) that on the death of "said children" the entire beneficial interest vested in the grantor, leaving only a naked use in the trustees, which by the statute of uses immediately became executed in the grantor, so that he could convey a perfect title.



In Error to the Circuit Court of the United States for the Eastern District of Missouri.

This is an action of ejectment, instituted by the plaintiff in error against the defendant in error to recover possession of a lot or parcel of ground in block 422 in the city of St. Louis, Mo., popularly known as the lot of ground on which was situated McDowell's Medical College.

Isaac Drake McDowell is the common source of title. It appears from the bill of exceptions that in 1843 Dr. Joseph N. McDowell made a contract of purchase for this property with the then owner, Thomas F. Smith. It would seem that, said Smith having died, one Frederick W. Beckwith was appointed administrator of his estate, and in June, 1852, under order of the probate court, the administrator made a deed to said lot to Isaac Drake McDowell. The deed recited that it was made in fulfillment of said contract of purchase, and in consideration of the payment of \$1,200, made by said Joseph N. McDowell. Afterwards, on the 28th day of February, 1853, Isaac Drake McDowell conveyed this property to certain named trustees, in trust for the following purposes:

"The said parties of the second part [the trustees] and their successors in office to hold the said property for the sole use and benefit of Joseph N. McDowell during his natural life; the said property to be controlled, rented, and managed by the said parties of the second part, their successors in office, as they may deem fit, by and with the advice and consent of the said Joseph N. McDowell. And in case of the death of the said Joseph N. McDowell, the parties of the second part, their successors in office, trustees as aforesaid, shall hold the said property for the sole use and benefit of Amanda V. McDowell during her natural life; said trustees to manage, rent, and control said property as they may deem fit, by and with the advice and consent of the said Amanda V. McDowell. And in case of the death of the said Amanda V. McDowell, the trustees aforesaid shall hold said property for the joint use and benefit of the children of the joint bodies of the said Joseph N. McDowell and the said Amanda V. McDowell, his wife, during the natural lives of said children; the said trustees to manage and rent said property as they deem fit, by and with the advice and consent of the said Isaac Drake McDowell. And in case of the death of said children, the said trustees to hold said property for the sole use and benefit of the said Isaac Drake McDowell, the present grantor, unto him, his heirs and assigns, forever."

The said Joseph N. McDowell and Amanda V. McDowell were the father and mother of said Isaac Drake McDowell. The children born of the joint bodies of said Joseph N. McDowell and Amanda V. McDowell were John J., Charles N., and Annie W. McDowell, and said Isaac Drake McDowell. On the 28th day of May, 1866, said John J., Charles N., and Annie W. McDowell conveyed, by quitclaim deed, their interest in said lot to said Isaac Drake McDowell. Joseph N. McDowell and Amanda V. McDowell died prior to 1870, leaving the said children surviving. In February, 1871, Isaac Drake McDowell presented to the circuit court of St. Louis county a petition, reciting the facts aforesaid respecting the deed of February 28, 1853, alleging the disqualification or refusal to act of the trustees designated in said deed of trust, and praying for the appointment of William Patrick as trustee to carry out the provisions of the trust, which petition was granted, and the appointment of William Patrick was accordingly made, who accepted the trust. Thereafter, on the 18th day of April, 1871, the said trustee, William Patrick, joined Isaac Drake McDowell and wife in the execution of a deed of trust to David Rankin and Ephraim G. Obeare, to secure to one Thomas R. Patton the payment of about \$10,500, money borrowed by Isaac Drake McDowell from said Thomas R. Patton. On default of payment this mortgage was foreclosed and the property sold thereunder. It is admitted that the defendant's title is derived under this foreclosure sale, and that, prior to the institution of this suit, said John J., Charles N., and Annie W. McDowell, and said Isaac Drake McDowell, had departed this life; the said Isaac Drake McDowell dying last, on the 5th day of January, 1882. Annie W. McDowell intermarried with William K. Speed, of which marriage the plaintiff in this action was the only child. All the other said children died childless. On this evidence the circuit court directed the jury to return a verdict for the defendant, whereupon the plaintiff sued out this writ of error.

Henry T. Kent and James W. Williams, for plaintiff in error.  
John H. Overall, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

Plaintiff's counsel have displayed marked research into the nice distinctions respecting the creation of qualified estates, and rest the case largely upon the rigidity of some technical rules of construction touching such deeds to real property. We will not undertake to review all the authorities cited, as the discussion would be more academic than useful. There is in the interpretation and construction of written instruments no more marked tendency of the judicial mind than to get at directly what was the real thought and purpose of the maker of the instrument. When the language and terms employed are explicit, or have a generally accepted meaning, or, as applied to the subject-matter, have acquired a technical application, the letter of the written instrument must control. But when the language is ambiguous or vague, or the terms employed create reasonable uncertainties as to what was the actual intent of the grantor, no safer rule can obtain than to place ourselves, as near as may be, in the precise situation of the person at the time of the execution of the instrument, and read and apply every part of it as a whole, and, thus discovering what the real mind of the party was, to follow that to its practical conclusion. The court that does this will seldom go wrong, and will measurably avoid the offense of making and enforcing contracts never assented to by the parties signing them. This thought is aptly expressed in *Walsh v. Hill*, 38 Cal. 481:

"In the construction of written instruments we have never derived much aid from the technical rules of the books. The only rule of much value—one which is frequently shadowed forth, but seldom, if ever, expressly stated in the books—is to place ourselves as nearly as possible in the seats which were occupied by the parties at the time the instrument was executed; then, taking it by its four corners, read it."

It may be regarded as the recognized rule that in the exposition of grants and contracts the construction should be upon the view of the attitude of the person making them, and upon a comparison of every part of the entire instrument, so that, while endeavoring to give every substantive part operative effect, also to give it a practical rather than a theoretical application. 2 *Devl. Deeds*, 837, 855; *Wolfe v. Dyer*, 95 Mo. 545, 8 S. W. 551; *Jackson v. Myers*, 3 Johns. 387. And when the intention is apparent, without repugnance to the settled rules of law, it will control the technical terms; "for the intention, and not the words, is the sense of any agreement." And this will prevail "regardless of inapt expressions or careless recitation." *Collins v. Lavelle*, 44 Vt. 233; *Carson v. McCaslin*, 60 Ind. 337; *Rockefeller v. Merritt*, 40 U. S. App. 666, 22 C. C. A. 608, 76 Fed. 909, 913; *In re Bomino's Estate*, 83 Mo. 433, 441.

The construction to be placed upon the deed of February 28, 1853,

executed by Isaac Drake McDowell, creating certain express trusts, will decide this case. It involves the single question: Did the grantor intend to convey the real estate in trust—First, for the use of his father during his natural life; second, to the use of his mother during her natural life; and, third, to the use of their children during their natural lives, with remainder over to Isaac Drake McDowell's heirs? Or, did the grantor intend by the deed to create a use in his father and mother during their natural lives, and then a use in his brothers and sisters during their natural lives, and thereafter for the sole use of himself, his heirs and assigns, forever? If the former construction is to be given, it is conceded that the verdict should have been for the plaintiff; but, if the latter construction shall obtain, the verdict was for the right party.

The plaintiff's contention is suspended entirely upon the third trust specified in the deed, which declares that, after the death of the father and mother, "the trustees shall hold said property for the joint use and benefit of the children of the joint bodies of said Joseph N. McDowell and Amanda V. McDowell, his wife, during the natural lives of said children." The argument is that the term "children of the joint bodies of said Joseph N. and Amanda V. McDowell," included the grantor as clearly as if his name had been specifically written in the deed in connection with the other named children; that a conveyance to a designated class by apt words is as effective as if the instrument described, by name, each member of that class. *Arthur v. Weston*, 22 Mo. 381; *Hamilton v. Pileher*, 53 Mo. 334; *Pratt v. Mining Co.*, 24 Fed. 869; 1 *Beach, Trusts*, § 267; *Dev'l. Deeds*, § 184; *Freem. Co-Ten.* § 110.

Had the trusts created stopped with the third clause of the deed, it could be safely said that the grantor reserved to himself only a contingent life estate or use, as he was described to a reasonable certainty by the designation of the "children of the joint bodies," etc. This would be so because the statute (*Rev. St. Mo. 1889*, § 8834) declares that:

"Every conveyance of real estate shall pass all the estate of the grantor therein, unless the intent to pass a less estate shall expressly appear, or be necessarily implied in the terms of the grant."

But the deed proceeds further to provide, in this connection, that, when the life estate shall devolve upon the children, the said trustees shall "manage and rent said property as they deem fit, by and with the advice and consent of said Isaac Drake McDowell." During the life of the father the said trustees were to manage the estate with his advice and consent; and likewise, in the case of the mother, the trustees were to manage the estate with her advice and consent. When it came to the management of the estate for the benefit of the children, the grantor provided for a protectorate in himself to guard the administration of the trust in their behalf, as if then regarding himself as the best friend of the beneficiaries to secure to them the best results. Then the deed proceeds:

"And in case of the death of the said children, the said trustees to hold said property for the sole use and benefit of the said Isaac Drake McDowell, the present grantor, unto him, his heirs and assigns, forever."

The term "said children" is most significant. It refers back, of course, to the children named in the third clause of the deed. By this expression the grantor quite clearly indicated that it was not in his mind to include himself in the clause of "children born of the joint bodies of said Joseph N. McDowell and Amanda V. McDowell." If so, why should he have provided specifically for himself by name in the fourth and last trust? He was still dealing with the class designated in the third trust as "the children," and it would be as palpably absurd as contradictory to say that he was providing for an estate in himself after he was dead. Had it been the purpose of Isaac Drake McDowell to reserve to himself a life estate only, he would have indicated it by some such words as the following: And in case of the death of said children, the said trustees to hold said property for the sole use and benefit of the heirs of said children. Or, if he had desired to limit the use to his own heirs he would have said: To the sole use and benefit of the heirs of said Isaac Drake McDowell. This, under the statute, on the termination of the life estate, would have entitled the heirs "to take as purchasers by virtue of the remainder so limited in them." Rev. St. Mo. 1845, c. 32, § 7; Rev. St. Mo. 1889, § 8838. Instead of this, however, "after the death of said children," he expressly reserved the sole use and benefit "to Isaac Drake McDowell, the grantor, his heirs and assigns, forever." These are apt words to create an estate in fee simple absolute.

The contention of plaintiff renders useless the entire provision of the fourth clause of the trust, inasmuch as it was not at all necessary (as we have already shown) to reserve thereby to the grantor a mere life estate; whereas, under the other construction, vitality and operation are given to every part of the instrument—First, a use for life to the father and mother; then, a use for life to their children; and thereafter the remainder to the grantor, his heirs and assigns, forever. While the plaintiff, as the child of the sister, in the event of Isaac Drake McDowell dying intestate, seised of the land, would have been his heir, yet, inasmuch as in his lifetime Isaac Drake McDowell conveyed his title, it vested in the assignee. On the death of "said children" the entire beneficial interest vested in Isaac Drake McDowell. Therefore, the trust became a dry trust, and on the recognized doctrine that, as the extent of the trustee's title is to be measured rather by its object than the words of the trust, and it "cannot be carried further than the complete execution of the trust necessarily requires," the trustee had no active duty to perform, and, therefore, it was not essential that the trustee, Patrick, should have joined Isaac Drake McDowell in the execution of the deed of trust under which defendant claims. In such event there was nothing left in the trustee but a naked use, which the statute of uses at once executed in the plaintiff. *Roberts v. Mosley*, 51 Mo. 282; *Pugh v. Hayes*, 113 Mo. 424, 21 S. W. 23.

It may, therefore, be conceded to plaintiff's contention that the trustee had no power to place a mortgage upon this land. And it is quite evident that the whole proceeding in the circuit court of St. Louis county for the appointment of Patrick as trustee, and his

joining in the execution of the deed of trust, were inspired by the attaché of some real-estate office, who in such matters generally has more caution than knowledge of the law. The contention of plaintiff's counsel that the recitations in the petition of Isaac Drake McDowell to the circuit court of St. Louis county for the appointment of Patrick as trustee amount to a construction placed by him upon his title inconsistent with the present contention of defendant is of little consequence. This contention is based upon the recitation in said petition that:

"The only children of the joint bodies of said Joseph N. and Amanda V. McDowell were John J. McDowell, Charles N. McDowell, Annie W. McDowell, and Isaac Drake McDowell, your petitioner."

Any inference from this recitation favorable to the plaintiff is reversed by the language and provisions of the deed of trust soon thereafter made by Isaac Drake McDowell to Rankin and Obear, trustees. The habendum clause is:

"To have and to hold the same, with the appurtenances, to the said parties of the second part, and to the survivor of them, and to their successor, and to the assigns of the said parties of the second part, or of said successor, or survivors, forever."

And then it expressly declared that, in case of sale, the trustee or officer making the same "shall execute and deliver a deed or deeds in fee simple of the property sold to the purchaser or purchasers thereof." He thereby solemnly asserted that he had in himself the fee to this property at the time of the execution of the last-named deed of trust, and was dealing with the property upon that assumption.

The judgment of the circuit court is affirmed.

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#### LOUISVILLE & N. R. CO. v. MORLAY.

(Circuit Court of Appeals, Seventh Circuit. April 6, 1898.)

No. 449.

1. RAILROADS—INJURY TO PERSON NEAR TRACK—CONTRIBUTORY NEGLIGENCE.

Where a workman, engaged in setting a curbstone in a street of a city, was guilty of contributory negligence, and was struck by a locomotive, there being evidence tending to show that the servants of the railroad might, by the exercise of proper diligence, after perceiving his danger, have avoided harming him, the question was properly left to the jury.

2. SAME.

The ordinary presumption is that a workman engaged in street work near a railroad track will look after his own safety on the approach of a train; but, when the engineer sees that he is not doing so, it becomes the engineer's duty to use all reasonable means in his power to arrest the man's attention and avoid injuring him; and it was proper to refuse an instruction that it was not the duty of the engineer to stop his train even if he saw the man continuing at his work.

3. TRIAL—INSTRUCTIONS.

While one clear statement of a proposition, with an explanation of the evidence bearing upon the point, would seem to be enough, a judgment will not be reversed because of needless repetitions in a charge to the jury.

In Error to the Circuit Court of the United States for the Southern District of Illinois.

J. M. Hamill, for plaintiff in error.

M. Millard, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The chief question here is whether the court erred in refusing to instruct the jury to find a verdict for the defendant. The defendant in error, Walter Morlay, at the time of the injury for which the action was brought, was engaged in setting a curbstone in Eighth street, in East St. Louis, near the track of the railroad of the plaintiff in error. While so engaged he was struck by the locomotive of a freight train coming from the southeast, which, if observant, he might have seen for half a mile or more before it came upon him. A passenger train from the other direction would have been due in a few minutes, and it has been insisted in argument that the necessity to watch for the approach of that train was an excuse for what might otherwise be deemed a lack of vigilance in looking to the opposite direction from which no regular train was then due, the freight train being near two hours behind its schedule time. The declaration is in three counts. The negligence alleged in the first is that the defendant so carelessly and improperly drove and managed a locomotive and freight train that the plaintiff was thereby struck and injured. In the second count it is alleged that the defendant then and there drove a locomotive and freight train upon and across the street where the plaintiff was working without ringing any bell or sounding any whistle at the distance of at least eighty rods from the crossing, by means of which neglect the plaintiff was injured. In the third count it is alleged that there was an ordinance of the city of East St. Louis which required all freight trains to run within the corporate limits of the city at a speed not exceeding six miles an hour, and that the train which hit the plaintiff was running at a very much greater speed, to wit, twenty-five miles an hour. There was evidence to support the charge of each count; the speed of the train being put by witnesses on one side at six to eight miles, and on the other side at ten to fifteen miles an hour. The speed was probably near the higher rate stated, since the train was behind time, and close upon the time of the outgoing passenger train, and the plaintiff, though standing in the ditch in which the curbstone was being set, was struck with such force as to be hurled a distance of eight or ten feet (considerably further according to some of the witnesses), was rendered unconscious, and suffered permanent injuries.

We think it beyond dispute that the defendant in error was guilty of contributory negligence, but do not find it necessary to state the evidence on the point. It is contended that, if contributory negligence be conceded, there was still a right of recovery, because the servants of the railroad company in charge of the train, after perceiving that the defendant in error was unaware of the train's approach, might, by the exercise of proper diligence, have avoided harming him. There is evidence in the case which made that a question for the

jury. Aside from the presumption that the defendant in error did not intentionally incur injury, there is in the record his own testimony that he did not know that the train was near him. One witness testified that the train approached very quietly, and that he heard no ringing of the bell or sounding of the whistle or other signal. Other witnesses testified to the same effect. The engineer who had been in charge of the train testified that when he saw that the man did not pay any attention to the train coming, and the fireman was ringing the bell, and he still paid no attention, he grabbed the whistle lever with one hand, and set the air brake with the other, and gave two quick blasts; that this was done when he was about three car lengths from the man; that the train was running six or seven miles an hour; that, when he saw the man at work, he did not know, or have means of knowing, whether it was one of the sectionmen, or who it was; that it was a common occurrence to see people on the track who would step off before they were approached; that, so far as he had observed, there was no indication that the man was going to stay there, else he would have stopped; that his impression was that the man would naturally work until he got within a reasonable distance, and then step aside, and, it being outside of the rail, it would take him considerably less time to get out of the range of the car; if he had any reason to suppose that he was going to remain there, and had gotten a signal to stop, he would have stopped; that a signal with the hand would have stopped him; that he could have stopped easily; that, after the blowing of the whistle, the fireman shouted at the man before he was hit; that the fireman shouted two or three times. The fireman's testimony was that he was ringing the bell constantly; that the engineer gave the alarm signal when about 300 feet from the man; and that, after that signal was given, he (the fireman) shouted to the man as loud as he could, to try to call his attention to the train, but that he never made a move in the way of looking towards the train; that he moved his position once,—that is, when they were about three or four blocks away from him; that he could not say whether he looked in the direction of the train, but that, when he raised up and moved down again in his position, he stayed in his position there until he was hit; that, when he shouted to him, the train was about two car lengths or sixty feet from him, and, if he had heard, he could have saved himself; that the train was going at the rate of six or eight miles an hour, and could have been stopped inside of three cars' lengths.

This testimony shows that, when from 200 to 300 feet away from the man, the danger of his situation was recognized by the engineer and fireman, and that from that moment to the instant of the injury they attempted, by blasts of the whistle and by shouts, to warn him; but the testimony of other witnesses and the fact that the man's attention was not awakened tend to show that the warnings were not given. Whether they were given, and whether an earlier effort to stop or reduce the speed of the train should have been made, were, therefore, questions for the jury. In *Coasting Co. v. Tolson*, 139 U. S. 551, 11 Sup. Ct. 653, the contributory negligence asserted consisted in the injured party's standing in a dangerous position, too near the edge of a wharf which a steamboat was approaching at his call; and it was

urged that the officers of the boat, though they saw him waiting on the wharf, were not bound to anticipate his remaining in that position; but in response to that argument the court said:

"The jury might well be of opinion that, while there was some negligence on his part in standing where and as he did, yet that the officers of the boat knew just where and how he stood, and might have avoided injuring him if they had used reasonable care to prevent the steamboat from striking the wharf with unusual and unnecessary violence. If such were the facts, the defendant's negligence was a proximate, direct, and efficient cause of the injury."

It is insisted that there was error in the giving and refusing and modifying of instructions. Twice in its own charge and eleven times by modifications to special requests of the plaintiff in error for instructions on the subject of contributory negligence, the court charged the jury that, notwithstanding contributory negligence, the plaintiff could recover for the injury suffered, "if the jury found on the preponderance of the evidence that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of plaintiff's negligence"; and it is urged that the frequent repetitions of this proposition must have unduly influenced the jury. We perceive no good reason for such reiteration of a proposition. One clear statement, with an explanation of the evidence bearing upon the point, would seem to be enough; but we know of no instance of a judgment being reversed because a proper charge had been repeated. The blame for some of the needless repetitions here may be due to the needless number of requests for special instructions on the one subject of contributory negligence, the giving of which unmodified might also have had an undue effect upon the mind of the jury.

The court gave the following instruction:

"If the jury believe from the evidence that the engineer in charge of the locomotive saw the plaintiff was engaged in his work and apparently unconscious that the train was approaching him, notwithstanding the warning that may have been given him, then it was the duty of the engineer to use all reasonable means in his power to arrest the attention of the plaintiff, and avoid injuring him."

The objection that this instruction required of the defendant too high a degree of care is not tenable. In such an emergency the law and the dictates of humanity alike require that all reasonable effort to avoid harm be put forth. The ordinary rule of care required of a railroad company in propelling its engines or cars over public crossings has no application to a sudden emergency, when some one is seen to be unaware of near danger of being run down. Neither is the instruction objectionable because it assumes that the servants of the plaintiff in error did not use every reasonable effort to avoid injuring the plaintiff. It neither contains such an assumption nor an implication that the railroad was bound to exercise more care to avoid inflicting than the plaintiff was required to exercise to escape the injury.

The court properly refused to instruct broadly that it was not the duty of the engineer to stop his train even if he saw the plaintiff at work; that it was the duty of the plaintiff to keep out of the way; and that the engineer had a right to presume that, in obedience to the known custom of the country, the plaintiff, like all other pedestrians, would keep out of the way of the train. The ordinary presumption



would be that one in the position of the plaintiff would look after his own safety, but, when the engineer perceived that he was not doing so, it became his duty to put forth every reasonable effort to prevent injury. The judgment below is affirmed.

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ATLAS DISTILLING CO. v. RHEINSTROM et al.

(Circuit Court of Appeals, Seventh Circuit. April 16, 1898.)

No. 469.

1. APPEAL AND ERROR—ASSIGNMENT OF ERROR.

An assignment that the court erred in admitting in evidence a certain paper "as set forth in bill of exceptions" is not good because it does not, as required by rule 11 of the circuit court of appeals, contain a statement of the full substance of the document referred to.

2. SAME—EVIDENCE.

Where a document objected to was offered "together with other evidence in depositions and of witnesses examined on the trial in open court showing the same matters," and it does not appear that concerning those matters inconsistent or conflicting evidence was offered, the error in admitting such document was not of sufficient importance to justify a reversal.

3. SAME—MOTION FOR NEW TRIAL.

Where a case at law is submitted to the court without a jury, and judgment is given upon a general finding, the overruling of a motion for a new trial is a matter of discretion, which cannot be reviewed.

In Error to the Circuit Court of the United States for the Southern Division of the Northern District of Illinois.

Isaac J. Levinson, for plaintiff in error.

Geo. T. Page, for defendants in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The defendants in error sued the Atlas Distilling Company in assumpsit. Trial by jury was waived by stipulation in writing, and the court, upon a general finding, gave judgment in the sum of \$2,330.25 in favor of the plaintiffs. The plaintiff in error urges only the first and fifth specifications of error, which are to the effect, first, that the court erred in admitting in evidence a certified copy of Form 52 A and B, furnished by the internal revenue collector, "as set forth in bill of exceptions," and, fifth, that the court erred in overruling the motion for new trial and rendering judgment upon the finding. Neither of these specifications is available. The first is not good because it does not, as required by rule 11 of this court (21 C. C. A. cxii., 78 Fed. cxii.), contain a statement of the full substance of the document referred to. See *U. S. v. Indian Grave Drainage Dist.*, 85 Fed. 928; *Sladden v. Insurance Co.*, 86 Fed. 102. If a reference to the bill of exceptions for the entire document were enough, the rule would be meaningless. In this instance, if the error alleged were conceded and were well assigned, it would not be of sufficient importance to justify a reversal of the judgment, even if in itself not purely technical, because of the statement in the bill of exceptions that the document objected to was offered "together with other evidence in

depositions and of witnesses examined on the trial in open court, showing the same matters." It does not appear that concerning those matters inconsistent or conflicting evidence was offered.

In respect to the other specification it is enough to refer to the well-settled rule that in a case at law, submitted to the court for trial without a jury, when judgment is given upon a general finding, the review on a writ of error can extend only to the rulings of the court during the progress of the trial, and that the overruling of a motion for a new trial, whether the verdict be general or special, is ordinarily a matter of discretion, which cannot be reviewed. The judgment below is affirmed.

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CHICAGO G. W. RY. CO. v. HEALY.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 891.

1. TRIAL—INSTRUCTION.

Where, at the conclusion of the plaintiff's testimony, the court overruled a motion to direct a verdict in favor of the defendant, to which the defendant excepted, but did not stand upon the exception, and proceeded to introduce evidence, the defendant thereby waived the exception.

2. SAME.

Where, at the close of all the evidence, a motion is made to instruct the jury to return a verdict in favor of the defendant, in deciding the motion the court assumes that all the evidence in the case is true, and that the witnesses are all credible.

3. SAME.

Where the facts are not controverted, and where the inference to be drawn from them is certain, necessary, and undisputed, or where there is no evidence tending to establish a necessary element in the case, the trial court may direct what verdict should be given; but when it is a matter of judgment and discretion, of sound inference, and what deduction is to be drawn from even undisputed facts, the law commits it to the decision of the jury, under instructions from the court.

4. SAME—OMISSION FROM INSTRUCTIONS.

Where the instruction is correct as far as it goes, and the only contention is that it did not go far enough, such contention cannot be taken advantage of on error, unless the attention of the trial court was called to the omission, and request made for more explicit instructions.

5. MASTER AND SERVANT—DEFECTIVE RAILWAY BRIDGE—DUTY OF INSPECTION.

A railroad company owes to its train employes the duty of making reasonably frequent and reasonably thorough inspections of the condition of the timbers in a bridge, and is bound to apply such tests as are ordinary and usual in that business to ascertain any defects which exist therein.

In Error to the Circuit Court of the United States for the Southern District of Iowa.

A. B. Cummins, for plaintiff in error.

S. P. Huston (J. P. Flick, on brief), for defendant in error.

Before BREWER, Circuit Justice, SANBORN, Circuit Judge, and RINER, District Judge.

RINER, District Judge. This is an action brought by Nellie Healy, as administratrix of the estate of John J. Healy, deceased, against the Chicago Great Western Railway Company, to recover

damages for the death of said John J. Healy, which she alleges was caused by the negligence of the railway company. The case was commenced in the state court, and removed by the plaintiff in error to the circuit court for the Southern district of Iowa. In her petition the plaintiff, in substance, alleged that she was the duly appointed, qualified, and acting administratrix of the estate of the said John J. Healy, deceased; that the defendant, at the time of the injury complained of, was a corporation duly incorporated and organized under and by virtue of the laws of the state of Illinois, as a railroad company, and was operating a line of railway from the city of Des Moines, in the state of Iowa, to the city of St. Joseph, in the state of Missouri; that in the state of Iowa, on the line of defendant's road, and forming a part of the road, there was a long and high bridge, spanning a water course; that this bridge was negligently and defectively constructed by the defendant, and by the defendant in that condition negligently and carelessly maintained; that on the 6th day of August, 1894, and long prior thereto, the defendant, its agents and servants, had negligently permitted the material composing a part of the bridge to become and remain rotten, unsound, and out of repair; that the bridge was unsafe and dangerous for trains to pass over. It was further alleged that John J. Healy was in the employ of the defendant company as a freight conductor; that on the 6th of August, 1894, he was engaged in running a freight train for the defendant between the city of St. Joseph, Mo., and the city of Des Moines, Iowa; that while his train was passing over the bridge described in the petition, although he was exercising due care and caution on his part, it gave way, wrecking the train, and injuring Healy to such an extent that he died as a result of his injuries. The answer admitted that the defendant was a corporation organized under the laws of the state of Illinois, and was at the time alleged in the petition, and at the time the answer was filed, engaged in operating a line of railway in the state of Illinois, and through the state of Iowa, and from the city of Des Moines, in the state of Iowa, to the city of St. Joseph, in the state of Missouri; that at the time alleged in the petition John J. Healy, deceased, was in the employ of the defendant as a freight conductor, and engaged in running a freight train over its road between the cities of Des Moines and St. Joseph; and that at or about the time alleged in the petition said John J. Healy met with an accident which caused his death,—concluding as follows: "The defendant denies each and every other allegation in said petition contained." There was a trial; verdict and judgment for the plaintiff in the sum of \$6,000.

At the trial it was admitted that the plaintiff below was the administratrix of the estate of John J. Healy, deceased, that she was a citizen of the state of Iowa, and that the defendant was a corporation organized under the laws of the state of Illinois. The following facts were established by the evidence: At the time mentioned in the pleadings the plaintiff in error owned and operated a line of railroad between the city of Des Moines, in the state of Iowa, and the city of St. Joseph, in the state of Missouri. On the line of,

and forming a part of, the railroad, between the places just mentioned, and within the state of Iowa, there was a wooden bridge, known as a "pile bridge," estimated by some of the witnesses to be about 252 feet long, crossing a deep ravine. In the construction of this bridge, rows of piling, 15 feet apart, were driven into the ground across the course of the road. Upon these pilings, caps were placed; upon these caps, stringers running lengthwise of the bridge were laid; and upon these stringers the cross-ties and rails were placed. The bridge was first constructed in 1887, and, as originally constructed, the pilings, caps, stringers, and sway braces were of white pine lumber. In 1893, about a year before this accident, the bridge was reconstructed in part by putting in oak pilings, new caps, and new sway braces, using the old stringers. On the 6th of August, 1894, John J. Healy, the husband of the defendant in error, was in the service of the plaintiff in error as a freight conductor in charge of a train consisting of an engine, tender, 14 loaded freight cars, and a caboose, going north. That his run was from St. Joseph, Mo., to Des Moines, Iowa. That when his train was upon the bridge in question the bridge fell, injuring Healy to such an extent that he died within an hour from the time of the accident. The track, for a distance of about three-quarters of a mile south of the bridge, was straight, with a slight down grade towards the bridge. The steam was shut off by the engineer some distance before reaching the bridge, and the train was running by its own gravity, without jar perceptible to the train crew, until it was on the bridge, when there was a sudden jerk felt, and the bridge, with the exception of 40 or 50 feet of the north end, fell. In addition to the foregoing facts, which were not disputed, the plaintiff offered testimony tending to prove that the stringers of the bridge, where they rested on the caps, were badly rotted; that the ends of some were entirely rotted off, other largely so, and all more or less decayed and unsound. The testimony on behalf of the defendant tended to prove that there was a general inspection of this bridge by the superintendent of bridges in June, 1894, about two months prior to the accident, and that it was seen by the division bridge foreman frequently between the time it was rebuilt, in 1893, and the date of the accident; that the stringers at the date of the accident were not decayed. It also offered testimony tending to show that one of the cars in Healy's train had become derailed about 45 feet from the south end of the bridge; that the trucks of that car, falling upon the ties with the force given them by the moving train, tore up and destroyed the bridge.

Three assignments of error are insisted upon by the plaintiff in error as grounds for reversing the judgment:

First. "The court erred in overruling the defendant's motion, made at the close of the testimony offered by the plaintiff in chief, to instruct the jury to return a verdict for the defendant." Second. "The court erred in refusing to give to the jury at the close of the testimony the instruction asked by the defendant, directing the jury to return a verdict for the defendant; said instruction being as follows: 'You are instructed to return a verdict for the defendant.'" Third. "The court erred in that part of its instructions to the jury relating to the measure of damages, in this: That there was no rule or criterion stated in said instruc-

tions whereby the jury could be guided in its deliberations upon that subject. The court directed the jury that the amount to be recovered was compensation for the loss suffered by the estate of the deceased, but it did not give any instruction that would guide the jury in determining how to measure or compute such loss."

In reference to the first assignment of error, but little need be said. Upon the conclusion of the plaintiff's testimony, the defendant moved the court to direct a verdict in its favor. This motion was overruled by the court, and the defendant excepted. It did not, however, stand upon its exception, but proceeded to introduce testimony in its own behalf. It thereby waived the exception. *Bogk v. Gasert*, 149 U. S. 17, 13 Sup. Ct. 738; *Railway Co. v. Daniels*, 152 U. S. 684, 14 Sup. Ct. 756; *Railway Co. v. Hawthorne*, 144 U. S. 202, 12 Sup. Ct. 591.

It is also insisted that the court erred in refusing to instruct the jury to return a verdict for the defendant at the close of all of the evidence in the case. A motion of this character is in the nature of a demurrer to the evidence. "It answers the same purpose, and should be tested by the same rules. A demurrer to the evidence admits, not only the facts therein stated, but also every conclusion which a jury might fairly or reasonably infer therefrom." *Schuchardt v. Allens*, 1 Wall. 359, 370. In deciding this motion the circuit court had to assume that all of the evidence in the case was true, and that the witnesses were all credible; for if there were any questions in the case relating to the credibility of witnesses, or if what the evidence proved depended upon the credibility of witnesses, or upon the proper deduction to be drawn from the evidence, they were questions, not for the court, but for the jury, under the direction of the court. In the case of *Hickman v. Jones*, 9 Wall. 197, an action for malicious prosecution, in which the court peremptorily instructed the jury to acquit two of defendants, the supreme court, in holding this instruction to have been erroneous under the circumstances, said:

"There was some evidence against most of them. Whether it was sufficient to warrant a verdict of guilty was a question for the jury, under the instruction of the court. The learned judge mingled the duty of the court and jury, leaving to the jury no discretion but to obey the direction of the court. Where there is no evidence, or such a defect in it that the law will not permit a verdict for the plaintiff to be given, such an instruction may be properly demanded, and it is the duty of the court to give it. To refuse is error. In this case the evidence was received without objection, and was before the jury. It tended to maintain on the part of the plaintiff the issue which they were to try. Whether weak or strong, it was their right to pass upon it. It was not proper for the court to wrest this part of the case, more than any other, from the exercise of their judgment. The instruction given overlooked the line which separates two separate spheres of duty. Though correlative, they are distinct, and it is important to the right administration of justice that they should be kept so. It is as much within the province of the jury to decide questions of fact, as of the court to decide questions of law. The jury should take the law as laid down by the court, and give it full effect. But in its application to the facts, and the facts themselves, it is for them to determine. These are the checks and balances which give to the trial by jury its value. Experience has proved their importance. They are indispensable to the harmony and proper efficacy of the system. Such is the law. We think the exception to this instruction was well taken."

In the case of *Railroad Co. v. Woodson*, 134 U. S. 614, 10 Sup. Ct. 628, it is said:

"It is the settled law of this court that when the evidence given at the trial, with all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. \* \* \* While, on the other hand, the case should be left to the jury unless the conclusion follows, as matter of law, that no recovery can be had upon any view which can be properly taken of the facts the evidence tends to establish."

In the case of *Railroad Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748, where the error assigned was the refusal of the court to instruct the jury as requested by the defendant,—in substance, that the deceased was guilty of such contributory negligence as to prevent recovery,—Mr. Justice Brewer, in delivering the opinion of the court, said:

"It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them."

Where the facts are not controverted, and where the inference to be drawn from them is certain, necessary, and undisputed, or where there is no evidence tending to establish a necessary element in the case, the trial court may peremptorily direct what verdict should be given; but where, in any case, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from even undisputed facts, where different men, equally sensible and equally impartial, would make different inferences, the law commits such a case to the decision of the jury, under instructions from the court. *Railroad Co. v. Stout*, 17 Wall. 657; *Dunlap v. Railroad Co.*, 130 U. S. 649, 9 Sup. Ct. 647; *Insurance Co. v. Ward*, 140 U. S. 76, 11 Sup. Ct. 720; *Railway Co. v. Ives*, 144 U. S. 408, 12 Sup. Ct. 679; *Gardner v. Railroad Co.*, 150 U. S. 349, 14 Sup. Ct. 140.

The motion in this case, in our judgment, was properly overruled. It was clearly the duty of the railroad company to see to it that this bridge was kept in good repair and in a safe condition; and this duty could not be delegated so as to exonerate the company from liability to its servants for injuries resulting from the omission to perform it, or through its negligent performance. While the duty of the company did not go to the extent of a guaranty of safety, it did require that reasonable precautions be taken to secure safety. It was bound to make reasonably frequent and reasonably thorough inspection of the condition of the timbers which were used in the construction of the bridge. In making such inspection, it was its duty to apply such tests as were ordinary and usual in that business for the purpose of developing any defect which existed in the timbers. If the timbers had become decayed so that the bridge was thereby rendered unsafe, and reasonable inspection would have disclosed that fact, the company was bound to make such inspection. A failure to do so would be negligence, for which it would be responsible to any employé injured in consequence thereof. *Railway Co. v. Conroy*, 68 Ill. 560; *O'Don*

rell v. Railroad Co., 59 Pa. St. 239: The rule is perfectly well settled that an employé has the right to rely upon the presumption that the company has constructed and maintained its railroad in an ordinarily safe manner. Snow v. Railroad Co., 8 Allen, 441; Seaver v. Railroad Co., 14 Gray, 466; Gibson v. Railroad Co., 46 Mo. 163. The testimony as to the condition of a part of the bridge timbers was squarely conflicting. The testimony of five witnesses who testified in the case tended to show that the stringers were more or less decayed where they rested upon the caps, and that some of them were in fact badly rotted, while the testimony of other witnesses who testified in the case tended to show that the stringers were sound. As to the matter of inspection, Mr. Banks, the superintendent of bridges, testified that the proper method of making an inspection of a bridge consisted in digging around the base of the piles, and sounding them with a pick, and looking over the stringers, and sounding them with a bar, or boring into them with an auger, but did not testify that such tests were applied in the case of this bridge, while the testimony of Mr. McClain, division bridge foreman, tended to show that, in making the inspections which were made of this bridge prior to the accident, they did not bore into the timbers with an auger, for the purpose of ascertaining their condition, but that the examination consisted in looking over the bridge. He testified that they could tell, from such examination as was made, whether the stringers were in good condition. In view of the conflicting character of the testimony in relation to the condition of the timbers, and the uncertainty as to whether reasonably careful and thorough inspection had been made in the case of this bridge, the question whether the railway company was negligent in the matter of inspection and keeping the bridge in repair was clearly a question to be determined by the jury. So long as the laws provide for a jury trial of issues of fact, the right should be guarded and preserved, to all parties, where there are controverted facts pertinent to the issues. To apply the doctrine contended for by the plaintiff in error would be to disregard the well-settled rules announced in the cases above cited.

The third assignment relates to the court's instruction as to the measure of damages. That the instruction was correct as far as it went is not questioned. The contention is that it did not go far enough to furnish any rule or criterion whereby the jury could be guided in its deliberations upon that subject. No request for additional instructions was made by the defendant below. The attention of the trial court was in no way called to the fact that it had omitted anything from the instructions in relation to the proper method of estimating the damages. The rule is perfectly well settled that, where there is no request for an instruction, it is not error for the court to omit it. If the plaintiff in error thought that the instruction was either indefinite, or not sufficiently comprehensive, it should have asked that further and more explicit instructions be given. Having failed to do so, the judgment should not be reversed unless it appears from the record that the jury were misled or wrongly directed. The instructions given by the court at the trial are entitled to a reasonable interpretation, and, where the proposition stated is not erroneous, the in-

structions, as a general rule, are not to be regarded as incorrect on account of omissions or deficiencies to which the attention of the court was not called by a request for more explicit instructions. *Armstrong v. Toler*, 11 Wheat. 258; *Express Co. v. Kountze*, 8 Wall. 342; *Shutte v. Thompson*, 15 Wall. 151. We cannot say that the jury were either misled or wrongly directed by the instruction here complained of. This assignment of error therefore affords no ground for reversing the judgment. Finding no error in the record, the judgment of the circuit court will be affirmed.

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NORTHERN PAC. R. CO. v. MONTGOMERY.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1898.)

No. 369.

**1. LIMITATION OF ACTIONS—BREACH OF WARRANTY.**

Eviction, either actual or constructive, is essential to a right of action for damages for the breach of the covenant of warranty of title, and the statute of limitations begins to run only from the date of such eviction.

**2. SAME—PURCHASE OF RAILROAD LANDS.**

Lands selected by a land-grant railroad company, and which had previously been reserved by the secretary of the interior for its benefit, were sold by the company, both parties supposing it had good title. It subsequently appeared that the lands were not included in the grant, and an act of congress was passed asserting title in the government. *Held*, that the statute of limitations against an action for breach of warranty of title began to run, not from the date of the deed, but from the date of the act of congress.

**3. DAMAGES—BREACH OF WARRANTY.**

Certain railroad bonds stated on their face that they were at all times receivable with accrued interest, at par, in payment for lands of the company at their market price. A contractor received such bonds at par, in payment for work done for the company, and used them in the purchase of lands from the company. In an action for breach of warranty, *held*, that the measure of damages was the face value of the bonds, with interest, and not the market value at the time they were used in the purchase of the land.

**4. SAME—INTEREST.**

In an action for breach of warranty of title, where the purchaser was never in actual possession of the lands, and never derived any rents or profits or other benefits therefrom, he is entitled to interest from the date of his payment.

In Error to the Circuit Court of the United States for the District of Oregon.

D. T. Crowley, B. S. Grosseup, C. W. Bunn, and Carey & Mays, for plaintiff in error.

Mitchell, Tanner & Mitchell, Stott, Boise & Stott, and Dolph, Nixon & Dolph, for defendant in error.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

ROSS, Circuit Judge. This was a suit for the recovery of damages for the breach of a warranty of title contained in a deed executed by the plaintiff in error to the defendant in error, for certain lands situated in the then territory (now state) of Washington. At the time of the execution of the deed, which was April 10, 1876, it was supposed by both parties thereto that the lands were covered by the grant made to the Northern Pacific Railroad Company



by the joint resolution of congress of May 31, 1870 (16 Stat. 378). The defendant in error, who was plaintiff in the court below, had built a portion of the Northern Pacific Railroad for that company, in part payment for which work he received from the company certain bonds, known as the "Jay Cooke Bonds," at their face value, aggregating \$18,789.58. Those bonds were obligations of the Northern Pacific Railroad Company, secured by a mortgage executed by that company, upon, among other property, all of the lands granted to it by congress. Each of the bonds contained this stipulation: "This bond is exchangeable, at the option of the holder, for registered bond of like tenor and date, and is at all times receivable, with its accrued interest, at par, in payment for lands of the company at their market price." Indorsed upon each of the bonds was a similar notice, in these words: "This bond and accrued interest receivable at all time at par in payment for land of the company at market prices." The plaintiff in the suit accepted the bonds at their face value in discharge of indebtedness of the company to him for part construction of its road, for the purpose and with the intent of exchanging the same for lands of the company at their appraised market value; and he proceeded to select such of the lands supposed by both parties to be within the grant to the railroad company as he desired to purchase. They were unoccupied timber lands, and, when selected by the plaintiff, the company executed to him its deed therefor, with a warranty of title, in consideration of which the plaintiff surrendered to it the bonds; the face value of the bonds and the appraised value of the land being the same; to wit, \$18,789.58. As a matter of fact, none of the lands were within the grant to the Northern Pacific Railroad Company, but were embraced by the grant made by congress on May 4, 1870 (16 Stat. 94), to the Oregon Central Railroad Company, which latter grant was declared forfeited by act of congress of January 31, 1885, after which last-mentioned date, and prior to the bringing of this suit, the lands in question were opened to settlement and sale, and were thereafter patented by the government to settlers, pursuant to the laws of the United States. This action not having been commenced until November 2, 1894, the defendant railroad company pleaded in bar of the action the statute of limitations, which raises one of the questions presented by the present appeal.

The statute of Oregon, in which state the suit was brought, prescribes the period of 10 years within which an action upon a sealed instrument must be commenced. Hill's Ann. Laws Or. pp. 131-134. It is contended on behalf of the plaintiff in error that, inasmuch as the Northern Pacific Railroad Company never had any title to the lands in controversy, its warranty of title was broken immediately upon the execution of its deed, and that from that moment the statute of limitations began to run. If so, the action is, of course, barred. The covenant of warranty contained in the deed is in these words:

"And the Northern Pacific Railroad Company, for itself and its successors, doth by these presents covenant, grant, and agree to and with the said James B. Montgomery, his heirs and assigns, that it, the said Northern Pacific Railroad

Company, shall and will warrant and defend the title to the said premises unto the said James B. Montgomery, his heirs and assigns, forever, against the lawful claims of all persons whomsoever."

Eviction, either actual or constructive, is essential to a right of action upon a covenant of warranty of title. Rawle, Cov. (4th Ed.) 148-151. Even if it be true that the mere proof of an outstanding paramount title in the government is, in general, sufficient to show eviction, we do not think it enough under the circumstances of the present case. Here the proof shows, without conflict, not only that both parties to the deed believed the lands in controversy to be covered by the grant to the defendant company, but that the secretary of the interior, acting for the government, so supposing, had, prior to the execution of the deed in question, withdrawn those lands, with others, from the mass of public lands for the benefit of the Northern Pacific Company, which company was permitted to select them under its grant. It was not until after the passage of the act of congress of January 31, 1885, declaring forfeited the grant to the Oregon Central Railroad Company, that the secretary of the interior canceled the selections which had been theretofore made by the Northern Pacific Company of the lands in controversy, and declared the same restored to the public domain, and open to settlement and purchase. Since the forfeiture of the grant to the Oregon Central Railroad Company, declared by congress by the act of January 31, 1885, was for the benefit of the government, it may be that that act constituted a hostile assertion of its paramount title as against the Northern Pacific Railroad Company as well, although the selection of the lands in controversy by the latter company under its grant was permitted to remain of record for some time thereafter, the precise date of cancellation not appearing in the record. But, certainly, January 31, 1885, is the earliest date at which it can be said that there was any hostile or adverse assertion of the paramount title by the government as against the Northern Pacific Railroad Company. Within 10 years from that time the present action was commenced. Some hostile or adverse assertion of the paramount title, and consequent disturbance of the plaintiff's supposed rights, was essential to constitute eviction. Rawle, Cov. (4th Ed.) 146; Loomis v. Bedel, 11 N. H. 74. We are of opinion that the action was not barred by the statute of limitations.

The other question presented by the appeal relates to the proper measure of damages. This arises upon the instructions of the court to the jury, and upon its ruling in respect to certain testimony introduced by the defendant tending to show that, at the time the bonds were used by the plaintiff in paying for the lands, they were not worth exceeding 17 cents on the dollar. In respect to that matter the court below ruled that all of the testimony tending to prove that the bonds were worth less than par at the time of the purchase was immaterial, and constituted no defense to the action, and in its instructions told the jury that the plaintiff was entitled to recover the full amount of the face value of the bonds, with interest thereon at the rate specified therein, to wit,

7<sup>3</sup>/<sub>10</sub> per cent. per annum from April 10, 1876. To the action of the court below in each respect the defendant duly excepted. The verdict was in accordance with the instructions of the court, upon which judgment was entered for the plaintiff in the aggregate amount of \$46,405.24. It is, no doubt, true that, in cases where money was the consideration paid for the conveyance, the measure of damages for a breach of a covenant of warranty of title, ordinarily and where there was no fraud, is the purchase money, with interest and costs; but every case must be determined upon its own particular facts and circumstances. Here, as the record shows, without conflict, the defendant company was indebted to the plaintiff in the sum of \$18,789.58, for building a section of its road. The government had granted it certain lands in aid of the construction of the road, which lands the company held for sale; and the latter had issued its bonds, secured by its mortgage, and placed them upon sale, each bond reciting upon its face that it was at all times receivable, with the accrued interest thereon, at par, in payment for lands of the company at their market price. Some of those bonds, amounting, according to their face value, to \$18,789.58, the plaintiff purchased of the defendant company, in discharge of a money indebtedness, in the like amount, due him from the company. The purchase and sale made were for the very purpose of thereby enabling the plaintiff to acquire from the company certain of its lands at their appraised value. It was in pursuance of that intent that the deed which forms the basis of the present action was executed by the defendant company to the plaintiff. By those acts of the respective parties, they, in effect, declared the true value of the bonds and the lands described in the deed to be the same, to wit, the face value of the bonds, and the value so fixed binds both parties to the transaction.

The incidental question remains in respect to interest allowed the plaintiff under the instructions of the court below, and by its judgment. The eighth assignment of error is as follows:

"The verdict of the jury, rendered under the instruction of the court, is excessive in amount, in that it includes interest from the 10th day of April, 1876, to the 28th day of May, 1896, whereas, under the pleadings and the evidence, the plaintiff was not entitled to any interest until the year 1885. The court also erred in including in the judgment said excessive interest, and the defendant now assigns as error the excessive amount of the verdict in the respect herein stated, and also including in the judgment said excessive interest."

In addition to the facts already stated, the proof shows, without conflict, that the lands in controversy are wild timber lands, not inclosed or cultivated, and that the plaintiff derived no income therefrom, was never on but one or two sections of the land, and, upon the execution of the deed, went to reside at Portland, Or., where he has resided ever since. Never having been in the actual possession of the lands, and never having derived any rents or profits or other benefit therefrom, he received nothing for which to account to the true owner, and nothing as an equivalent for interest on that which he paid for the lands. Under such circumstances, it is quite clear that he was properly allowed interest from

the date of his payment. *Graham v. Dyer* (Ky.) 29 S. W. 346; *Mann v. Mathews*, 82 Tex. 98, 17 S. W. 927; *Lawless v. Collier*, 19 Mo. 480; *Wood v. Coal Co.*, 48 Ill. 357. The judgment is affirmed.

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PITTEL et al. v. FIDELITY MUT. LIFE ASS'N OF PHILADELPHIA et al.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1898.)

No. 584.

1. INSURANCE POLICY—LEGAL REPRESENTATIVES.

"Legal representatives" in a policy of insurance ordinarily means executors or administrators when not qualified by the context, but it may be shown to mean next of kin or successors or assigns.

2. RES JUDICATA—PLEA.

Where a plea gives the parties to a former suit in the same court, refers to all the documents, pleadings, and judgment, and makes them a part of the plea "as though fully and in detail set out herein," as the court takes judicial knowledge of its own records, this is sufficient in a plea of res adjudicata.

3. SAME—ACTION ON INSURANCE POLICY.

A policy in favor of the insured's legal representatives was assigned by him, and after his death the assignee sued thereon. The insured's administrator intervened in the suit, and claimed the fund. *Held*, that he was the representative of the wife and child of the insured, so that a judgment in favor of the company was conclusive upon them.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

"The plaintiffs in error, Caroline H. Pittel and her daughter, Mary Karowski, joined by her husband, Herman Karowski, on March 6, 1896, instituted suit in the district court of Galveston county, Tex., against the Fidelity Mutual Life Association of Philadelphia and Albert Behrends, to recover the sum of \$5,000, claimed to be due and payable to plaintiffs under a certain certificate of membership in said association, issued by said association to Edward Pittel, the husband of Caroline Pittel, and father of Mary Karowski, the plaintiffs." "Plaintiffs' petition alleges that the defendant is a mutual life association for the benefit of its members, and insures their lives upon the assessment plan, as known to such associations; that on or about October 22, 1891, Edward Pittel became and was admitted a member of said association for the term of 10 years; that for a valuable consideration, required to be paid for a certificate of membership, said association issued to Edward Pittel a certificate of membership, and therein undertook and promised to pay to the legal representatives of Edward Pittel, upon proof of his death, the sum of \$5,000; that Edward Pittel died September 17, 1894; that proof of the death of Edward Pittel has been made; and that, though the money due has been demanded, the association has failed and refused to pay it." "The plaintiffs allege that they are the beneficiaries designated in said certificate or policy of insurance, and are in law and of right entitled to the money due and payable under said policy; that Edward Pittel, without any right or authority in law, assigned and transferred said policy of insurance to Albert Behrends, one of the defendants; that Albert Behrends wrongfully and illegally holds said policy, and is seeking to recover said insurance fund from said association." Plaintiffs pray judgment against the association for \$5,000, and that the assignment of this policy to Albert Behrends be canceled and held for naught.

The cause was removed to the circuit court of the United States for the Eastern district of Texas, at Galveston, upon the petition of the defendant association. On October 19, 1896, the defendant association filed a general demurrer and the following pleas: "And, for special answer, this defendant says that there has been rendered in this court a final judgment, and, to the suit in which said judgment was rendered, all of the parties hereto were parties, and in which suit the same identical issue as is raised in this cause, to wit, the right of Herman D.

Karowski, as administrator, and the right of Caroline H. Pittel and her daughter, Mary Karowski, as heirs of Edward Pittel, deceased, and to recover the amount of the policy in this cause sued on from this defendant, was tried, determined, and adjudicated; that the very issue proposed to be tried in this case was tried and determined in the cause referred to; and that all the parties to this suit were parties to the suit referred to, and to the said suit, viz. the suit of A. Behrends vs. The Fidelity Mutual Life Association, of Philadelphia, Pa., numbered C. L. 1786, on the docket of this court, and all the documents, pleadings and the judgment thereto, reference is here now made, and they are prayed to be taken as part of this plea as though fully and in detail set out herein. And the defendant now pleads the matters here in controversy, as between the parties of this cause, are *res adjudicata*." "And, for further and special answer in this behalf, this defendant says that the policy issued, if any was ever issued, was payable to the legal representatives of said Edward Pittel, deceased, and that there was on the — day of — appointed by the probate court of Galveston county, Texas (a court then having jurisdiction of the matter), an administrator of the estate of Edward Pittel, deceased, to wit, Herman D. Karowski; that said Herman D. Karowski, as his administrator, and standing for and representing the heirs and creditors of said Edward Pittel, deceased, did, by intervention, become a party to the suit referred to in the paragraph hereof next preceding; and that Herman D. Karowski stood and was the legal representative of Edward Pittel, deceased, and was and is the only person in whom the rights could vest to have and maintain an action in said policy." The plea of "*res adjudicata*" was by the parties submitted, and the court sustained the same, and dismissed the suit. This ruling the plaintiff below assigned as error, and brought the case here.

L. E. Trezevant, for plaintiff in error.

Thos. J. Ballinger, for defendant in error.

Before PARDEE, Circuit Judge, and SWAYNE, District Judge.

SWAYNE, District Judge (after stating the facts). It is contended on the part of the plaintiff in error that this plea of "*res adjudicata*" did not in proper terms allege that the former cause went to judgment upon the same issue, and was between the same parties. We think it does not require a careful inspection of the plea to prove this objection bad. It clearly shows that in the former suit the administrator of Edward Pittel was a party, and refers to and adopts all the documents, pleadings, and judgment in the former case as a part of this plea. The cause went to trial thereon without any objection on the part of the plaintiffs below to this form of pleading. It is a well-established doctrine that the court will take judicial knowledge of its own records, especially when they are referred to and made part of a plea as fully as those set out herein. A vital question in this case upon the record is whether Behrends et al., as assignee, or Karowski, as administrator of Edward Pittel, could recover on the policy. If either of these could recover in a good cause of action, then the plaintiff in error would be concluded by a judgment rendered in the cause in which either the assignee or the administrator were parties.

The petition in the present case alleges that the policy was payable to "legal representatives" of Edward Pittel, and the contention is made by the plaintiffs in error that the words "legal representatives" do not mean executors, administrators, or assigns, but only heirs or next of kin, and that the proceeds of the policy are not to be administered on as assets by the executor or administrator. "Legal representatives" ordinarily means executors or administrators when not in any way qualified by the context; but it may be shown to mean next

of kin, or successors or assigns, as was the case in some of the causes cited. In one case it appeared by the application for insurance, which by the terms of the policy was made part of it, the insured stated that he desired the money paid in case of his death to his "legal heirs," "wife if living," and, at the end, said that the policy was taken for his "legal representatives." The court adds that, "notwithstanding the loose, inaccurate, and apparently contradictory use of the terms in the application and policy, we are satisfied that the heirs (including the widow) of the deceased are the beneficiaries of the policy, and that the words 'legal representatives,' as therein used, must be construed as meaning heirs or next of kin, and not executors or administrators." We not only have nothing in the record to require the court to depart from the usual construction of the language used, but the insured himself, in his life, stamped upon the contract his understanding of its import, by assigning it to Behrends. Clearly, Behrends, as assignee, had a right of action, and might have recovered on a valid policy. Herman Karowski, as administrator of Pittel, could intervene, as he did, to have his rights tested; and, when judgment was entered against him in cause No. 1,768, it was upon the same issues, in the same cause, and between the same parties; for, as such administrator of Edward Pittel, he was the representative of Caroline H. Pittel, the surviving wife of Edward Pittel, deceased, and Mary Karowski, the daughter and only child of said Edward Pittel and Caroline H. Pittel, and wife of Herman D. Karowski. At the same time, in the same cause of action, and before the same court from which this appeal was taken, judgment was given against him and those whom he represented; and the effort here being made to get another trial of the same matters between the same parties must be refused. Judgment is therefore affirmed.

McCORMICK, Circuit Judge, being recused in the case, took no part in its determination.

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MORELAND v. BROWN.

(Circuit Court of Appeals, Ninth Circuit. February 14, 1898.)

No. 390.

1. BANKS AND BANKING—SPECIAL DEPOSIT.

A debtor deposited in a bank in New York the amount due from him to a creditor in Helena, Mont. The bank in New York telegraphed the Bank of Helena to pay the debt, and charge to it. The Bank of Helena refused to pay in any way but by exchange on New York, which the creditor refused to accept, and also refused to permit the amount to be placed to his credit. The creditor then accepted a draft on the New York bank, to be a payment if honored. The Bank of Helena suspended, and the draft was not paid. *Held*, that the refusal of the creditor to accept the draft in payment, or to permit the amount to be placed to his credit, made it a special deposit subject to the law governing such deposits.

2. SAME—PLEADING.

Where the complaint sets forth facts sufficient to make a special deposit, a demurrer will not be sustained because it does not appear from the com-

plaint that there was continuously in the bank, from the time of the special deposit to the day the bank failed, a sum of money equal to the amount of the deposit.

### Appeal from the Circuit Court of the United States for the District of Montana.

This action was originally brought by the plaintiff, Isaac S. Moreland, in the district court of the First judicial district of the state of Montana, against the receiver of the First National Bank of Helena, and by the latter removed to the circuit court of the United States for the district of Montana. The object of the action is to establish a lien upon certain collateral securities in the hands of the receiver, to the amount of \$2,635, with interest from August 31, 1896, and to obtain a decree that the receiver be required to pay that sum into court, with costs, for the use of the plaintiff. The amended bill of complaint alleges, in substance, that the plaintiff had due him, on August 31, 1896, the sum of \$2,635, from one Thomas Anderson, then in New York City. By agreement between the plaintiff and Anderson, the latter, on that day, deposited the amount named in the First National Bank of New York City, to be by it transmitted and paid to the plaintiff. The First National Bank of New York forthwith telegraphed to the First National Bank of Helena, Mont., to pay the sum of \$2,635 to the plaintiff, and charge the same to the First National Bank of New York. The plaintiff, being advised of this direction to the First National Bank of Helena, called at that bank, and demanded payment of the said sum, but the bank refused to give the plaintiff anything in payment of the sum except exchange drawn by it upon the said First National Bank of New York, which the plaintiff refused to accept. The bank then requested the plaintiff that he permit the said sum to be placed to the credit of his account with the said First National Bank of Helena, with which request the plaintiff also refused to comply. After further protracted negotiations, in which the plaintiff demanded the immediate payment of the sum in cash, the bank peremptorily declined to give the plaintiff anything except exchange on New York. Finally, the plaintiff accepted of the First National Bank of Helena a draft drawn by it on the First National Bank of New York, with the express reservation on his part, at the time declared to the said bank, that he should consider it a payment only in case the draft was honored. The First National Bank of Helena suspended on the 3d day of September, 1896, and on the 15th day of October, 1896, E. D. Edgerton was appointed the receiver of the bank by the comptroller of the currency. The draft which the plaintiff received from the Helena bank was transmitted to the New York bank, and payment of it refused, for the reason, as the fact then was, that the Helena bank had suspended, and closed its doors, prior to the presentation of the draft for payment to the New York bank. When Thomas Anderson made the payment of \$2,635 to the First National Bank of New York, to be transmitted to the plaintiff, the said bank placed the amount to the credit of the account of the First National Bank of Helena, making the entry on its books as on account of plaintiff. When the Helena bank suspended, on September 3, 1896, it had to its credit about \$11,000 on the books of the New York bank, and it was at the same time obligated to the New York bank in the sum of about \$15,000, to secure the payment of which the New York bank held collateral security consisting of bills payable and other evidences of indebtedness due the Helena bank amounting to the face value of upward of \$100,000. The receiver of the Helena bank, acting under advice and permission of the comptroller of the currency, proceeded to redeem this collateral security in the New York bank, and for this purpose paid to that bank the sum of \$4,000, being the difference between the debit and credit account of the Helena bank with the New York bank. In this credit account was this sum of \$2,635 paid to the New York bank by Anderson on account of the plaintiff. When the New York bank surrendered the collateral to the receiver of the Helena bank, the New York bank supposed that the Helena bank had paid plaintiff the amount of his draft, and that the latter bank was entitled to credit for that amount in accordance with the credit in the books of the New York bank. The defendant is the successor of Edgerton as the duly-appointed receiver of the bank. To this complaint the defendant demurred on the ground that by the complainant's own

showing he was not entitled to the relief prayed for in the amended bill against the defendant. The demurrer was sustained, and the bill dismissed.

Richard R. Purcell and Thomas J. Walsh, for appellant.  
Wm. Wallace, for appellee.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge, after stating the case as above, delivered the following opinion:

In determining the sufficiency of the bill of complaint, the important question is whether the order of the New York bank to the Helena bank to pay the plaintiff the sum of \$2,635 was in the nature of a special deposit for that purpose. When the plaintiff called on the Helena bank for the money transmitted to it by the New York bank for his account, the officers of the Helena bank admitted, in effect, that the bank had that particular deposit for him, but refused to pay it, except by giving exchange on the New York bank, or by placing the amount to his credit in the Helena bank. The refusal of the plaintiff to accept either proposition as a payment of the order telegraphed by the New York bank fixed the character of the deposit in the Helena bank as a special deposit for the plaintiff, and subject to the law governing such deposits. The relation of debtor and creditor was not established. It was precisely the relation which the plaintiff refused to accept. The Helena bank was unquestionably the agent of the New York bank to pay the plaintiff a specified sum of money, but when the Helena bank refused to make the payment as directed by the New York bank, and undertook to deal with the plaintiff on its own account, it admitted that it had in its possession the specific sum, and the bank and its receiver are estopped from denying that such was the fact. In *Marine Bank v. Fulton Bank*, 2 Wall. 252, 256, the supreme court determined the character of a deposit that would create the relation of debtor and creditor, and at the same time clearly distinguish it from a transaction involving the trust feature of a special deposit. The Fulton Bank of New York sent two notes for collection to the Marine Bank of Chicago. The two notes were collected by the Marine Bank, and the proceeds placed to the credit of the New York bank. There being some trouble at that time about the currency, the Fulton Bank requested the Marine Bank to hold the avails of the collection, subject to order, and advise amount credited. Afterwards the Marine Bank sought to pay in the currency which it had received on the collection, then largely depreciated, but its claim in this respect was denied; Mr. Justice Miller, speaking for the court, saying:

"The truth undoubtedly is \* \* \* that both parties understood that when the money was collected plaintiff was to have credit with the defendant for the amount of the collection, and that defendant would use the money in his business. Thus the defendant was guilty of no wrong in using the money, because it had become its own. It was used by the bank in the same manner that it used the money deposited with it that day by city customers; and the relation between the two banks was the same as that between the Chicago bank and its city depositors. It would be a waste of argument to attempt to prove that this was a debtor and creditor relation. All deposits made with bankers may be divided into two classes, namely, those in which the bank becomes bailee of the de-



positor, the title to the thing deposited remaining with the latter; and that other kind of deposit of money peculiar to banking business, in which the depositor, for his own convenience, parts with the title to his money, and loans it to the banker, and the latter, in consideration of the loan of the money and the right to use it for his own profit, agrees to refund the same amount, or any part thereof, on demand. The case before us is not of the former class. It must be of the latter."

In the present case the plaintiff, as we have seen, not only did not authorize the Helena bank to give him credit on its books for the amount of the draft, but positively refused to accept such a credit. He declined to part with the title to his money, and refused to loan it to the bank for any purpose. It was a special deposit made by the New York bank in the execution of an express trust in which the title to the money was in the plaintiff.

In *Farley v. Turner*, 26 Law J. Ch. 710, the customer of a bank, having a sum of £924 standing on his account, paid in a further sum of £707, with a written direction that £500 of that sum should be forwarded to another bank to meet a bill to become due. The £500 was sent as directed, but before the bill became due the latter bank ceased to carry on business. It was held that the £500 was specifically appropriated, and belonged to the customer of the bank receiving the deposit, and not to the general creditors of the suspended bank. As the bill had not become due when the bank failed, the title to the money remained in the original depositor. In the present case the title had been transferred to the payee before the bank closed.

It is objected, however, to the claim of a special deposit, that it does not appear from the complaint that there was in the bank from August 30th to September 4th, continuously, a sum of money equal to or greater than \$2,635, the amount in question. This objection is based upon observations to be found in decisions of the court that it is not important that the special deposit claimed to have been made in the suspended bank should bear some mark by which it might be identified. It will be sufficient, the courts say, to trace it to the bank vaults, and find a sum equal to it, and, presumably, representing it, continually remaining therein until the bank passes into the hands of the receiver. If that amount of money was not, in fact, in the vaults of the Helena bank between the dates named, it might, perhaps, be set up by way of defense; but it is not material to be considered at this time in determining the sufficiency of the complaint. In our opinion, the facts set forth in the complaint are sufficient to entitle the plaintiff to maintain his action against the receiver of the bank for the amount claimed as a special deposit.

It is further contended, on the part of the plaintiff that when the New York bank sent its telegraphic order to the Helena bank to pay plaintiff the sum of \$2,635, and credited the latter bank with the amount as having been paid, the New York bank held collateral securities belonging to the Helena bank out of which it was able to make that credit good; and, the receiver of the Helena bank, having used that credit in the settlement of the balance due the New York bank, and in securing possession of the securities, the plaintiff has become subrogated to the rights of the New York bank in such collateral, and is now entitled to pursue those securities, or their proceeds, in the

hands of the receiver. This question involves the relation of the New York bank to the Helena bank, and the nature of the agreement under which the collaterals were held by the New York bank. The complaint does not make these matters clear, and is, therefore, not sufficient to establish a lien on such securities. For the reasons above given, the decree of the circuit court must be reversed, and the case remanded to the circuit court for further proceedings in accordance with this opinion.

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**BROWN v. INGALLS TP., KAN.**

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 1,014.

**1. MUNICIPAL BONDS—ESTOPPEL BY RECITALS.**

Where municipal corporations have lawful authority to issue bonds upon the adoption of certain preliminary proceedings, and the adoption of those proceedings is certified on the face of the bonds by the officers to whom the law intrusts the power, and upon whom it imposes the duty, to ascertain, determine, and certify this fact, before or at the time of issuing the bonds, such a certificate estops the municipality, as against a bona fide purchaser of the bonds, from proving its falsity to defeat them.

**2. SAME—ELECTION.**

Where a law authorizing a township board to issue refunding bonds provides that the compromise shall not be valid "unless assented to by the legal voters of such township at an election," it is the fact of the assent of the voters, and not the certificate of that fact or the canvass of the vote, which confers the right to issue the bonds.

**3. SAME—CANVASSING VOTE.**

Where an election was held under Laws Kan. 1879, c. 50, §§ 1-3, authorizing townships to refund their indebtedness, with the assent of the voters of the township, and imposing upon the township officers the duty of calling and holding the election and the duty of issuing the bonds, it is the duty of the township board to canvass the returns and declare the result, and the act of 1875 (Gen. St. Kan. 1889, pars. 442, 7064, 7071, 7072), requiring the board of county commissioners to canvass the returns and declare the result of an election, does not apply to an election held under the act of 1879.

In Error to the Circuit Court of the United States for the District of Kansas.

A. A. Godard (D. M. Valentine, on brief), for plaintiff in error.

E. A. Madison (M. W. Sutton, on brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. On February 25, 1890, the township of Ingalls, in the state of Kansas, issued its negotiable bonds with coupons attached. Each of these bonds contained these representations:

"This bond is one of a series of fifteen bonds, of one thousand dollars each, and issued by virtue of and in accordance with the provisions of sections one, two, and three of chapter fifty of the Laws of 1879, being an act of the legislature of the state of Kansas entitled 'An act to enable counties, municipal corporations, the boards of education of any city and school districts to refund their indebtedness,' which said act took effect March 10, 1879; and it is hereby certified and recited that all acts, conditions, and things required to be done,

precedent to and in the issuing of said bonds, have been done, happened, and performed in regular and due form, as required by law."

Only three sections of the act of March 10, 1879, are material in this case. The first authorized every township in Kansas to refund its matured and maturing indebtedness and to issue new bonds for that purpose. The second provided that bonds issued by a township under that act should be signed by the trustee, attested by the township clerk, and countersigned by the township treasurer. The third section contained these provisions:

"When a compromise has been agreed upon, it shall be the duty of the proper officers to issue such bonds at the rate agreed upon to the holder of such indebtedness in the manner prescribed in this act: \* \* \* provided, that no compromise by any township or school district shall be of any validity unless assented to by the legal voters of such township or school district, at an election or school meeting called for such purpose; of which election or school meeting at least ten days' notice shall be given." Gen. St. Kan. 1889, pars. 464-466.

Due notice was given of an election to determine whether or not the legal voters of the township of Ingalls would assent to the compromise on which these bonds are based; the election was held; 64 votes were cast, 62 of which were in favor of assenting to the compromise, and 2 were against it; the township board canvassed the returns, declared the result, and issued the bonds to those who were entitled thereto; but the board of county commissioners of the county of Gray, in which this township is situated, never canvassed the returns of this election. After the bonds had been issued, Ephraim A. Brown (who has since died) purchased the bonds, and Anne F. Brown, the executrix of his last will, the plaintiff in error, brought this suit against the township upon some of the coupons which had been attached to the bonds and which had not been paid. She is, and her testator was, when living, the bona fide purchaser for value of these bonds and coupons, without other notice of irregularities in their issue than they were by law bound to take. The case was tried by the circuit court without a jury, and the foregoing facts appear from an agreed statement which was adopted by the court as its findings. The court below held that by virtue of certain general provisions of the statutes of Kansas, which are not found or referred to in the act of 1879 (Gen. St. Kan. 1889, pars. 442, 7064, 7071, 7072), the board of county commissioners of Gray county was required to canvass the returns of this election, and that the bonds and coupons were void in the hands of an innocent purchaser, for value, because that board had never made the canvass. 81 Fed. 485; *Faulkenstein Tp. v. Fitch*, 2 Kan. App. 193, 43 Pac. 276. This is the only ground on which the counsel for the defendant in error attempts to sustain the judgment of dismissal which was rendered below, and, under the decisions of the supreme court of the United States and of this court, it is not tenable, for several reasons:

1. If it was the duty of the board of county commissioners to canvass the returns of the vote on the proposition to issue these bonds, then it was the duty of the members of the township board to send to the board of county commissioners the returns of the election for it to canvass, and it was their duty to examine the records of the county clerk, and determine therefrom whether or not that canvass had been made

before they issued the bonds. If a canvass and certificate by the board of county commissioners was the only evidence from which the members of the township board could determine whether or not the voters had assented to the issue of the bonds, then section 3 of the act of 1879, which made them invalid without such assent, imposed upon them the duty to ascertain and determine whether that evidence existed, whether that canvass had been made and certified before they issued the bonds, and, when they certified on the face of each of these bonds "that all acts, conditions, and things required to be done precedent to and in the issuing of said bonds have been done, happened, and performed as required by law," they certified that the board of county commissioners had canvassed the returns and had filed a certificate thereof which showed that the voters assented to their issue, and the township of Ingalls is estopped from denying the truth of that certificate to defeat the collection of its bonds by an innocent purchaser for value. Where municipal corporations have lawful authority to issue bonds upon the adoption of certain preliminary proceedings, and the adoption of those proceedings is certified on the face of the bonds by the officers to whom the law intrusts the power, and upon whom it imposes the duty, to ascertain, determine, and certify this fact, before or at the time of issuing the bonds, such a certificate estops the municipality, as against a bona fide purchaser of the bonds, from proving its falsity to defeat them. *National Life Ins. Co. v. Board of Education of Huron*, 27 U. S. App. 244, 266, 10 C. C. A. 637, 651, and 62 Fed. 778, 792, and cases there cited; *West Plains Tp. v. Sage*, 32 U. S. App. 725, 736, 16 C. C. A. 553, 558, and 69 Fed. 943, 948; *Board v. Howard*, 49 U. S. App. 642, 27 C. C. A. 531, 83 Fed. 296, 298; *E. H. Rollins & Sons v. Board of Commissioners*, 49 U. S. App. 399, 26 C. C. A. 91, 98, and 80 Fed. 692, 699; *Second Ward Savings Bank v. City of Huron*, 80 Fed. 660; *Evansville v. Dennett*, 161 U. S. 434, 443, 446, 16 Sup. Ct. 613; *City of Cadillac v. Woonsocket Institution for Savings*, 16 U. S. App. 545, 558, 7 C. C. A. 574, 578, and 58 Fed. 935, 939.

2. It was the fact of the assent of the voters at the election, and not the certificate of that fact, or the canvass of the vote, which authorized the township board to issue the bonds. That fact existed. The voters did assent by a vote of 62 to 2. How, then, can the bonds be void? The legislature might have provided that they should not be valid unless the board of county commissioners canvassed the vote and declared that the voters assented, but it did not do so, and it would be judicial legislation for a court to import into this law a condition precedent which the legislature omitted. The act authorizes the members of the township board to issue the bonds, and then provides only that the compromise shall not be valid "unless assented to by the legal voters of such township at an election." The best evidence of the result of an election is the ballots actually cast, and they were 62 for and 2 against the funding proposition. The returns of officers who count the ballots and the canvass and certificate of those who read these returns are, after all, but secondary evidence made prima facie by the statutes. If the ballots were preserved, any court trying the question of the result would receive them in evidence and base its findings upon their count. It is the vote at the

election, and not the certificate of the result, which confers the right, and that right may be enforced without the official certificate as effectively as with it. Paine, Elect. § 625, note 2, and authorities there cited. The assent of the voters of this township to the compromise upon which these bonds were based could not have been withdrawn by the failure of the county commissioners to ascertain and declare the fact, and, as the assent was all that was required to validate the bonds, they are not void.

3. We cannot assent to the proposition that the board of county commissioners was required to canvass the returns or declare the result of this election. That conclusion was only reached by importing into the act of 1879 the provision of the act of 1875, which declares that an election held under the latter act shall be conducted and the returns thereof ascertained in the manner prescribed by law for holding general elections, and by then citing the general law which requires the board of county commissioners to canvass the returns for general elections for state, county, and township officers. The act of 1879 contains no such provision. It is not an amendment of any other act or law, and it is complete and efficacious in itself. It imposes upon the township officers the duty of calling and holding the election and the duty of issuing the bonds. They must count the votes and ascertain the result in any event, and no reason is perceived why a provision from another law which would require them to return to the board of county commissioners a statement of the result which they had found, for the sole purpose of enabling that board to read this statement and certify back to them the same result, should be read into this law after the legislature wisely, and we must presume purposely, omitted it. When the legislature of Kansas by the act of 1879 imposed upon this township the duty of calling and holding the election, it undoubtedly intended to impose upon them the duty of canvassing the returns and declaring the result. *People v. Dutcher*, 56 Ill. 144, 147. The judgment below is reversed, and the case is remanded to the court below, with directions to render judgment for the plaintiff in error for the amount claimed in her petition.

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DEUEL COUNTY, NEB., et al. v. FIRST NAT. BANK OF BUCHANAN  
COUNTY, MO.

(Circuit Court of Appeals, Eighth Circuit. April 4, 1898.)

No. 975.

1. MANDAMUS—TO COMPEL TAX TO PAY JUDGMENT.

The federal courts may issue writs of mandamus to compel the levy of a tax to pay judgments which they have rendered against counties or other municipal corporations, when, by the laws of the state, it is expressly or impliedly made the duty of the officers of such municipalities to make provision for the payment of such judgments by an exercise of the power of taxation.

2. SAME.

Where, by the laws of Nebraska, it is made the duty of county officials to levy a tax to pay all judgments against their respective counties, when such

judgments remain unpaid for want of sufficient funds a prima facie right to mandamus is made out by an information which alleges the recovery of a judgment against a county, and the failure of the county officials to pay it, or take any steps looking to its payment.

**3. SAME—APPORTIONMENT OF REVENUE.**

When, as under Code Neb. 1875, art. 9, § 5, the county authorities are prohibited from levying a tax in excess of a certain amount, for all purposes, and the estimate of expenses is sufficient to exhaust the revenue, where such expenses can be reduced by judicious management, and a portion of the revenues applied to the payment of judgment creditors, that course ought to be pursued, and the court may, by mandamus, require that it shall be pursued.

**In Error to the Circuit Court of the United States for the District of Nebraska.**

This is a proceeding by mandamus, which was brought to compel the levy of a tax to pay a judgment in the sum of \$5,102.40, with accrued interest and costs, which was recovered by the First National Bank of Buchanan County, St. Joseph, Mo., the defendant in error, against the county of Deuel et al., the plaintiffs in error, in the circuit court of the United States for the district of Nebraska, on July 1, 1896. The Consolidated Statutes of Nebraska of 1893, at pages 977, 978, contain the following provisions relative to the collection of judgments against counties which appear to be still in force:

"4112. That whenever any judgment shall be obtained in any court of competent jurisdiction in this territory for the payment of a sum of money against any county, \* \* \* or against any municipal corporation, or when any such judgment has been recovered and now remains unpaid, it shall be the duty of the county commissioners, \* \* \* city council, or other corporate officers, as the case may require, to make provisions for the prompt payment of the same.

"4113. If the amount of revenue derived from taxes levied and collected for ordinary purposes shall be insufficient to meet and pay the current expenses for the year in which the levy is made, and also to pay the judgment remaining unpaid, it shall be the duty of the proper officers of the corporation against which any such judgment shall have been obtained and remaining unsatisfied, to at once proceed and levy and collect a sufficient amount of money to pay off and discharge such judgments.

"4114. The tax shall be levied upon all the taxable property in the district, county, township, town, or city, bound by the judgment, and shall be collected in the same manner and at the same time provided by law for the collection of other taxes.

"4115. The corporate officers whose duty it is to levy and collect taxes for the payment of the current expenses of any such corporation against which a judgment may be so obtained, shall also be required to levy and collect the special tax herein provided for, for the payment of judgments.

"4116. If any such corporate authorities whose duty it is, under the provisions of this act, to so levy and collect the tax necessary to pay off any such judgment shall fail, refuse, or neglect to make provisions for the immediate payment of such judgment, after request made by the owner, or any person having an interest therein, \* \* \* he or they having such interest may apply to the district court of the county in which the judgment is obtained, or to the judge thereof in vacation, for a writ of mandamus to compel the proper officers to proceed to collect the necessary amount of money to pay off such indebtedness, as provided in this act; and when a proper showing is made by the applicant for said writ, it shall be the duty of the court or judge, as the case may be, to grant and issue the writ to the delinquents, and the proceedings to be had in the premises shall conform to the rules and practice of said court, and the laws of this territory in such cases made and provided."

The respondents below, who are the plaintiffs in error here, filed a motion to quash the alternative writ of mandamus, which motion was overruled. Subsequently they filed an answer or return to the writ. A motion was made to strike out parts of the return, but the record does not disclose any action with reference to said motion. The cause was submitted to the circuit court upon the pleadings, "together with all the evidences," as the record recites, and the

trial judge made a special finding of the facts, upon which he awarded a peremptory writ, directing the levy of a tax for the year 1897 sufficient to pay one-third of the relator's judgment. To vacate this order the respondents below have sued out a writ of error.

W. T. Wilcox and John J. Halligan, for plaintiffs in error.

Alfred Hazlett and F. N. Prout, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The questions open for review in this court upon the present record are: First, whether the motion to quash the alternative writ of mandamus was properly overruled; and, second, whether a peremptory writ of mandamus was properly awarded on the facts found and reported by the trial judge.

The principal ground urged by the respondents below in support of their motion to quash the alternative writ of mandamus is that, as the authority to issue a writ of mandamus against a county must be found in the laws of the state, and as the laws of the state of Nebraska quoted above only authorize an application for a writ of mandamus against a county to be made to a particular court, to wit, the district court of the county, the circuit court of the United States had no right to entertain the application for a writ of mandamus, and in granting it acted wholly without jurisdiction. With reference to this contention it is only necessary to say that it has long been settled that the federal courts may issue writs of mandamus to compel the levy of a tax to pay judgments which they have rendered against counties or other municipal corporations, when, by the laws of the state, it is expressly or impliedly made the duty of the officers of such municipalities to make provision for the payment of such judgments by an exercise of the power of taxation. This power has been exercised repeatedly by the federal courts, and of its existence at the present time there can be no reasonable doubt. If the courts of Nebraska can compel the officers of a county to levy a tax to pay a judgment rendered against a county,—as they doubtless may do,—then the circuit court of the United States for the district of Nebraska can exercise a similar jurisdiction to compel the payment of a judgment by it rendered. *Stryker v. Board*, 40 U. S. App. 585, 599, 23 C. C. A. 286, and 77 Fed. 567; *Riggs v. Johnson Co.*, 6 Wall. 166; *Von Hoffman v. City of Quincy*, 4 Wall. 535; *Butz v. City of Muscatine*, 8 Wall. 575, 581; *U. S. v. New Orleans*, 98 U. S. 381, 393; *Loan Ass'n v. Topeka*, 20 Wall. 660; *Wolff v. New Orleans*, 103 U. S. 358; *U. S. v. Clark Co.*, 96 U. S. 216; *Ralls Co. Ct. v. U. S.*, 105 U. S. 733.

Another ground upon which the motion to quash appears to have been based was as follows: That the information upon which the alternative writ had been obtained was fatally defective, in that it did not show the nature of the original cause of action on which the judgment was founded, so that the court could decide whether,

under the laws of the state, the right existed to compel an exercise of the power of taxation for its payment. This position, however, must be regarded as untenable, for the reason that the federal courts take judicial notice of the general laws of the several states, and by the laws of Nebraska it is made the duty of county officials to levy a tax to pay all judgments which are recovered against their respective counties, when such judgments remain unpaid for want of sufficient funds wherewith to pay them. A prima facie right to a writ of mandamus was, therefore, made out by the information, which alleged the recovery of a judgment against Deuel county, and the failure of the county officials of that county to pay it, or to take any steps looking to its payment.

The constitution of Nebraska adopted in 1875 (article 9, § 5), which is still in force, provided, in substance, that county authorities should never assess taxes for county purposes the aggregate of which should exceed \$1.50 per \$100 valuation, except for the payment of indebtedness existing at the adoption of the constitution, unless otherwise authorized by a popular vote. This limitation, it seems, was applicable to the indebtedness represented by the relator's judgment. In view of that provision of the organic law, the trial court found, in substance, that on January 12, 1897, the board of county commissioners of the county of Deuel met, as required by law, for the purpose of making their annual estimate of the expenses of the county for that year; that the relator's attorney was present, and requested the board to include in their annual estimate of expenses the amount requisite to pay the relator's judgment, interest, and costs; that such request was denied, and that said board failed to include in said estimate any sum whatsoever for the payment of said judgment. It further found that the assessed valuation of county property for the year 1896 was \$836,467, that the estimated assessed value of county property for the year 1897 would not exceed the valuation for the year 1896, and that the estimated county expenses as fixed by the board in January, 1897, amounted to \$14,370. It further found that it would be burdensome on the taxpayers of said county if the board of commissioners was obliged to levy a tax sufficient to pay off the entire amount of the relator's judgment, interest, and costs, in addition to the necessary current expenses of the county for the year, but that it would not be burdensome to levy a tax sufficient to pay one-third of said judgment, interest, and costs. It accordingly concluded as a matter of law that it was the duty of the board of county commissioners to have included in their estimate of the expenses of said county for the year 1897 the amount of the relator's judgment, and it therefore ordered a levy of taxes for the year 1897 adequate to pay one-third of said judgment and the accrued costs, amounting in the aggregate to the sum of \$1,872.49. Such action on the part of the trial court necessarily required the board of county commissioners to appropriate to the payment of the relator's judgment a portion of the county revenue for the year 1897, which the board had intended to apply exclusively to the discharge of the



estimated county expenses, inasmuch as a levy of  $1\frac{1}{2}$  per cent. on the assessed valuation of county property would not produce a fund adequate to pay one-third of the relator's judgment and the other estimated expenses. It is strenuously urged that this was an unauthorized interference with a discretionary power vested in the board of county commissioners. The supreme court of Nebraska, however, in *State v. Weir*, 33 Neb. 35, 39, 49 N. W. 785, has decided, in effect, that a board of county commissioners in that state may be compelled by mandamus to appropriate a part of the county revenue to the payment of a judgment against the county, notwithstanding the fact that the other estimated expenses are enough to absorb the entire revenue, provided the amount devoted to such object is not so large as to leave the county board practically without means to meet the necessary current expenses of the county government. The court in that case remarked, in substance, that, if such control could not be exercised over the action of the board, then it would be entirely feasible for the board to exhaust all the revenues of the county in the payment of current expenses, without making any provision for the payment of the just indebtedness of the county already incurred, and that by this means judgment creditors might be deprived of all means of enforcing the payment of their claims. We do not understand that the doctrine enunciated in the case last cited has been overruled or disturbed by the recent decision in the case of *State v. Sheldon* (Neb.) 73 N. W. 694. It seems to us to be an entirely just and reasonable view that boards of county commissioners, under the laws of Nebraska, are not vested with such an absolute control over the disposition of the county revenues as will enable them to defeat the claims of judgment creditors by swelling the estimate for county expenses to such a sum as will exhaust the entire county revenue for a given year, or a series of years. If a judgment is recovered against a county, its board of commissioners ought to make a fair effort to pay it,—if need be, by cutting down to some extent the outlay for current expenses. Such expenses, by judicious management, are usually capable of being reduced to some extent without serious injury to the public service; and when they can be so reduced, and a portion of the current revenue applied to the payment of judgment creditors, that course ought to be pursued, and the courts may properly require that it shall be pursued. In view of the special finding of facts contained in the present record, we understand that the trial court was satisfied by the evidence that the public would suffer no harm, and that the board of county commissioners of the defendant county would not be seriously embarrassed in maintaining the county government, if enough of the current revenue for the year 1897 to pay one-third of the relator's judgment was applied to that purpose. We must accept that finding by the trial court as conclusive, and it results therefrom that the judgment awarding a peremptory writ should be affirmed. It is so ordered.

## JOHNSON et al. v. C. &amp; N. W. SAND &amp; GRAVEL CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 16, 1897.)

No. 435.

## 1. TRESPASS—DAMAGES TO THE FREEHOLD.

An action of trespass, or trespass on the case, to recover damages for injury to the freehold, or for severance and conversion of a portion of the freehold, cannot be maintained by the true owner, out of possession, against one in open, notorious, exclusive, adverse, and hostile possession, claiming under color of title.

## 2. SAME—TITLE.

In an action of trespass, or trespass on the case, the courts are not at liberty to try the title to land, and therefore cannot decree that the possession of the defendant has ripened into a perfect title.

**In Error to the Circuit Court of the United States for the Northern District of Illinois.**

The plaintiffs in error, deriving title as heirs at law of Francis Johnson, deceased, on September 18, 1893, filed their præcipe for a summons in a plea of trespass, to recover certain sand and gravel taken from their lands by the defendants in error, and by them converted to their use. In 1858 Francis Johnson acquired title, through mesne conveyances from the government, to sections 26, 27, 34, and 35 in town 46 N., of range 12 E. of the third P. M., Lake county, Ill.,—four miles northeast of the city of Waukegan. Section 26 has a frontage of one-quarter of a mile, and section 35, which lies immediately south of section 26, a frontage of one-half mile, on Lake Michigan. Sections 27 and 34 do not reach to the lake. Francis Johnson died intestate in August, 1860, leaving the plaintiffs in error (and a daughter, who afterwards, and before this suit, died unmarried, intestate, leaving no descendants), his only heirs at law. The premises in question had never been actually possessed by Francis Johnson, or by any of his heirs, up to the time that the grantors of the defendants in error took possession. As hereafter stated, the lands were unoccupied and unfenced. There were no buildings upon them. They were not fit for cultivation, being mainly sand and gravel washed up from the lake, and in small part swamp-grass land, with a little scrub-oak timber, fit only for firewood. On September 30, 1892, the plaintiffs in error conveyed their respective interests in these lands to James B. Hobbs. The deed contained a recital that it should not be construed to have the effect to transfer to the grantee any claim or right of action that the grantors, or either of them, had against any corporation or person for rents and profits of the premises prior to August 25, 1892, or any claim or right of action for waste upon the premises, or damage for injury thereto by taking and carrying away sand and gravel, or otherwise, prior to August 28, 1892. The original declaration contained two counts in trespass. On September 9, 1895, an amended declaration was filed, containing two counts, the first of which, after stating that the plaintiffs were seised in fee of the premises on the 1st day of November, 1888, charged that on that day, and on each day thereafter until October 1, 1892, the defendants entered upon the said premises, "and then and there, with a large force of men, with tools, rakes, shovels, wheelbarrows, and other instruments, and machinery, tramways, and cars moved by hand, with animal power, and steam engines, took and carried away large quantities of said sand and gravel, to wit, ten carloads each and every day, the property of the plaintiffs, being then and there of great value, to wit, of the value of \$100,000; and the defendants then and there seized, took, and carried the same away, and converted the same to their own use." The second count charges that on the day, and each of the days, and during all the time and at the place in the last count mentioned, the plaintiffs were the owners, as tenants in common in freehold, of the same land and premises, and that "the said defendants then and there, in and upon said premises, seized, took, and carried away, by the means and in the manner mentioned in the above count, divers other large quantities of sand and gravel, water-washed and of superior quality, to wit, thirty thousand car loads, each

car containing, to wit, twenty cubic yards, then and there of great value, to wit, \$100,000, of the property of the plaintiffs, then and there found and being, and then and there took and converted and disposed of the same to their own use, to the damage of the said plaintiffs of \$100,000; and therefore they bring suit," etc. A demurrer to the declaration and to the amended declaration having been overruled, the defendants below pleaded—First, not guilty; second, that the premises in the declaration mentioned were the close, soil, and freehold of the defendants, and that they entered thereupon, and did the acts charged in the declaration, peaceably, and without force or violence, and as they lawfully might; third, that the supposed causes of action in said declaration stated did not accrue to the plaintiffs at any time within five years next before suit.

At the trial the following facts appeared: In 1865 the lands in question, except section 26, were sold to one Truesdell for delinquent taxes, and a tax deed thereon issued to him in 1867. In 1868 he conveyed to McCready, who in turn, in 1871, conveyed to Fenner W. Ward. Ward in 1887 conveyed to O'Connell, one of the defendants in error, and Michael C. Hayes. The latter subsequently quitclaimed his interest to O'Connell, and O'Connell, December 20, 1888, conveyed to the defendant in error the C. & N. W. Sand & Gravel Company. Ward in the year 1884 leased the property to Hollister, and the latter soon thereafter assigned the lease to Hayes and O'Connor. A tax deed for section 26, dated July 23, 1880, was issued to A. B. Smith upon a sale for the unpaid taxes of 1879. Smith quitclaimed to O'Connor, one of the defendants in error, September 5, 1888, and the latter on December 20, 1888, conveyed his interest to the defendant in error the C. & N. W. Sand & Gravel Company. All these deeds were introduced by the defendants in error for the purpose solely of showing color of title in the defendants. Ward cut firewood from the land conveyed to him in the years 1872, 1874, and 1882, and had firewood cut thereon by others in the years 1872 and 1873. He took supervision of the property, and drove people away who were taking wood therefrom in the year 1880. He rented the land to Hollister in 1884, who leased it for the purpose of cutting grass upon it. Hayes and O'Connell occupied the land, and took sand and gravel from it; and no one but Ward and his tenants occupied the land, or used it for any purpose, from the date of the deed to Ward until the latter sold it to Hayes and O'Connell. The land was unfenced until the year 1888, when it was inclosed by the C. & N. W. Sand & Gravel Company. When Ward purchased from McCready, the boundaries were pointed out to him, and he obtained his family fuel therefrom, the land being then valueless for any other purpose. Hayes and O'Connell in the spring of 1884, under the lease from Ward to Hollister, entered into the open and notorious possession of all the land, and held and used the land until O'Connell conveyed to the C. & N. W. Sand & Gravel Company, December 20, 1888. It was further shown that all taxes upon the lands from the year 1868 to the commencement of this suit were paid by the different persons claiming under the various tax deeds; that the parties in possession built upon the land various dwellings and other buildings, and constructed a large elevated platform, several hundred feet long, to be used in connection with the unloading of tram cars to and upon the railroad cars, and a tram railway for the purpose of bringing to the loading station sand and gravel, and that since December 20, 1888, the C. & N. W. Sand & Gravel Company had been in the exclusive, open, and notorious possession of all the lands; that the parties who had so severally possessed the land claimed title thereto in good faith, either as tenants of the owners thereof, or by virtue of independent title obtained from such owners, claiming title under such tax deed; and that the sand and gravel removed from the lands were so removed by the C. & N. W. Sand & Gravel Company, the other defendants claiming to act as officers of the company, and this was done while in such open, notorious, and exclusive possession, and claiming the land as owner thereof. At the conclusion of the testimony the court below directed the jury to return a verdict of not guilty, and judgment was thereupon entered in favor of the defendants below.

Geo. A. Dupuy, for plaintiffs in error.

S. M. Meek, for defendants in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

JENKINS, Circuit Judge (after stating the facts as above). The plaintiffs in error were not in the actual possession of the premises at the occurring of the alleged trespasses, and they were not entitled to the possession of the premises at the bringing of the suit, having previously conveyed their interest. We do not stop to inquire, concerning the declaration, whether the various counts are in trespass or trespass on the case, or some in one and some in the other; for the main question here is whether, in such an action,—whether it be in trespass or in trespass on the case,—the one having legal title, but being out of possession, may recover for injuries done to the freehold by one in actual and peaceable possession under color of title, and claiming in good faith to be the owner. The actions of trespass and trespass on the case were not designed to be actions for the trial of title to the land. They are transitory, not local actions, like ejectment. It is indeed true that when the owner is out of actual possession, having only that constructive possession which flows from his title, he may maintain an action for trespass against one whose only possession is casual, and in aid of the trespass. In such an action he must prove his title to the land, in order to show himself to be the owner of, and entitled to, that which has been severed from the freehold. We, however, understand the rule to be that the true owner out of possession cannot maintain an action to recover damages for injury to the freehold, or for the severance and conversion of a portion of the freehold, against one in the open, notorious, exclusive, adverse, and hostile possession, claiming under color of title in good faith. Such an action is not the appropriate remedy. *Com. Dig. "Trespass"; Rolle, Abr. "Trespass," K, 3, K, 4; Allen v. Thayer, 17 Mass. 299; Bigelow v. Jones, 10 Pick. 161; Wood v. Lafayette, 68 N. Y. 190; Brothers v. Hurdle, 32 N. C. 490; Branch v. Morrison, 50 N. C. 16; Id., 51 N. C. 16; Mather v. Ministers of Trinity Church, 3 Serg. & R. 508; Wright v. Guier, 9 Watts, 172; Brewer v. Fleming, 51 Pa. St. 102; Transit Co. v. Weston, 121 Pa. St. 485, 15 Atl. 569; Lehigh Zinc & Iron Co. v. New Jersey Zinc & Iron Co., 55 N. J. Law, 350, 26 Atl. 920; Rowland v. Rowland, 8 Ohio, 40; White v. Yawkey, 108 Ala. 270, 19 South. 360; Halleck v. Mixer, 16 Cal. 574; Page v. Fowler, 28 Cal. 605; Cook v. Foster, 2 Gilman, 652; Anderson v. Hapler, 34 Ill. 436; Winkler v. Meister, 40 Ill. 349; Smith v. Wunderlich, 70 Ill. 426; Railroad Co. v. Cobb, 82 Ill. 184; Ft. Dearborn Lodge v. Klein, 115 Ill. 177, 3 N. E. 272.* The action of ejectment in such cases furnishes ample relief, coupled with the equitable consideration that under statutes in vogue in most of the states the defendant in actual possession under bona fide color of title may have proper allowance for the betterments he has placed in good faith upon the property, and which have increased its value. Having the legal title, Francis Johnson could have had his action for a trespass or entry amounting to an ouster, but the statute of limitation has run against the assertion of that right. To enable the true owner to recover for damages done subsequently to the ouster, there must be a re-entry. The supreme court of Michigan, in *Busch v. Nester, 70 Mich. 525, 38 N. W. 458; McKinnon v. Meston,*

104 Mich. 642, 62 N. W. 1014; *Cook v. Cook*, 106 Mich. 164, 64 N. W. 12; *Moret v. Mason*, 106 Mich. 340, 64 N. W. 193,—have gone as far as any court in opposition to the rule, although it must fairly be said that in each of these cases the decision seems to be rested upon the ground either that the case presented was not within the rule, or that the alleged possession was only a subterfuge, or a fugitive possession merely for the purpose of committing the trespass complained of. In the case before us, however, the possession was undoubtedly long continued, bona fide, exclusive, and hostile, under claim and color of title, accompanied with the payment of taxes for many years. Under such circumstances the rule is too well settled to be disregarded, whatever may be thought of the justice of the rule. If its enforcement will deprive the plaintiffs in error of all remedy, it is only because by their voluntary act they have divested themselves of title.

We are asked to hold that the possession of the defendants in error has ripened into a perfect title under the statute of limitations of the state of Illinois. We cannot do that, because the courts in this class of actions are not at liberty to try the title to land, and also because the evidences of title were introduced merely as a basis for color of title accompanied by possession, and not in support of any claim of absolute title to the land. The judgment is affirmed.

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**CITY OF HURON v. SECOND WARD SAV. BANK.**

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 980.

**1. MUNICIPAL CORPORATIONS—REFUNDING BONDS—ESTOPPEL BY RECITALS.**

A municipal corporation is estopped from defending an action by an innocent purchaser to collect its negotiable bonds which recite that they were issued for the purpose of funding the bonds, warrants, or floating debt of the corporation, either on the ground that the warrants or bonds which they were issued to satisfy were void, or that the apparent debt which they were issued to pay was fictitious.

**2. SAME—DIVERSION OF PROCEEDS.**

The fact that a municipal corporation has diverted the proceeds of its negotiable securities from the lawful purpose for which they appear on their face to have been issued to an unlawful purpose is no defense to an action upon them by an innocent purchaser, who had no knowledge of or part in the diversion or waste.

**3. SAME—LIMIT OF INDEBTEDNESS.**

Bonds which are issued to fund a valid indebtedness neither create any debt nor increase the debt of a municipality, but merely change the form of indebtedness; and, as against an innocent purchaser in the open market without notice, the fact that, at the time the bonds were issued, the indebtedness of the city already exceeded the prescribed limitations, is no defense to an action on such bonds.

**4. SAME.**

Where an innocent purchaser buys, of others than the municipality or its agents, negotiable bonds which recite that they were issued to fund the debt or obligations of the municipality, the purchaser may rest on the legal presumption that the legal method was adopted that the issue of the bonds did not increase the debt of the municipality, and he is not required to consider or inquire concerning the question of excessive indebtedness.

8. SAME—POWER TO ISSUE BONDS.

A grant of power to borrow money and to issue bonds for all municipal purposes includes the power to issue bonds to pay or refund the indebtedness of the municipality.

6. SAME—EXERCISE OF DISCRETION BY CITY COUNCIL.

Where the charter of a city grants power to its council to appropriate money and provide for the payment of the expenses and indebtedness of the city, and gives it both the power to levy taxes and to borrow money and issue bonds for that purpose, the method by which the indebtedness of the city shall be paid is left to the discretion of the council; and when that discretion has been exercised, and bonds issued and bought by bona fide purchasers, it is too late for the courts to review it.

7. CITY CHARTER—REPEAL BY GENERAL LAWS.

The act of 1887 (Comp. Laws Dak. p. 257, §§ 1149, 1150) does not revoke the power granted to the city of Huron by its charter to issue bonds for all municipal purposes: (1) Because the powers and privileges granted by a special act or charter are not affected by general legislation on the same subject; (2) because the act of 1887 carries a proviso that it shall not be construed to limit or restrict the powers theretofore conferred by any special charter upon the council of any city.

8. EVIDENCE—CERTIFICATE OF INDEBTEDNESS OF A CITY.

On a trial of a suit against a city on its bonds, the certificate of the city clerk of the amount of the assessed valuation of property, and the amount of the indebtedness of the city, was immaterial, and should not have been admitted as evidence, for the purpose of showing that the city was estopped to prove the facts in this regard, when it did not appear that the holders of the bonds ever saw or relied on the certificate.

**In Error to the Circuit Court of the United States for the District of South Dakota.**

This is an action brought by the Second Ward Savings Bank, the defendant in error, against the city of Huron, the plaintiff in error, upon coupons cut from 16 funding bonds of \$500 each, which that city issued on August 15, 1889. The defense was (1) that the bonds were issued to pay, and that their proceeds were devoted to the payment of, void warrants, which the city had issued to promote its selection as the capital of the state of South Dakota; (2) that these bonds created a debt in excess of the limitation prescribed by the organic act of the territory of Dakota; and (3) that the city had no power to issue funding bonds. The case was tried by the court. Objections were interposed to the complaint, to the bonds, coupons, and all the evidence for the defendant in error, and to the findings and judgment of the court upon the grounds outlined in this defense. The court made special findings, and rendered a judgment against the city. This was the case: The legislature of the territory of Dakota granted a special charter in 1883 to the city of Huron, which provided: "Sec. 7. The city council shall have power: \* \* \* Part 28. To admit and allow all just claims against the city and direct the payment of such as are allowed. Part 29. To appropriate money and provide for the payment of the expenses and the indebtedness of the corporation. \* \* \* Part 31. To levy and collect taxes not exceeding five mills on the dollar, for the purpose of providing a sinking fund with which to pay any future-bonded indebtedness of the corporation, and not exceeding ten mills on the dollar for all other municipal purposes in any one year, on all the property, real or personal, within the city limits, taxable according to the laws of the territory. Part 32. To borrow money, and for that purpose, to issue the bonds of the city in such denominations, for such length of time, not to exceed twenty years, and bearing such rate of interest, not to exceed seven per cent. per annum, as the city council may deem best, said bonds to express upon their face, under what authority and for what purpose they are issued, and may have interest coupons attached;" provided that such bonds may be issued only after an election at which a majority vote for their issue, and that they may not be sold for less than their par value. Act March 8, 1883 (Laws Dak. p. —). The organic law of the territory of Dakota, which was enacted in 1886, provided that no municipal corporation should ever become indebted exceeding 4 per centum

on the value of the taxable property within such corporation, to be ascertained by the last assessment for territorial and county taxes previous to the incurring of such indebtedness, and that all bonds or obligations in excess of such amount should be void. Comp. Laws Dak. p. 34, § 112. Four per centum of the value of the taxable property in the city of Huron, according to the last assessment previous to the issue of these bonds, was \$62,920.99; and at the time of their issue the city was indebted in the sum of \$70,698.99, \$54,500 of which was evidenced by bonds, and the remainder by warrants. The public records of the city showed the amount of taxable property and the amount of this indebtedness of the city. In 1887 the legislature of the territory of Dakota had passed a general law, which provided that any city in that territory might, upon a majority vote of its electors, incur a bonded debt which should not increase its total indebtedness above 4 per centum of the taxable property therein, for the purpose of erecting school buildings, purchasing fire apparatus, putting in waterworks, sinking public wells or cisterns, and putting in sewers, and improving streets. This law, however, contained this proviso: "And provided, that this act shall not be construed to limit or restrict the powers already conferred by any special charter upon the council of any city or municipal corporation." Id. p. 257, §§ 1149, 1150. Pursuant to an election held under its charter on April 2, 1889, at which a majority of the qualified electors of the city of Huron voted to authorize its city council to issue bonds to the amount of \$25,000, for the purpose of funding the floating indebtedness of the city, the 16 bonds from which the coupons here in suit were cut were issued by the city council, and were sold in 1889 to Farson, Leach & Co. for \$8,140. The ostensible purpose of these proceedings was to fund the floating debt of the city; but the real purpose, which was known to the citizens and officers of the city, was to raise money to pay the void warrants which the city had issued to carry on a political campaign to elect itself the capital of the state of South Dakota. The \$8,140 was actually used by the city to pay these warrants, and none of it was so used until 20 days after it had been paid into the city treasury by Farson, Leach & Co. Each of these 16 bonds was signed by the proper officers of the city, and sealed with its seal, and each contained these words: "The city of Huron, ten years after date, for value received, will pay to bearer the sum of \$500, at the American Exchange National Bank, New York, with interest thereon at the rate of six per cent. per annum, payable semiannually, according to the terms of the annexed coupons. Issued pursuant to an election held April 2, 1889, by authority granted by article 32, section 7, of the charter of the city of Huron, said charter approved by the legislative assembly of the territory of Dakota, March 8th, 1883. Issued for the purpose of funding the floating indebtedness of the city of Huron." The defendant in error purchased these bonds in the ordinary course of business from Farson, Leach & Co. The city paid the first four coupons upon them, but declined to pay more.

A. W. Wilmarth, for plaintiff in error.

Rollin B. Mallory, for defendant in error.

SANBORN, Circuit Judge, after stating the facts as above, delivered the opinion of the court.

The first contention of counsel for the plaintiff in error in this case is that the bonds and coupons in controversy are void, although the former recite upon their face that they were "issued for the purpose of funding the floating indebtedness of the city of Huron," because they were in fact issued, and their proceeds were actually used, to pay city warrants which constituted no debt, but which the city of Huron had emitted in violation of its charter and of the organic act of the territory of Dakota. This proposition is without novelty. It presents the old questions which have often been answered by this and other courts: May a municipal corporation certify on the face of its bonds that it has issued them for a lawful purpose, and after the bonds have been bought by an innocent purchaser for value, in reliance upon this certificate, defeat them by the plea that the certificate was

false, and that they were actually issued for an unlawful purpose? May a city defeat the innocent purchaser of its bonds by diverting their proceeds, without his knowledge, from the lawful object for which it certified that it issued them? The plaintiff in error has had our answer to these questions.

In *National Life Ins. Co. v. Board of Education of Huron*, 27 U. S. App. 244, 255, 10 C. C. A. 637, 644, and 62 Fed. 778, 784, the citizens and officers of this city, with the intention of using the proceeds of bonds for the unlawful purpose of persuading the people of South Dakota to select that city as their capital, took the necessary steps to issue them for the lawful purchase of a school site and the erection of a school building, certified that they were issued for that purpose, and then diverted their proceeds to the illegal object, and undertook to defeat the bona fide purchasers of the bonds by the plea of their own wrong. This court answered that plea in these words:

"It is no defense for this corporation, as against bona fide purchasers, that during all this time it intended to use, and has since used, the money it raised from these bonds for the unlawful purpose of conducting a campaign for the state capital. \* \* \* Such a plea cannot be entertained in a court of justice. The corporation is estopped from denying that these bonds were issued to raise money for a school site and school building."

In *Re West Plains Tp. v. Sage*, 32 U. S. App. 725, 733, 16 C. C. A. 553, 557, 69 Fed. 943, 946, the township, with the intention of using the proceeds of its bonds for the unlawful purpose of paying town scrip issued to purchase a sugar factory, took the necessary steps to issue, and certified that it had issued, the bonds to refund its indebtedness, then used the proceeds to take up the void scrip, and pleaded its own iniquity as a defense to its bonds. This court said:

"It is no defense for this township, against the action of an innocent purchaser who has invested his money in these bonds, that the township board, and the voters of the township who authorized the board to issue them, knew that the township had no indebtedness to refund, and that all these records and declarations were made to evade the law. Against a bona fide purchaser, the township is estopped from denying that these bonds were issued to refund its outstanding indebtedness."

In *Board v. Howard*, 49 U. S. App. 642, 27 C. C. A. 531, and 83 Fed. 296, this court again held that a municipal corporation which had recited in its bonds that they were issued "to refund its matured and maturing indebtedness heretofore legally created by said county" could not be heard to say to an innocent purchaser that a part of the indebtedness so refunded was void.

In *Jasper Co. v. Ballou*, 103 U. S. 745, the supreme court held that where the people of a county, at an election held under a refunding act, voted to issue new bonds to exchange for old ones, such a vote recognized the original bonds as binding and subsisting obligations, and that the city was thereby estopped from setting up that they were invalid because voted for at an election called by the supervisors instead of the county court, and that where at an election held according to law the people authorized their proper representatives to treat outstanding county obligations as properly authorized by law for the purpose of settling with the holders, and the settlement had been made, the validity of the obligations could no longer be questioned.



In *Graves v. Saline Co.*, 161 U. S. 359, 374, 16 Sup. Ct. 526, the supreme court held that a county was estopped from contesting the validity of refunding bonds which had been issued to pay old bonds which were void under the decisions in *Town of Eagle v. Kohn*, 84 Ill. 292, and *German Sav. Bank v. Franklin Co.*, 128 U. S. 526, 538, 9 Sup. Ct. 159.

In *City of Cadillac v. Woonsocket Sav. Inst.*, 16 U. S. App. 546, 558, 7 C. C. A. 574, 578, and 58 Fed. 935, 939, the circuit court of appeals for the Seventh circuit held that the recital in the refunding bonds that they were "issued for the purpose of extending the time of payment of bonds formerly issued by said city," pursuant to an ordinance entitled "An ordinance authorizing new bonds of the city of Cadillac to be issued in place of, and to extend the time of payment of, former bonds of said city falling due," estopped the city from defending an action by an innocent purchaser of the bonds on the ground that the former bonds were void.

The defendant in error did not issue or procure the issuance of these bonds. This is not a case in which the officers of a municipality have violated the will of their constituents, and abused their power to rob them. It is a case in which all the people of a city, in a burst of wild enthusiasm, promoted or consented to the action of its representatives. The citizens of Huron must have known the real purpose for which these bonds were to be issued when they voted for them. Any one who owned taxable property in that city could have prevented the issue or the payment of the capital campaign warrants, or the issue of these bonds by a simple petition to any court which had jurisdiction. This thing was not done in a corner, or in the dark, or in haste. The electors of Huron voted to issue these bonds on April 2, 1889, but they were not issued until August 15, 1889, more than four months after the notice of the election and the vote. The city council was vested with the power and charged with the duty "to admit and allow all just claims against the city, \* \* \* and provide for the payment of the expenses and indebtedness of the corporation," and it was authorized "to borrow money, and for that purpose to issue the bonds of the city." It issued these bonds pursuant to the vote of the qualified electors, of that city. It wrote upon the face of each of them the words "issued for the purpose of funding the floating indebtedness of the city of Huron," and sent them forth into the commercial world, to be sold upon this statement, when every officer of that city, every member of its city council, and many, if not all, of its citizens, knew that these bonds were issued to pay void warrants which evidenced no debt. Why did not the city council write the truth into these bonds? Why did it not write "issued for the purpose of paying the void warrants put forth by the city of Huron to elect itself the capital of the state"? The reason is obvious. The truth would not have persuaded investors to purchase the bonds. The words "floating indebtedness" have a clear and well-understood meaning in the commercial world. They do not mean void paper semblances of obligations which neither create nor evidence a debt. They mean "that mass of lawful and valid claims against the corporation, for the payment of which there is no money in the corporate treasury specifically designed, nor any taxation or other means

of providing money to pay, particularly provided." *People v. Wood*, 71 N. Y. 371, 374. When the city council of Huron, the body which alone had the power to determine the validity of claims against that city, put forth bonds in which it declared that they had been issued to fund the floating indebtedness of the city, it made the representation best calculated to assure purchasers of the incontestability of the bonds and most likely to induce them to buy. This was the reason why it inserted this declaration rather than the statement of the truth in the face of these bonds. The Second Ward Savings Bank, the defendant in error, is a corporation doing business in Milwaukee, in the state of Wisconsin. The charter of the city of Huron informed it that its city council had the power to determine the validity of all claims against that city. Some time after August 15, 1889, this bank found in the market in Chicago or Milwaukee these 16 bonds, issued by authority of a vote of the people of the city of Huron, and by direction of its city council, in which that council represented that they had been issued to fund the floating indebtedness of the city. The council and the city knew whether or not they had been so issued, and whether or not their proceeds had been applied to that purpose; and the bank did not know. It had the right to rely, and the city intended that it should rely, on the representation contained in its bonds; and now that the bank has bought them in reliance upon that statement, it would be a monstrous perversion of justice to permit the city to defeat their collection because its statement was false. As against this bank, the city is conclusively estopped from claiming that the bonds were issued for, or that their proceeds were applied to, any other purpose than the payment of the valid floating indebtedness of the city. For all the purposes of this action, the warrants paid with the proceeds of these bonds must be deemed to be the legal evidences of a just debt of the municipality.

A municipal corporation is estopped from defending an action by an innocent purchaser to collect its negotiable bonds which recite that they were issued for the purpose of funding the bonds, warrants, or floating debt of the corporation, either on the ground that the warrants or bonds which they were issued to satisfy were void, or that the apparent debt which they were issued to pay was fictitious. See the cases cited above, and *Ashley v. Board*, 16 U. S. App. 656, 675, 8 C. C. A. 455, 466, and 60 Fed. 55, 66; *Meyer v. Brown*, 65 Cal. 583, 26 Pac. 281; *Moran v. Commissioners*, 2 Black, 722; *Hackett v. Ottawa*, 99 U. S. 86, 96; *Ottawa v. Bank*, 105 U. S. 342, 343.

The fact that a municipal corporation has diverted the proceeds of its negotiable securities from the lawful purpose for which they appear on their face to have been issued to an unlawful purpose is no defense to an action upon them by an innocent purchaser who had no knowledge of or part in the diversion or waste. *National Life Ins. Co. v. Board of Education*, 27 U. S. App. 244, 255, 10 C. C. A. 637, 644, and 62 Fed. 778, 784; *West Plains Tp. v. Sage*, 32 U. S. App. 725, 733, 16 C. C. A. 553, 556, and 69 Fed. 943, 946; *Commissioners v. Beal*, 113 U. S. 227, 240, 5 Sup. Ct. 433; *Cairo v. Zane*, 149 U. S. 122, 137, 13 Sup. Ct. 803; *Maxey v. Williamson Co. Ct.*, 72 Ill. 207.

Another proposition which is zealously argued in this case is that these bonds are void because they create a debt in excess of the limita-

tion prescribed by the organic act of the territory of Dakota. It is conceded that, at the time these bonds were issued, the indebtedness of the city of Huron already exceeded the limitation prescribed by that act. But, as we have already shown, the warrants which these bonds refunded must, for all the purposes of this case, be deemed to have evidenced a just debt of the city, and bonds which are issued to fund a valid indebtedness neither create any debt nor increase the debt of the municipality which issues them. They merely change the form of an existing indebtedness. *Board v. Platt*, 49 U. S. App. 216, 25 C. C. A. 87, 89, and 79 Fed. 567, 569; *E. H. Rollins & Sons v. Board of Com'rs*, 49 U. S. App. 399, 26 C. C. A. 91, 98, and 80 Fed. 692, 698; *In re State Bonds (Me.)* 18 Atl. 291; *Powell v. City of Madison*, 107 Ind. 110, 8 N. E. 31; *City of Los Angeles v. Teed (Cal.)* 44 Pac. 580; *Marion Co. Com'rs v. Harvey Co. Com'rs*, 26 Kan. 181, 201; *Hotchkiss v. Marion*, 12 Mont. 218, 29 Pac. 821; *Miller v. School Dist. (Wyo.)* 39 Pac. 879. It is insisted, however, that the issue of these bonds did temporarily increase the debt of the city because their proceeds were not applied to any of the warrants until 20 days after these proceeds were paid into the treasury, and that, during this time while both the bonds and the refunded warrants were outstanding, the debt was increased. In support of this contention, counsel cites *Doon Tp. v. Cummins*, 142 U. S. 366, 378, 12 Sup. Ct. 220; *Shaw v. School Dist.*, 62 Fed. 911; *Coffin v. City of Indianapolis*, 59 Fed. 221, and *Ætna Life Ins. Co. v. Lyon Co.*, 44 Fed. 329, 342. The case in hand, however, is clearly distinguishable from these cases by the fact that the defendant in error bought these bonds of a third party in the open market, without notice of the fact that the debt of the city was increased by their issue, or of any other defect in them, while holders of the bonds in the cases cited took them with notice of their defects. In *Ætna Life Ins. Co. v. Lyon Co.* the bonds disclosed the amount of the contemporaneous issue, and this issue, standing alone, was in excess of the constitutional limitation of the debt of the county. In the case at bar, the entire issue voted was far within the limitation of the organic act, and the bonds did not disclose even this amount. *Coffin v. City of Indianapolis* was an action by a bidder to recover from the city money which he had deposited as a purchaser of bonds which he discovered were illegal, and refused to accept before they were delivered. In *Shaw v. School Dist.*, the holder of the refunding bonds had received them in exchange for old bonds which he held, and which he knew had been issued in violation of the constitutional limitation. In *Doon Tp. v. Cummins*, 142 U. S. 367, 378, 12 Sup. Ct. 220, the plaintiff did not buy the bonds for value, in good faith, and without notice of any defect from one to whom they had been issued by the corporation, as the bank did in this case; but he was himself the person to whom they were originally issued, and he knew when he took the first 10 bonds that the district exceeded the constitutional limit of its indebtedness in issuing them, and that it intended to exceed that limit still more. The opinion of the majority of the court in that case was that, where the debt of a municipal corporation already exceeded the constitutional limitation, the exchange of new bonds for old, bond for bond, would not increase the debt of the corporation, and would not be inconsistent with the

constitutional limitation, but that if the new bonds were sold, and their proceeds were subsequently used to pay the old bonds, there would be a temporary increase of the debt, which would violate the limitation and invalidate the new securities. The distinction seems to be more nice than real, and, in view of the vigorous dissent which is recorded with the opinion, we may be permitted to doubt whether it will ever be made again. Conceding, however, that it is well taken, it establishes the proposition that there was a practical and legal method by which the bonds here in question might have been issued by the city of Huron without increasing its indebtedness, and without violating the limitation found in the organic act. They might have been exchanged for warrants, dollar for dollar. Was not the bank which purchased these bonds in the open market, without notice of any defect, warranted in presuming that this method had been pursued? It was the only method by which the city could legally issue refunding bonds in 1889. The legal presumption was that the city and its officers had complied with the law, and had issued them in a legal manner. The city put forth each of these bonds with this recital on its face: "Issued pursuant to an election held April 2, 1889, by authority granted by article 32, section 7, of the charter of the city of Huron." If the decision of the supreme court in *Doon Tp. v. Cummins* is to be adhered to, the exchange of these bonds for the warrants, dollar for dollar, was a condition precedent to their lawful issue under this charter, and it was a condition which it was within the power and which it was the duty of the officers who signed these bonds to comply with. The recitals of the officers of a municipality who are invested with the authority to perform a precedent condition to the issue of negotiable bonds, or with authority to determine when that condition has been performed that the bonds have been issued "in pursuance of" or "in conformity with" or "by virtue of" or "by authority of" the statute, preclude inquiry, as against an innocent purchaser for value, as to whether or not the precedent conditions had been performed before the bonds were issued. *National Life Ins. Co. v. Board of Education*, 27 U. S. App. 244, 266, 268, 10 C. C. A. 639, 651, 652, and 62 Fed. 778, 792, 793, and cases there cited; *School Dist. v. Stone*, 106 U. S. 183, 187, 1 Sup. Ct. 84; *Town of Colloma v. Eaves*, 92 U. S. 484; *Commissioners v. Bolles*, 94 U. S. 104; *Mercer Co. v. Hackett*, 1 Wall. 83; *Commissioners v. Beal*, 113 U. S. 227, 238, 239, 5 Sup. Ct. 433; *Cairo v. Zane*, 149 U. S. 122, 13 Sup. Ct. 803; *City of Evansville v. Dennett*, 161 U. S. 434, 443, 16 Sup. Ct. 613. There was a legal method by which these bonds could have been issued by the city. The city certified that they had been issued according to law. If, upon any theory, the bonds of a municipality can be valid, an innocent purchaser has the right to presume that they are so, and that the recitals in them are true; and, after he has completed his purchase, that presumption is conclusive upon the corporation. *E. H. Rollins & Sons v. Board of Com'rs*, 49 U. S. App. 399, 26 C. C. A. 91, 98, and 80 Fed. 692, 699; *City of Evansville v. Dennett*, 161 U. S. 434, 443, 446, 16 Sup. Ct. 613; *Chaffee Co. v. Potter*, 142 U. S. 355, 363, 364, 12 Sup. Ct. 216.

The truth is that where an innocent purchaser buys, of others than the municipality or its agents, negotiable bonds, which recite that they

were issued to fund the debt or the obligations of the municipality, the question of excessive indebtedness does not arise, and the purchaser is not required to consider or inquire concerning it, because, if the old debt was refunded in the legal method pointed out in *Doon Tp. v. Cummins*, the debt of the municipality could not be increased, and the purchaser may well rest on the legal presumption that the legal method was adopted. The result is that the legal presumption and the recitals in these bonds preclude the city of Huron from defeating them on the ground that they increased its indebtedness. We have not arrived at this conclusion without a careful examination of the decisions of the supreme court of Iowa in *S. C. & St. P. R. Co. v. Osceola Co.*, 45 Iowa, 168, *Austin v. District Tp.*, 51 Iowa, 102, 49 N. W. 1051, and *Holliday v. Hilderbrandt* (Iowa) 66 N. W. 89. But this is a question of commercial law upon which the national courts are bound to exercise their own judgment. In so far as the decisions of the supreme court of Iowa are not in accord with the views expressed in this opinion, they do not commend themselves to our judgment, and are in conflict with the rules and principles which have been established by the decisions of the supreme court of the United States and of this court to which we have adverted, and which must govern this case. We cannot yield our own opinion, and depart from these rules, to follow the decisions in Iowa. The decisions of the supreme court are controlling in this court, and they commend themselves to our reason and judgment.

Another objection to these bonds is that the city of Huron was without power to issue them. The position is not entitled to extended consideration, because the power granted by the charter of the city of Huron is plenary. It was general, not special. It was not limited to specified purposes, but was to borrow money and issue bonds for all municipal purposes. It was "to borrow money, and for that purpose to issue bonds of the city in such denominations, for such length of time, not to exceed twenty years, and bearing such rate of interest, not to exceed seven per cent. per annum, as the city council may deem best." Charter of Huron, pt. 32. The whole is greater than any of its parts, and includes them all. The power to borrow money and issue bonds for all municipal purposes includes the power to do so to pay or refund the indebtedness of the municipality. *Portland Sav. Bank v. City of Evansville*, 25 Fed. 389; *Simonton Mun. Bonds*, § 126; *City of Quincy v. Warfield*, 25 Ill. 317; *Morris & Whitehead v. Taylor* (Or.) 49 Pac. 660; *City of Galena v. Corwith*, 48 Ill. 423; *Village of Hyde Park v. Ingalls*, 87 Ill. 13; *Rogan v. City of Watertown*, 30 Wis. 259, 268. There is nothing in the cases of *Police Jury v. Britton*, 15 Wall. 566; *Merrill v. Monticello*, 138 U. S. 673, 684, 11 Sup. Ct. 441; *Heins v. Lincoln* (Iowa) 71 N. W. 189, 191; *New Orleans v. Clark*, 95 U. S. 644; *City of Waxahachie v. Brown*, 67 Tex. 519, 4 S. W. 207; *State v. Board of Liquidation*, 40 La. Ann. 398, 4 South. 122; *Middleport v. Insurance Co.*, 82 Ill. 565; *Bogart v. Lamotte Tp.* (Mich.) 44 N. W. 612; *Brenham v. Bank*, 144 U. S. 173, 182, 12 Sup. Ct. 559; *Coffin v. Kearney Co.*, 12 U. S. App. 562, 6 C. C. A. 288, and 57 Fed. 137; or *Shannon v. City of Huron* (S. D.) 69 N. W. 598,—in conflict with this conclusion. No court has held in any of these cases that the unlimited power to borrow money and issue bonds for all municipal purposes ex-

cludes the power to do so to fund or pay municipal debts. In *Police Jury v. Britton* no power to issue bonds was granted to the parish, and the court simply held that this power was not to be inferred from the grant of general powers of administration. In *Merrill v. Monticello* a power was given to issue bonds for specified purposes, and the court held that this was not a grant of power to issue them for purposes not specified, on the familiar principle, "*Expressio unius est exclusio alterius.*" In *Brenham v. Bank* and *Heins v. Lincoln* it was held that a mere power to borrow money without authority to issue bonds did not include the power to emit negotiable securities to evidence the debt. In *Coffin v. Kearney Co.* the statute expressly forbade the issue of bonds at the time when they were put forth; and in *Shannon v. City of Huron* the power to issue bonds was not under discussion at all. The other cases cited are as wide of the mark.

It is insisted, however, that the power granted by the charter to the city council to pay current expense warrants of the city by a levy of a tax implies the exclusion of the power to fund such warrants by the issue of negotiable bonds. The contention would be worthy of serious consideration if the express power to issue negotiable bonds was not also granted to the city council by this charter, but the charter grants to the council authority "to appropriate money and provide for the payment of the expenses and indebtedness of the corporation," and gives it both the power to levy taxes, and the power to borrow money and issue bonds for this purpose. It cannot be that the grant of both these powers excludes either, and the choice of the method by which the indebtedness of the city should be paid is left to the discretion of the council. That discretion has been exercised, and now that bona fide purchasers have bought the bonds in reliance upon its exercise, it is too late for the courts to review it.

Another position of counsel for the plaintiff in error is that the unlimited power to issue bonds granted to the city council in 1883 by the charter of this city was revoked or restricted to the power to issue them for the specified purposes of erecting public school buildings and other buildings for city purposes, procuring fire apparatus, putting in waterworks, sinking public wells and cisterns, putting in sewers and improving streets, named in the general law of 1887. *Comp. Laws Dak.* p. 257, §§ 1149, 1150. The position is untenable (1) because the charter of the city of Huron is a special act, and the act of 1887 is a general law, and powers and privileges granted by a special act or charter are not affected by general legislation on the same subject, but the special charter and the general laws must stand together, the one as the law of the particular case, and the other as the general law of the land (*Gowen v. Harley*, 12 U. S. App. 574, 584, 6 C. C. A. 190, 196, and 56 Fed. 973, 979; *Dill. Mun. Corp.* [4th Ed.] § 87; *State v. Stoll*, 17 Wall. 425, 436); and (2) because the act of 1887 carries a proviso which expressly declares that it shall not be construed to limit or restrict the powers theretofore conferred by any special charter upon the council of any city or municipal corporation. The conclusion of the whole matter is that the bonds and coupons, together with the facts that the defendant in error purchased them for value in the ordinary course of business, and that the coupons were not paid, established

a good cause of action, and none of the objections to the complaint, to the evidence of these facts, or to the judgment, can be sustained.

A single error in the trial of the case was well assigned. It was that the trial court admitted in evidence proof, and found as a fact, that the city clerk of the city of Huron issued a certificate on August 14, 1889, of the amount of the assessed valuation of the property within the city of Huron, and of the amount of that city's indebtedness. That certificate was immaterial, and should not have been received in evidence or noticed. It does not appear that the defendant in error ever saw or relied upon it, and it could in no way affect the rights of the parties to this litigation. The findings of the court, however, are ample to sustain its judgment after discarding its reference to this certificate, and it conclusively appears from the record and the findings that its admission in evidence could not have prejudiced the plaintiff in error. Error without prejudice is no ground for reversal. *Smiley v. Barker*, 55 U. S. App. 125, 28 C. C. A. 9, and 83 Fed. 684, 687. The trial below was conducted without prejudicial error; the judgment was founded in reason, and sustained by authority; and it must be affirmed.

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ATNA LIFE INS. CO. v. VANDECAR.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 934.

**1. INSURANCE—ACCIDENT POLICY—EVIDENCE.**

In an action for damages under an accident policy, where the defendant claims that the injury was not accidental, the burden is upon the plaintiff to establish that it was accidental,—that is, without design, volition, or intent on his part,—and any evidence tending to show that the injury was intentional, or which constituted a link in the chain of proof necessary to establish that fact, should be admitted.

**2. SAME—INJURIES IN A PASSENGER CONVEYANCE.**

Where the policy provides that, "if such injuries are sustained while riding as a passenger in a passenger conveyance using steam, cable, or electricity as the motive power, the amount to be paid shall be double the sum above specified," these words do not apply to one riding on the platform of a railway car.

Thayer, Circuit Judge, dissenting as to the latter proposition.

In Error to the Circuit Court of the United States for the District of Nebraska.

Charles J. Greene and Ralph W. Breckenridge, for plaintiff in error.  
E. Wakeley (A. C. Wakeley, on the brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and RINER, District Judge.

RINER, District Judge. This is an action upon an accident policy of insurance. In the petition setting out the plaintiff's cause of action it is alleged that the defendant is a corporation organized under the laws of the state of Connecticut, and carrying on a life and accident insurance business in the state of Nebraska and elsewhere; that on the 14th of October, 1895, at Omaha, Neb., in consideration of the sum of

\$25, the premium to it duly paid by the plaintiff, and of certain alleged warranties made in the application for insurance, the defendant executed and delivered to the plaintiff its "combination accident policy" No. 213,045, for the principal sum of \$10,000, wherein and whereby the defendant company insured the plaintiff, under classification "select," being a life insurance agent by occupation, for the term of six months from noon of the 14th day of October, 1895, in the sum of \$50 per week against loss of time, not exceeding 52 consecutive weeks, resulting from bodily injury effected during the term of said insurance by external, violent, and accidental means which should, independently of any other causes, immediately and wholly disable him from prosecuting any and every kind of business pertaining to his occupation, above stated; or, said policy further provided, if such injury alone resulted within 90 days in the loss, by removal, of the right hand at or above the wrist, or either leg at or above the knee, the said defendant would pay to the said plaintiff one-half (\$5,000) of the principal sum insured in lieu of weekly indemnity as therein provided, and the said policy should cease, and be surrendered to the company. It is also alleged that it is further provided in the policy, if such injuries are sustained while riding as a passenger in a passenger conveyance using steam, cable, or electricity as a motive power the amount to be paid shall be double the sum above specified; and in case of accident notice shall be given to the defendant, and that proof of loss of a limb, or death, or sight, as the case may be, shall be furnished within seven months from the happening of the accident. It is also alleged that, after the payment of the premium, and its receipt and acceptance by the company, and after the issuance and delivery of the policy, and while the same was in full force and effect, on the 11th of November, 1895, the plaintiff was riding, as a passenger, in a passenger conveyance using steam as a motive power, to wit, on a passenger train of the Omaha & Republican Valley Railroad Company; that upon arriving in Loup City, in Howard county, Neb., at about 7:30 in the evening, after the station of Loup City had been called, and the doors of the car opened by the conductor, the plaintiff, who had arisen from his seat, was standing on the platform of the car, with his valise in hand, ready to alight, when the car was given a sudden and violent impetus and jerk, throwing the plaintiff down on the steps of the platform, and thence to the ground, and in such a manner that, although the plaintiff exercised due care in the premises, and made all of the effort which it was possible for him to make to avoid the injury, the wheel of the car ran over his right hand, and the plaintiff thus received a bodily injury through violent, external, and accidental means; that the result of the injury was such as to necessitate the amputation of the plaintiff's right hand above the wrist. It is then alleged that the plaintiff, at the time of the injury, was the owner and holder of the policy, and that he immediately notified the insurance company of the accident, and that within seven months from the date of the accident he furnished the defendant proof of the loss of his right hand, and duly complied with, and in every respect performed, all of the conditions of the policy on his part to be performed, and prayed judgment for \$10,000. The defendant, in its



amended answer, admits the corporate existence of the defendant, and that on the 14th day of October, 1895, in consideration of the warranties made in the application therefor and of the premium paid by the plaintiff to the defendant, it issued a policy of accident insurance to the plaintiff substantially as set out in the second paragraph of his petition, but denies that the injuries for which the plaintiff seeks to recover were effected through accidental means, and denies that the plaintiff was injured while riding as a passenger in a passenger conveyance. It then sets out certain warranties in the application, and alleges that they were false, and known by the plaintiff to be false. It also alleges that the plaintiff violated the rules of the railroad company on whose train he was a passenger by riding upon the platform of a moving car; that he voluntarily exposed himself to unnecessary danger by leaving a seat inside of the car, and going upon and riding upon the platform; that he exposed himself to unnecessary danger by trying to leave a moving conveyance using steam as a motive power. It then denies each and every allegation in the plaintiff's petition not specifically admitted or denied. January 21, 1897, the plaintiff filed a reply to the amended answer. There was a trial, verdict and judgment for the plaintiff in the sum of \$10,612.50 and costs.

The policy, by its terms, insures the plaintiff for the term of six months, commencing at noon on the 14th of October, 1895, in the sum of \$50 per week, against loss of time, not exceeding 52 consecutive weeks, resulting from bodily injuries effected during the term of the insurance from external, violent, and accidental means. The policy also provides that, if such injuries alone result within 90 days in loss, by removal, of the plaintiff's right hand at or above the wrist, the defendant will pay to him one-half of the principal sum insured, in lieu of weekly indemnity as therein provided; and, if such injuries are sustained while riding as a passenger in a passenger conveyance using steam, cable, or electricity as a motive power, the amount to be paid shall be double the sum specified. The policy was issued subject to certain conditions printed thereon, which were made a part of the policy, and among these conditions are the following:

"This insurance does not cover \* \* \* accident, nor death, nor loss of limb or sight, nor disability, resulting wholly or partly, directly or indirectly, from any of the following causes, or while so engaged or affected: \* \* \* Intentional injuries inflicted by the insured or any other person (assaults by burglars and robbers excepted); \* \* \* violating the rules of a corporation; voluntary exposure to unnecessary danger; \* \* \* entering, or trying to enter, or leave, a moving conveyance using steam as a motive power (except cable and electric street cars); riding in or on any such conveyance not provided for transportation of passengers."

The evidence shows that on the 11th of November, 1895, the plaintiff purchased a ticket, and was traveling as a passenger on a passenger train of the Omaha & Republican Valley Railroad, from St. Paul to Loup City, in the state of Nebraska; that the train, from St. Paul for Loup City, left St. Paul between 4 and 5 o'clock in the afternoon, and arrived at Loup City between 7 and 8 o'clock the same evening, where the train remained over night; that as the train approached Loup City on the date in question, after the whistle had sounded for the

station, the plaintiff and a man by the name of John Iams went out upon the front platform of the rear coach of the train while the train was yet in motion, and going at a speed, estimated by the plaintiff, from 8 to 12 miles per hour. The plaintiff testified that while standing upon the platform of the car he had a valise in one hand, and had the other hand in his overcoat pocket; that when the train was a short distance from the station, by a sudden jolt of the car, Iams was thrown against him, causing him to fall from the platform upon which he was standing to the ground; that as he fell he caught hold of the hand rail, or step of the car,—he did not know which,—and, landing partially on his feet, was thus pulled or dragged along for some distance, when he was obliged to relinquish his grasp, and was thrown under the car, the rear truck of which run over his right hand, bruising and mangling it to such an extent that amputation above the wrist became necessary. Neither the conductor, who was on the rear platform of the baggage car immediately in front of the car upon the front platform of which the plaintiff stood, nor the brakeman, who was standing upon the steps of the platform of the front end of the passenger coach, heard any outcry or exclamation from the plaintiff or any one else, and did not know of the injury to the plaintiff until after the train had stopped at the station. The plaintiff was first discovered, after the injury, by the porter of the St. Elmo Hotel, at Loup City, who came down to meet the train with the bus, and by the light of his lantern saw the plaintiff kneeling on his knees with his right hand on the rail of the track. The evidence further shows that the train upon which plaintiff was traveling consisted of a freight car, baggage car, and combination coach; that the cars were equipped with air brakes in perfect order; that there was a rule in force upon the Omaha & Republican Valley Railway, at the time of this accident, prohibiting passengers from riding upon the platforms of cars while the trains were in motion, and notices as follows: "Passengers are not allowed to go upon the platform of the car while the train is in motion," were posted at each end of the passenger coaches.

The fact that, at the time and place mentioned in his petition, the plaintiff suffered an external and violent injury to his right hand which necessitated its amputation is not controverted. The only question, therefore, is, was the injury, in addition to being external and violent, also accidental? Various definitions are found in books defining the words "accident" and "accidental," some of which are as follows: "An event happening without the concurrence of the will of the person by whose agency it was caused;" "any event that takes place without one's foresight or expectation;" "anything occurring unexpectedly, or without known or assignable cause;" "an accident is that which happens without one's direct intention;" "an accident is that which happens without design or expectation;" "it is defined as the happening of an event without the design and aid of a person, and which is unforeseen." "Accidental" signifies "happening by chance or unexpectedly; taking place not according to the usual course of things; casual; fortuitous." The opposite of accident is design, volition, intent. In many of the definitions the idea of design is excluded, making the event wholly involuntary. In the

case of *Association v. Barry*, 131 U. S. 100, 9 Sup. Ct. 755, the supreme court of the United States approved an instruction to the effect that the term "accidental" was used in a policy of insurance in its ordinary (popular) sense as meaning a happening by chance; unexpectedly taking place, not according to the usual course of things or not as expected; that, if a result is such as follows from ordinary means voluntarily employed in a not unusual and unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted from accidental means. The plaintiff alleges in his petition that he received the injury for which he seeks to recover from external, violent, and accidental means. This is denied by the defendant, both specifically and by general denial. Under the issues thus made by the pleadings, we think the burden is upon the plaintiff to establish, not only that the injury was the result of external and violent, but of accidental, means; that is to say, that it was without design, volition, or intent upon his part. *Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360. Mr. Justice Harlan, in delivering the opinion of the court in the case cited, said:

"There is no escape from the conclusion that, under the issue presented by the general denial in the answer, it is incumbent upon the plaintiff to show from all the evidence that the death of the insured was the result, not only of external and violent, but of accidental, means. The policy provides that the insurance shall not extend to any case of death or personal injury unless the claimant, under the policy, establishes by direct and positive proof that such death or personal injury was caused by external, violent, and accidental means."

The burden is always upon a plaintiff to establish his cause of action when it is in proper form denied by the defendant. It is very common to say in such cases that the burden is upon the defendant to establish the fact relied upon. All that this can properly mean is that, when the plaintiff has established a *prima facie* case, the defendant is bound to controvert it by evidence, otherwise judgment will go against him. When such evidence is given, however, and the case upon the whole evidence—that for and that against the facts asserted by the plaintiff—is submitted to the jury, then the question of the burden of proof as to any fact, in its proper sense, arises and rests upon the party upon whom it was at the outset, and is not shifted by the course of the trial; and, to entitle him to recover, all the material issues tendered by the plaintiff must be established by him by a preponderance of the evidence.

At the trial the plaintiff introduced evidence tending to show that his injury resulted from accidental means. For the purpose of meeting this proof and the *prima facie* case made by the plaintiff, the defendant offered to prove by A. S. Greene, a witness on its behalf, that after the issuance of the policy, and prior to the date of the accident, in a conversation had with the plaintiff at the Lindell Hotel, in Lincoln, plaintiff stated to the witness, "You know, Greene, that I have been damned hard up, but I am going to make a stake:" to which the witness replied, "How is that, Van?" and that Vandecar replied thereto by striking himself on the breast pocket and saying,

"What did I take out three insurance policies for?" The witness then said to the plaintiff, "You are not going to have an accident, are you, Vandecar?" to which the plaintiff replied: "You just wait and see. I have been hard up long enough, and I am going to get in a position shortly where I will have what money I need." The defendant also offered to prove by Dr. George O. W. Farnum, a witness on its behalf, that early in September, 1895, he had several conversations with the plaintiff regarding an injury to the foot or hand; that plaintiff wished to know how and where to ligate in case a hand or foot was crushed in being run over, and witness explained to plaintiff how the blood could be stopped in case a hand was crushed; that witness said to plaintiff, the best method would be to have it crushed where he could have a physician, but, in the absence of a physician, he could roll up and tie his handkerchief around the arm above the injury, and twist it tight with his lead pencil, and it would entirely stop the flow of blood; and the same would hold good in case the foot was crushed, and he could bandage the leg; that the plaintiff further inquired of the witness what would be the percentage of mortality in case of such an injury, and the witness assured him there was very little danger, as it would be gross carelessness in a physician if he lost a patient in amputating a hand or foot. This evidence was excluded by the court, and the rulings of the court are assigned for error. In the proof of cases involving the motives of men as influencing and giving character to their acts, it is impossible to confine the evidence within any precise limit. "It is admissible if it tends to prove the issue or constitutes a link in the chain of proof." 1 Greenl. Ev. 67; Cook v. Moore, 11 Cush. 216. In the case just cited it was held, for the purpose of proving that a conveyance of property made by a bankrupt was fraudulent under the United States bankrupt act of 1841, because made to defraud the plaintiff of his debt, that evidence tending to show that the defendant entertained such fraudulent intent even before the passage of the bankrupt act was admissible. The court said:

"Whenever the intent of a party forms part of the matter in issue upon the pleadings, evidence may be given of other acts, not in issue, provided they tend to establish the intent of the party in doing the acts in question. \* \* \* The reason for this rule is obvious. The only mode of showing a present intent is often to be found in proof of a like intent previously entertained. The existence in the mind of a deliberate design to do a certain act, when once proved, may properly lead to the inference that the intent once harbored continued, and was carried into effect by acts long subsequent to the origin of the motive by which they were prompted."

Under the provisions of the contract in this case the plaintiff could only recover for an accidental injury. If the injury was intentional, it was not accidental, and the plaintiff could not recover. Any evidence, therefore, tending to show that the injury was intentional, or which constituted a link in the chain of proof necessary to establish that fact, was admissible under the issue presented by the denials in the answer. The evidence offered should have been admitted. It tended to show an intent previously entertained by the plaintiff to bring upon himself an injury of the character for which he now seeks to recover, and was, therefore, at least one step towards the proof of

defendant's contention. And if this evidence, when considered in connection with the other facts and circumstances proved on the trial, had been sufficient to satisfy the jury that the plaintiff once harbored an intent to thus injure himself, that such intent continued in his mind, and was carried out by bringing upon himself this injury, a complete defense to the plaintiff's cause of action would have been made out. Whether the evidence offered, when considered in connection with the other evidence in the case, was sufficient to warrant this result, is to be determined by the jury; but the defendant had the undoubted right to have it considered by the jury in determining the question as to the accidental character of the injury. The circuit court seems to have held that by the contract of the parties every case of intentional injury described in the conditions annexed to the policy was made an express exception to the general description of injuries covered by it, and therefore took the place of and superseded all exceptions which might have been implied from or come within the general language in the body of the policy; and, to avail the defendant as a defense, it must be specially pleaded. It was in this view of the case, doubtless, that the testimony above mentioned was excluded, and the jury instructed "that the defendant has not set up in its answer, or claimed in its pleadings; that the injury was intentionally inflicted by the insured, or any other persons; and the jury is not to inquire whether or not the injury was intentional, and are not permitted to find or determine that it was so." As already suggested, we think that by the terms of the contract the burden was upon the plaintiff, under the issue presented by the general denial in the answer, to prove that the injury for which he seeks to recover was the result of an accident. As no valid claim could be made, under the contract, if the insured intentionally brought upon himself the injury which resulted in the loss of his hand, it was error to instruct the jury that "the jury are not to inquire whether or not the injury was intentional, and are not permitted to find or determine that it was so." The views here expressed do not conflict with the case of *Association v. Shryock*, 36 U. S. App. 658, 20 C. C. A. 3, and 73 Fed. 774. In that case the insurance company alleged in its answer that the death of Shryock was caused by disease, and at the trial offered evidence tending to show that he committed suicide. The circuit court declined to admit the testimony, on the ground that it was irrelevant, and the ruling was sustained by this court. Judge Sanborn, in delivering the opinion of the court, said: "The association pleaded no such defense, but pleaded that the death was caused by disease,—a defense inconsistent with the theory of suicide."

The policy in suit also provides, "If such injuries are sustained while riding as a passenger in a passenger conveyance using steam, cable, or electricity as a motive power, the amount to be paid shall be double the sum above specified," and the court instructed the jury as follows:

"The court instructs you as a matter of law that a person riding upon the platform of a passenger car, as was the plaintiff, is within the provision of the policy in question which provides that, if the injuries are sustained while riding as a passenger in a passenger conveyance using steam as a motive power, the amount to be paid shall be double the amount specified."

We cannot assent to the construction placed upon this provision of the contract by the circuit court. Contracts are to be enforced as made. The provisions of an insurance contract, like the provisions of any other contract, are to be given effect according to the fair meaning of the words used. *Ripley v. Insurance Co.*, 16 Wall. 336. If the words do not clearly indicate the intention of the parties, then, within the well-known rule, it would be the duty of the court to give the contract that interpretation most favorable to the insured. *Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360. The policy, however, constitutes the only relation between the parties. If it does not, by the fair and natural import of its words, give a right to double the sum specified, under the facts, then the plaintiff, if entitled to recover at all, could only recover the sum specified in the policy. The contract in this case provides that, if the plaintiff sustains injuries while riding as a passenger in a passenger conveyance using steam, cable, or electricity as a motive power, the amount to be paid shall be double the amount specified in the policy for such injuries. We think the words used in the contract clearly indicate the intention of the parties. They evidently meant to stipulate for the double indemnity while the insured was riding in an exceptionally safe place. One who rides as a passenger in a passenger conveyance using steam occupies such a place. But one who rides on, but not in, such a conveyance, whether on the platform, or on the top of the car, or on the machinery beneath it, occupies a very dangerous place, and the parties neither agreed by the terms of their contract, nor intended to agree, that this double indemnity should be paid to one who rode in such a position. The plain meaning of this provision is that, if the plaintiff is injured while traveling as a passenger in a place in a passenger conveyance (using the motive power mentioned in the contract) assigned for passengers,—in this case within the car,—the defendant will pay double the amount mentioned in the policy. That the defendant had a right to so limit its liability there can be no doubt. *Bigelow v. Insurance Co.*, 93 U. S. 284; *Insurance Co. v. McConkey*, 127 U. S. 661, 8 Sup. Ct. 1360; *Insurance Co. v. Seaver*, 19 Wall. 531. The words “in a passenger conveyance” were doubtless used advisedly, and for the express purpose of limiting the defendant’s liability. The reason for so doing is at once apparent. The place specified in the contract —“in a passenger conveyance”—is a place of little or no danger, and the risk assumed is slight, while on the platform of a conveyance using the motive power described in the contract, and especially, as in this case, on the platform of a railway car, is an exceedingly dangerous place when the train, to which the car is attached, is in motion. That riding upon the platforms of railway cars, when trains are in motion, is dangerous, is a matter well understood by the railway companies and people who are accustomed to traveling by rail, and, in order that passengers may be advised of the danger, in almost every passenger car in service upon the various railways of the country notices are posted in conspicuous places in the car warning passengers that it is dangerous to go upon the platforms of the cars while the train is in motion.

The contract in this case provides for double compensation in certain cases, but, to entitle the policy holder to recover this double compensation, his case must come fairly within its terms. The fact that it is not unusual for passengers traveling by rail to go upon the platforms of cars before the train stops at a station, as did the plaintiff in this case, cannot change or extend the contract of the parties. If the plaintiff had remained in the car—the place assigned for passengers on the train by which he was traveling—until it arrived at the station, he could not have been injured. He chose, however, to occupy a more dangerous position on the platform of the car; a position which, giving effect to the contract according to the fair meaning of the words used, does not come within the provision of the policy now under consideration.

The assignments of error which seek to question the action of the circuit court in refusing to submit special findings requested by the defendant are without merit. *Railroad Co. v. Horst*, 93 U. S. 291; *Nudd v. Burrows*, 91 U. S. 426; *Association v. Barry*, 131 U. S. 100, 9 Sup. Ct. 755. The last suggestion applies also to the assignments of error directed to the refusal of the court to instruct a verdict for the defendant. *Railroad Co. v. Woodson*, 134 U. S. 614, 10 Sup. Ct. 628; *Railroad Co. v. Powers*, 149 U. S. 43, 13 Sup. Ct. 748; *Gardner v. Railroad Co.*, 150 U. S. 349, 14 Sup. Ct. 140. For the errors to which we have called attention the judgment must be reversed, and the case remanded to the circuit court, with directions to grant a new trial.

THAYER, Circuit Judge. I concur in the reversal of this case on the first ground stated in the opinion of the majority, but I am not able to assent to the second proposition,—that, to entitle the insured to claim a double indemnity for the injuries which he sustained, it was necessary for him to show that they were inflicted while he was actually inside of the car. That view, in my judgment, attaches undue importance to a single word, and is highly technical. It also does violence to the probable intentions of the parties. The clause of the policy over which the controversy arises is as follows:

"If such injuries are sustained while riding as a passenger in any passenger conveyance using steam, cable, or electricity as a motive power, the amount to be paid shall be double the sum above specified."

The fundamental idea intended to be conveyed by this clause of the policy is that a double indemnity will be paid in case of an injury which is within the terms of the policy, provided it is sustained by one while traveling in, by, or on a certain class of public conveyances. In ordinary conversation persons are often heard to say that they came "by train," or "on a train," or "in a train," without intending to indicate by either form of expression the particular place in that conveyance which they occupied. It is hard to believe, therefore, that any special significance was intended to be given by the use of the word "in" in the clause above quoted. If the insurance company had intended to say that it would pay a double indemnity for injuries sustained while traveling by the public conveyances specified only in the event that they were inflicted while the insured was in a given place

on one of such conveyances, to wit, on the inside, the language employed would doubtless have been, "while riding as a passenger [inside of] any passenger conveyance," etc. It is common knowledge that in cities and towns where electricity is used as a motor street-railway companies, at certain seasons of the year, use many open cars as well as closed cars, and that at some hours of the day, and during all seasons, many persons ride on the platforms of street-railway cars, and are permitted to do so; that being the only place where they can find standing room. The construction of the policy in suit which has been adopted by the majority of the court leads to the conclusion that a person insured by such a policy who happens to be injured while lawfully riding on the platform of one of such conveyances, or in a seat which has been provided on the top thereof, can only claim a single indemnity, while a person, injured perhaps at the same time while riding on the inside, either standing up or sitting down, can claim a double indemnity. I am not able to assent to an interpretation of the policy which leads to such a strange, not to say unreasonable, result. The fact is, I think, that the policy promises a double indemnity to any one who sustains an injury while he is lawfully a passenger on any of the conveyances specified in the policy, provided he is standing or sitting in any place where he is permitted for the time being by the proprietor of such a conveyance to either stand or sit. If a person is stealing a ride on the top of a car, or on the trucks underneath a car, that fact alone, in the event that he is injured, would prevent him from claiming any indemnity, under other provisions of the policy. Such supposable cases, therefore, merit no consideration. The defendant company intended to offer travelers special inducements to become insured against the risk of injury incurred while traveling, by promising them a double indemnity for that class of injuries, and a technical construction ought not to be placed on the policy to shield it from liability for a loss that is fairly within the terms of its contract. It must be borne in mind that the rule is to construe an insurance policy most strongly against the company, because such contracts are invariably drawn by the insurer, and reasonable doubts arising from the language which it has employed should be resolved against it. It cannot be said that the use of the word "in" in the policy in suit so clearly evidences an intention to pay a double indemnity only in those cases where the insured is injured while traveling on the inside of a railway or street car as to put the case at bar beyond the reach of that rule of construction. In my judgment, the rule in question should, in itself, have led to a different interpretation of the clause relating to double indemnity than the one which has been adopted by the majority of the court.



## SOUTHERN RY. CO. v. SMITH.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1898.)

No. 622.

## 1. CARRIERS—PASSENGERS—EXTRAORDINARY CARE.

One who is crossing the track, with a railroad ticket in his pocket, to board a train, but has not been to the depot, and has not notified the officers or agents of the company that he is a prospective passenger, is not a person to whom the company owes extraordinary care and diligence as a passenger.

## 2. SAME—CONTRIBUTORY NEGLIGENCE—INSTRUCTIONS.

In Georgia it is error to refuse to charge that if, by the exercise of ordinary care, plaintiff could have avoided the consequence caused by defendant's negligence, he cannot recover.

## 3. SAME—INSTRUCTIONS TO JURY.

Where a train was in sight 200 yards away, and all other witnesses saw it approaching, and most of them heard the bell, and the plaintiff would have been obliged to see it if he had looked, his testimony that he did look, and did not see it, should be taken as untrue, and a verdict directed for defendant.

McCormick, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Georgia.

The following statement of the case, made by plaintiff in error, is full, and covers all of the important allegations in the pleadings and testimony:

"On April 14, 1896, Perry C. Smith filed his suit against the Southern Railway Company in the United States circuit court for the Southern district of Georgia, Western division, alleging that on September 16, 1895, plaintiff was in Eastman, Ga., and intended to take the 2:30 p. m. south-bound train; that he left the business part of the town in ample time to board his train, which was then standing on the side track on the east side of the railroad; that he had to approach the railroad at a public street and crossing, and walk up the railroad until he reached his train, this being the way provided by defendant for passengers to board its trains; that when he reached the crossing, out of abundant caution, he looked down the track, but could see no train approaching; that he had no reason to expect any train, because the north-bound had been meeting the south-bound train several miles below Eastman; that he then walked up the railroad track, as was necessary, to board the train; that, while walking within two or three feet of the main line, the north-bound train approached from his rear, at a high rate of speed, and the engine struck him in the back; that it was the company's duty to provide a safe place of ingress and egress for passengers to and from trains; that plaintiff was rightfully at the place of injury, having a ticket, and was in the way provided by the defendant company; that the train approached without blowing the station signal, and at a speed of twenty miles per hour; that the standing train was ringing its bell preparatory to starting, so that, if the approaching train was ringing its bell, plaintiff could not hear it on account of the confusion made by the noise of the standing train; that the approaching train gave no signal, as far as the plaintiff could hear; that he was on the track in the daytime, in plain open view of those on the approaching engine, and they gave him no signal by blowing the whistle or calling out to him; that it was the company's duty to run the train at such speed as not to endanger life, and so as to stop at the crossing where plaintiff was injured; that, in violation of law and duty, the train was running twenty miles per hour when the crossing was reached, and when plaintiff was struck; that the accident occurred in the corporate limits, near the center of the town; that the company was negligent in running at such speed in violation of an ordinance. Plaintiff sets out in detail the alleged nature and extent of his injuries, alleges they were permanent, and disabled him from pursuing his vocation as traveling salesman, and from procuring other profitable employment, says

he was without fault, and sues for \$5,000 damages, including punitive damages. The defendant company filed a demurrer which is in the record. Defendant also filed a plea denying all the material allegations, and especially denying every allegation of fault or negligence on the part of the defendant company or its employes, or freedom from fault on the part of the plaintiff, and denying any liability to plaintiff, and averring that the accident and injury to him, whatever it might be, was due entirely to his own fault, negligence, and carelessness; and it could easily have been avoided by him by the exercise of ordinary care and prudence on his part. The trial began May 10th, and was concluded May 13, 1897. The testimony at the trial showed that plaintiff below was in the town of Eastman, Ga., on the date specified, and was making his way to a train on a siding near the depot, for the purpose of boarding the same; that he had a mileage ticket in his pocket. In order to reach it, he was compelled to cross the main line, and in doing so was hit by the bumper on the front of the engine, and injured. It was further established that the train that caused the accident could be seen for from two hundred to five hundred yards before it reached the station, and it ran not more than three car lengths after it hit the plaintiff below. It is the uncontradicted testimony of all parties that the plaintiff was walking beside the track, and within a few feet of it, before turning to cross just in front of the incoming train. It was established that the whistle of the north-bound train was blown once as it came out of the cut about a quarter of a mile south of the depot, and some more short blasts were sounded before it reached the lower south switch, all of which could have been distinctly heard at the depot. The bell began to ring before the train reached the lower south switch, and rang continuously until the train finally stopped opposite the depot. The train stopped at the regular place opposite the depot. As Smith started to step onto the track, the fireman called out to him to 'Look out!' but he paid no heed to the warning, and was injured. Smith testified that when he reached the south side of Fourth avenue, near the western side track, he turned, and looked south, and saw no train coming, and that when he got between the side track and the main line, and had walked a few steps north, he again looked south, and saw no train coming. All the witnesses for plaintiff and defendant saw the train coming, and some of them as far as a quarter of a mile away, and all but one or two heard its bell ringing, and several heard the fireman call out to Smith as he started to step on the main line in front of the approaching train. No one testifies as to seeing Smith look for the train. There is no conflict in the evidence that there was nothing to prevent Smith from seeing the train. At the close of all the evidence, defendant's counsel moved the court to direct and instruct the jury to render a verdict in favor of the defendant, because the evidence demanded such a verdict, and no other verdict could properly be rendered under the evidence and under the law applicable in said case. The court, however, refused the motion to direct a verdict, and also refused to give in charge to the jury certain requests made by defendant's counsel; and, after receiving the instructions of the court, the jury retired to their room, and entered upon their deliberations, and a verdict was returned in favor of plaintiff for \$2,790.00, and a judgment was entered accordingly."

John F. Delacy and James Bishop, Jr., for plaintiff in error.

A. O. Bacon, A. L. Miller, and Wm. Brunson, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

SWAYNE, District Judge. The case comes to this court upon writ of error containing 21 separate specifications founded upon 15 special requests by defendant to charge, which the court refused, and upon exceptions to the charge as given by the court. The first error we would notice upon the record is that in which the court treated the plaintiff below as a passenger, and charged the jury that the defendant below owed him extraordinary care and diligence as such passenger. We think plaintiff below was not a passenger in the contemplation of

law. He was not upon the train, had not been to the depot recently, nor purchased a ticket, and did nothing to notify any of the officers or agents of the defendant company that he was even a prospective passenger. The company did not owe him extraordinary care or diligence as such passenger, but only ordinary care as to the general public.

We think the court erred in charging the jury as recited in the eighteenth specification of error, in which it assumed to be a fact that the train was running at 8 or 10 miles per hour, when it injured the plaintiff below, and further suggested to the jury that it usually ran into the station among the passengers at that rate of speed.

We think the requests contained in twelfth and thirteenth assignments of error, that there was no allegation or proof to justify or uphold a verdict for punitive damages, were erroneously refused, and that this was error.

Another question arising out of many of the assignments of error, and embodied in many of the special requests to charge by defendant below, is the question whether the injury to plaintiff below was caused by his negligence; that if, by the exercise of ordinary care, the plaintiff could have avoided the consequence caused by defendant's negligence, if defendant was negligent, then he could not recover. This request to charge the law long established both by the statutes and decisions of the state of Georgia as well as the decisions of courts generally was repeatedly requested by the defendant below, and was as repeatedly refused by the court. This doctrine is so well established, and is of such long standing, and upon which the courts of the country are so unanimous, that we should not stop to make any citations to sustain it if it was not so pointedly questioned by the record. First, section 3830 (2972) of the Code of Georgia reads as follows:

"If the plaintiff by ordinary care could have avoided the consequence to himself caused by the defendant's negligence, he is not entitled to recover; but in other cases the defendant is not relieved although the plaintiff may in some way have contributed to the injuries sustained."

In such cases the doctrine of contributory negligence does not apply. In *Railroad v. Bloomingdale*, 74 Ga. 604, Branham, J., indorses this doctrine; and, after quoting from several Georgia as well as noted English decisions to sustain it, adds:

"These cases were followed and made the basis of the opinion of this court in *Branan v. May*, 17 Ga. 136, and doubtless that case, as well as its citations, were duly considered by our codifiers in drafting sections 2972 and 3034 of the Code."

In *Blitch v. Railroad*, 76 Ga. 335, Blandford, J., indorses the above doctrine, and adds:

"So it appears that the plaintiff, in trying to make out his case, made out a full and perfect defense for the defendant, rebutting all assumption of negligence against it."

See, also, *Railroad v. Harris*, Id. 508, by Jackson, C. J.

In *Enright v. City of Atlanta*, 78 Ga. 297, Jackson, C. J., correctly states the law as follows:

"Our view of the law is that, to prevent recovery, he must have been not only lacking in ordinary care and diligence to prevent injury, but that by that ordinary care and diligence, had he used them, he would have avoided the injury."

In *Smith v. Railroad* (a case in which the facts are similar in many respects to those at bar, except it was established that the company was negligent) 82 Ga. 804, 10 S. E. 112, Bleckley, C. J., announces the law of Georgia and the construction of section 2972 of the Code as follows:

"It is beyond dispute that the railroad company was negligent. It failed to give the signals, to check the train at public crossings, and was running at a speed altogether too high. Enough, and more than enough, appears to fix liability upon the company if only its negligence were involved. But the evidence makes the plaintiff's negligence quite as apparent as that of the company. Not only so, but it shows in the fullest and clearest light that by the use of ordinary care he could have avoided the consequence to himself of the company's negligence; and, that being so, the Code (section 2972) declares in express terms that he is not entitled to recover. This rule of law it is that bars him, and renders recovery impossible. It is idle to try to evade the rule by dwelling upon the negligence of the company, for, unless there is negligence of the company which would otherwise render it liable, the rule we are considering would have no place in the law. It is only where there is negligence the consequences of which are to be shunned that the plaintiff is charged with the duty of shunning them if he can do so by the exercise of ordinary care. His failure in this respect does not stop with reducing the amount of his damages, but defeats a recovery altogether. *Railroad v. Bloomingdale*, 74 Ga. 604, and cases cited on the able opinion of Brannon, J. Nor is this mere Georgia law dependent on a local statute, but the principle prevails elsewhere."

This rule applies to a passenger as well as to the general public at railroad crossings. See *McLarin v. Railroad Co.*, 85 Ga. 504, 11 S. E. 840. See, also, *Ashworth v. Railway Co.*, 97 Ga. 307, 23 S. E. 86. The above doctrine is fully supported by *Markham v. Railroad Co.* (N. C.) 25 S. E. 786, and by *Berkeley v. Railway Co.* (W. Va.) 26 S. E. 349, and in *Railroad Co. v. Houston*, 95 U. S. 697, in which Mr. Justice Field, after commenting upon the charge of the court below as misleading and upon facts not before it, indorses the above doctrine in the following language:

"The failure of the engineer to sound the whistle or ring the bell, if such were the fact, did not relieve the deceased from the necessity of taking ordinary precautions for her safety. Negligence of the company's employes in these particulars was no excuse for negligence on her part. She was bound to listen and to look before attempting to cross the railroad track, in order to avoid an approaching train, and not to walk carelessly into the place of possible danger. Had she used her senses, she could not have failed both to hear and see the train which was coming. If she omitted to use them, and walked thoughtlessly upon the track, she was guilty of culpable negligence, and so far contributed to her injuries as to deprive her of any right to complain of others. If, using them, she saw the train coming, and yet undertook to cross the track, instead of waiting for the train to pass, and was injured, the consequence of her mistake and temerity cannot be cast upon the defendant. No railroad company can be held for a failure of experiments of that kind. If one chooses, in such a position, to take risks, he must bear the possible consequence of failure. Upon the facts disclosed by the undisputed evidence in the case, we cannot see any ground for a recovery by the plaintiff. Not even a plausible pretext for the verdict can be suggested, unless we wander from the evidence into the region of conjecture and speculation. Under these circumstances, the court would not have erred had it instructed the jury, as requested, to render a verdict for the defendant."

See, also, *Schofield v. Railway Co.*, 114 U. S. 615, 5 Sup. Ct. 1125.

The only remaining error we have to notice is that raised by the first assignment of the request of defendant's counsel at the conclusion of all the evidence to direct and instruct a verdict in favor of the

defendant on the grounds that the evidence demanded such a verdict, and that no other verdict could properly be rendered under the evidence and under the law applicable in this case. There can be no doubt of the right and duty of the court to do so when the evidence introduced shows that by the exercise of ordinary care he might have avoided the injury. It is the undisputed testimony in the case that the approaching train could be seen from 200 yards to a quarter of a mile before it reached the point where the accident occurred. It was daytime, and the plaintiff below was in possession of sight and hearing. All other witnesses saw it approaching, and most of them heard the bell. It is true that when plaintiff below was asked by counsel to state in his own way the circumstances of the injury, in his answer thereto he states no less than four times in the first paragraph that he looked for the train; but this was not and cannot be true. It never should have been submitted to the jury, and it is too much to ask this court to affirm a judgment upon a statement so evidently false. The train was in sight, and he either did not look, or, if he did, he saw it; he would be obliged to see it. When there is any question to leave to the jury, they should determine it; but when the testimony of a witness is so absolutely incredible as to be impossible of belief, the court should so determine. This was done in *Ashworth v. Railway Co.*, 97 Ga. 307, 23 S. E. 86, and in *Payne v. Railroad Co.* (Mo. Sup.) 38 S. W. 308, and was approved by Thayer, J., in *Railway Co. v. Pounds*, 27 C. C. A. 112, 82 Fed. 217. The comments of the court in the *Payne Case* seem so appropriate to the facts of this case that we conclude the opinion by an extract therefrom:

"But in this instance it is plainly proved beyond peradventure that this statement of plaintiff 'that he did all in his power to ascertain whether there were any trains approaching,' etc., was not, and, indeed, could not be, true. This matter of denying probative force even to direct and affirmative testimony, when such testimony is plainly at war with the physical facts and surroundings, has passed into precedent. Thus, in the leading case of *Artz v. Railroad Co.*, 34 Iowa, 153, it is said: 'But it is urged by the appellee's counsel that the plaintiff testifies that he did both look and listen to see and hear the train, but did not; and that this testimony shows that he was not guilty of contributory negligence, or, at the very least, it made that a question of fact for the jury. The difficulty, however, with the question is that, the conceded or undisputed facts being true, this testimony cannot, in the very nature of things, be true. It constitutes, therefore, no conflict. Suppose the fact is conceded that the sun was shining bright and clear at a specified time, and a witness having good eyes should testify that at the time, he looked, and did not see it shine, could this testimony be true? The witness may have been told that it was necessary to prove in this case that he did look, and did not see the sun shine; he may have thought of it with a desire that it should have been so; he may have made himself first believe it was so; and this belief may have ripened into a conviction of its verity; and possibly he even may testify to it in the self-consciousness of integrity. But, after all, in the very nature of things, it cannot be true, and hence cannot, in the law, form a basis for a conflict upon which to rest a verdict. A man may possibly think he sees an object which has no existence in fact, but which it may be difficult, if not impossible, to prove did not exist, or was not seen. But an object and power of sight being conceded, the one may not negative the other. In this case the plaintiff had good eyes. The train was approaching him in the night, with the engine's headlight burning brightly. If the plaintiff looked, he must have seen it, or he must have looked very negligently and carelessly. In either case, he was necessarily, in the eyes of the law, guilty of contributory negligence precluding his right to recover.'"

The judgment is reversed, and the cause remanded, with instructions to the court below to award a new trial.

McCORMICK, Circuit Judge (dissenting). I cannot concur with my brethren in the decision of this case. I do not draw from the testimony the same conclusions that they announce. I think there was a substantial conflict in the testimony as to the rate of speed of the incoming train, and as to the distance to the point at which the train came into plain view, and that these matters are not so well established by the proof as requires or permits the court to find as matter of law that the testimony of the defendant in error to the effect that he did look, and did not see the train, "is not and cannot be true." And, in my judgment, the state of the proof in the case requires that it should be submitted to the jury. I say nothing about the manner in which it was submitted to the jury, because this court, as I understand it, reverses the case on the ground that it should have been withdrawn from the jury, holding that the proof conclusively shows that want of care upon the part of the defendant in error, which would bar him from recovery, without regard to the negligence of the plaintiff in error. My understanding of the proof is that it shows that the defendant in error had placed his baggage on the outgoing train, upon which he intended to take passage, and, as that train was stopped for dinner, he stepped across the way, to some business house, while his train was waiting, and he was returning to his train at the time he received the injury. I do not understand the force of the suggestion that he had not been to the depot, nor purchased a ticket, nor notified any of the officers or agents of the defendant company that he was even a prospective passenger. He had a ticket. Therefore he did not need to purchase another. He put his baggage upon the train. I cannot see what occasion he had to go to the depot, unless it is intended to hold that a man cannot be a passenger on a road until he notifies some officer or agent of the carrier that he is a passenger, which I presume the court does not intend to hold. My view being that the defendant in error was a passenger within the meaning of the law applicable to the diligence that devolves upon such carriers, and that there was such a conflict in the testimony with reference to the speed of the train, and the distance at which it could have been seen, it was proper to submit the issues to the jury, and let them weigh the testimony, and pass on the questions of negligence.

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CITY OF HANNIBAL v. CAMPBELL.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 988.

1. MUNICIPAL CORPORATIONS—STREETS—MAINTENANCE—NEGLIGENCE.

Although a city may lay off a street 80 feet in width, it is not required to improve and maintain it for travel throughout its entire width, but it has performed its duty to the public by improving and maintaining such portion thereof as is sufficient for the reasonable accommodation of the public.

## 2. SAME.

Where the city had surveyed a street 80 feet in width, but graded and graveled only 30 feet thereof, which was adequate to the public use, an injury to a traveler occasioned by his driving off the usually traveled portion, and falling over the bank of a creek 30 feet from the graveled road, creates no liability on the part of the city, although the point of the accident may have touched the outer boundary of the surveyed highway.

## 3. SAME.

Unless the dangerous precipice or pitfall, which occasions the injury to the traveler, be so near to the usually traveled highway as to endanger his safety while traveling on the used highway, no liability to the city arises. If he departs from the used part of the highway, and the injury results to him while attempting to regain the highway, by reason of his horse balking and backing into a ditch or falling over a bank, no recovery can be had against the city.

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

This was an action at law by George Campbell against the city of Hannibal, Mo., to recover damages for personal injuries received by falling over a bank near the edge of a highway. In the circuit court verdict and judgment were given for plaintiff, and the defendant has sued out this writ of error.

George A. Mahan, for plaintiff in error.

D. H. Eby and C. A. Babcock, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The plaintiff in error is a municipal corporation organized under a special act of the legislature of the state of Missouri. Through one of its suburbs it opened a street known as "Grand Avenue." The street, as surveyed, was 80 feet in width, but only about 30 feet, lying principally west of the center, was graveled and used for public accommodation. The graveled portion was in good condition, and, as the locality through which it ran was sparsely settled, this portion of the street was amply sufficient for the public use. There was a small creek running, in its general course, parallel with the avenue. At a point perhaps a hundred yards south of the point where the accident in question happened, the avenue crossed this creek. From there, running north on the east side of the avenue, it zigzagged until opposite the house of one Bailey, which stood on the west side of the street. There was a considerable bend in the creek, which, thence returning to a point a little to the north, touched the outer east line of the surveyed avenue. On the occasion in question the plaintiff, a young man residing in Quincy, Ill., across the river from the city of Hannibal, in company with his father, went in a buggy along this avenue from the south, to attend a funeral at the house of said Bailey. Arriving at a point opposite this house, they turned out of the traveled gravel road into the bend of the creek, where they left the horse and buggy in the keeping of a boy while they entered the house to attend the funeral. Returning to the buggy, they got in, the father driving, and started in a northwestern course, with the view of re-entering the traveled road to take position in the funeral procession,

headed to the south. From the avenue to the bed of the creek there was an old wagon-road path, where wagons had gone down the creek bank for the purpose of hauling sand. It had not been used for a year or more, and was overgrown with grass. The buggy was driven up this blind path towards the avenue until (according to the version given by the plaintiff and his father) the horse's head or forepart reached the graveled road, when the driver's attention was called to the approach of a coal wagon coming from the south. Instead of attempting to pass on in front of the wagon, he pulled the horse back, and the horse continued to so back until some one cried out a warning of danger, whereat the driver struck the horse with the lines, but instead of going forward the horse continued to back, turning its head around towards the south, locking the buggy on that side, when the buggy and horse went over the bank, about eight feet high, into the bed of the creek, whereby the plaintiff received the injury for which he sued. The right of recovery is based upon the allegation that the city was negligent in not erecting and maintaining along said creek a railing, guard, or other barrier to protect persons, teams, and vehicles from falling into this creek. Other important features of the evidence will sufficiently appear in the progress of this discussion.

At the conclusion of the evidence on behalf of the plaintiff below, the defendant below asked for a peremptory instruction to the effect that the plaintiff could not recover. This request was renewed at the conclusion of all the evidence, and was refused by the court.

Among other instructions afterwards asked by defendant was the following:

"The court declares the law in this case that the defendant is not required to place guards or railings at a dangerous place located thirty or more feet from the traveled or used portion of Grand avenue; and although the jury may find from the evidence that there was a dangerous place at or near the eastern side of Grand avenue which was not protected by guards, and at which place plaintiff was injured, yet, if the jury further find that such dangerous place was more than thirty feet from the traveled part of Grand avenue, they will return a verdict for the defendant."

This instruction was refused. The jury returned a verdict for the plaintiff below in the sum of \$300, and the city brings the case here on writ of error.

It is the settled law of the state of Missouri that a municipality, like the city of Hannibal, has complete jurisdiction and control over its streets, and this control carries with it the corresponding obligation on the part of the city, after it has opened a street to public travel, to keep and maintain it in a reasonably safe condition for such use. *Blake v. City of St. Louis*, 40 Mo. 569; *Bowie v. Kansas City*, 51 Mo. 454; *Smith v. City of St. Joseph*, 45 Mo. 449. A neglect of this duty renders the city liable to damages for injuries received by persons traveling on the highway, exercising reasonable care, when unduly exposed to accidents by reason of pitfalls or precipices and the like, left unguarded near to the highway.

It is equally the well-settled law of Missouri that, notwithstanding a city may lay out one of its streets 80 feet wide, it is not required, especially in outlying districts like the one in question, to improve the street throughout its surveyed width. It is only required to improve



and maintain so much thereof as is reasonably suitable and necessary for the public travel. As said by the court in the case supra:

"There are streets or parts of streets in many cities which are not absolutely necessary for the convenience of the public, which will be brought into use by the growth of the city, or there may be streets that have more width than is necessary for the present use or requirements of travel. All that is required in such case is that the city see that as the streets are required for use they shall be placed in a reasonably safe condition for the convenience of travel."

This rule, as exemplified by Judge Cooley, is predicated of the established doctrine that the matter of improving and maintaining given parts of a surveyed street for public use pertains to the discretion of the legislative department of the municipal government, and as such is not reviewable by the courts. *Detroit v. Beckman*, 34 Mich. 125; *Lansing v. Toolan*, 37 Mich. 152.

Without reasonable ground for difference, the evidence being that the city at the point in question improved this avenue for the width of 30 feet by grading and graveling it so as to render it commodious and safe for all necessary public use, the question to be decided is, was the city guilty of culpable negligence in failing to erect and maintain a railing or other guard along the bank of said creek to protect travelers from passing over this embankment, who saw fit, for their own convenience, to voluntarily pass outside of the traveled portion of the highway, and was the accident that befell the plaintiff attributable to the failure to so barricade the creek?

It logically results from the proposition that in maintaining 30 feet of the street suitable for public convenience the city had in that respect discharged its obligation to the public, the case under consideration is to be treated as if the street had been surveyed and established originally only 30 feet wide. It is true that the plaintiff's testimony was to the effect that his horse, at the time he began the backward movement, had reached the graveled part of the road, and that he thought he did not back more than 10 or 15 feet before they went over the embankment; but the fact remains established by such a weight of evidence as to admit of no two opinions among honest men that the graveled part of the road opposite where the accident occurred lay principally on the west side of the avenue from the creek. The plaintiff put upon the witness stand the city engineer, who made, in the presence of several witnesses and confirmed by them, an actual measurement of the ground. By the map made by him, the creek, a few feet from where the buggy went over the bank, only touched the eastern line of the 80-foot surveyed avenue, and that from the center of the street to this point it was by actual measurement 40 feet. Even had the traveled portion of the road been in the center of the avenue, it would have been 25 feet to the outer line of the 80-foot survey. The evidence further showed that where the buggy went over the bank was 8 or 9 feet southeast of the point where the stake was placed by the engineer at the outer line of the survey.

The instruction requested by the plaintiff in error and refused by the court predicated the distance between the east line of the traveled road and the point of accident at 30 feet. Therefore the court refused to advise the jury that if the alleged dangerous precipice was 50 feet

from the street, which the city suitably maintained for the public travel, it was not under obligation to maintain a railing or other protection along the bank of the creek to prevent such an accident as befell the plaintiff below. The recognized authorities are agreed that no negligence is imputable to the defendant city for such failure.

In *Brown v. Mayor, etc.*, 57 Mo. 156, the plaintiff sought to recover from defendant city because of an injury resulting to his team, which ran into a hole in that portion of the street outside of the traveled portion of the street. The portion of the street there maintained for public use was 30 feet in width, and the court held that it was error not to charge the jury that if the street was safe and in good order, of a sufficient width to have been safely traveled with ordinary care and prudence, no damage occasioned by plaintiff's team getting from under his control and running away outside of the usually traveled portion of the street, to the spot where the accident took place, could be recovered against the defendant.

In *Puffer v. Orange*, 122 Mass. 389, it was held that a town is not bound to erect barriers to prevent travelers from straying from the highway, although there is a dangerous place near the highway which they may reach by so straying. So in *Murphy v. Gloucester*, 105 Mass. 470, it was held that a town is not liable for failure to erect barriers of any kind to prevent or warn travelers from straying off the highway and falling into a dock 25 feet distant therefrom, although the land, as in the case at bar, between the highway and the dock, was on a level therewith and open. In short, it will be found, on an examination of the authorities, that unless the dangerous precipice or pitfall is so near to the usually traveled highway as to expose the traveler while traveling thereon to an unexpected accident, as at a sharp turn in the road, or so near to the traveled path that the stumbling of a footman or veering of a horse might carry the person or vehicle over the embankment or into the pitfall, no negligence is imputable to the city for failure to place a railing or guard at such place. *Sparhawk v. Salem*, 1 Allen, 30; *Alger v. Lowell*, 3 Allen, 402; *Adams v. Natick*, 13 Allen, 429; *Daily v. Worcester*, 131 Mass. 454.

No liability to damages arises against the city by reason of the failure to erect barricades to protect a party who voluntarily passes outside of the known traveled way, or who receives an injury outside of the traveled path while attempting to come upon the highway by reason of a fall from an embankment lying outside of the improved and traveled street. *City of Monmouth v. Sullivan*, 8 Ill. App. 50; *Goodin v. City of Des Moines*, 55 Iowa, 57, 7 N. W. 411.

The case of *Barnes v. Chicopee*, 138 Mass. 67, in its essential facts and principles, is quite germane to the case at bar. Where the injury occurred the highway was 50 feet wide, of common earth, and, as in this case, was without sidewalks. The traveled part of the road was clearly marked, with a well-trodden footpath on the southerly line of the highway. On the south side of the highway as located in its entire width, and 9½ feet therefrom, was the top of the bank of the Chicopee river, on a level with the road. There was no rail or guard upon the bank. From the worn track of the used part of the road to

the edge of the bank the distance was 34 feet. The accident occurred in the evening after dark. The plaintiff was traveling in a one-horse wagon, accompanied by a man and two small children. The hat of one of the children blew off, and the horse was stopped while one of the party went to recover the hat, when the horse began to back, and despite the efforts of the men went down the bank with plaintiff and the children, killing the horse and breaking the carriage. In that case, just as here, when the horse began to back the carriage was not in the traveled road, but was upon the edge thereof, 9½ feet from the bank, and was in the path made by foot-passengers. There, as in this case, the driver did not know that the vehicle was near the bank until the horse began to back. The liability of the defendant town was predicated of negligence in not maintaining a railing or guard at said bank. It was held that the defendant town was not liable. The court said that "the test is whether there is such a risk of a traveler, using ordinary care, in passing along the street, being thrown or falling into the dangerous place, that a railing is requisite to make the way itself safe and convenient. But it is not bound to do so to prevent travelers from straying from the highway, although there is a dangerous place, at some distance from the highway, which they may reach by straying." And, further, that, in the determination of the question as to whether the defect is in such close proximity as to make traveling on the highway unsafe, "that proximity must be considered with reference to the highway as traveled and used for public travel, rather than as located"; citing several cases sustaining the nonliability of the town where the dangerous place was from 20 to 30 feet from the highway.

If the plaintiff's testimony were to be accepted as absolutely true, how is it possible under the law to render the defendant city answerable for his injuries? No accident befell him while traveling upon the known and sufficient public highway. For their own convenience, he and his father knowingly departed from the traveled road into the bend of the creek, and even then, but for the backward movement of the horse, in which from perversity or mismanagement the horse persisted until it passed outside of the surveyed limit of 80 feet, the misfortune would not have come to the plaintiff. Waiving any question as to the accountability of plaintiff for either the perversity of the horse or the mismanagement of the father in driving, the point where the horse and buggy went over the embankment was, as matter of law, where the defendant city was not required to erect and maintain a barrier to prevent an accident in no way connected with its establishment and maintenance of a public traveled highway at least 30 feet therefrom. It is only in cases where, by reason of the proximity to the traveled highway of some such precipice or dangerous pitfall, that a person while traveling on the improved and used portion of the road is exposed to accident, that it becomes a question of fact for the determination of a jury as to whether the traveled highway ran so near to such point of danger as to leave it in doubt among reasonable men whether it would have been prudent and careful for the city to have erected some suitable protection to travelers.

In any aspect of the case, admissible under this evidence, the court

should have given the instruction set out in the foregoing part of this opinion, to the effect that, if the point where the accident occurred was 30 feet from the traveled, graveled portion of the highway, the jury should return a verdict for the defendant. The judgment of the circuit court is therefore reversed, and the cause remanded for further proceedings in conformity with this opinion.

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In re LEUNG.

(Circuit Court of Appeals, Second Circuit. April 7, 1898.)

No. 94.

**CHINESE EXCLUSION—LABORERS.**

A Chinaman, whose chief occupation was that of a laundryman, but who was an active, voluntary, unpaid teacher in a Sunday school, and actively conversed with his countrymen upon religious subjects, is a laborer, and not a Christian missionary, within the meaning of the registration and deportation acts of 1892 and 1893.

Appeal from the Circuit Court of the United States for the Southern District of New York.

Wm. C. Beecher, for appellant.

Max J. Kohler, Asst. U. S. Atty.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge. The legal questions upon this appeal are the same which have already been considered at this term in Li Sing's Case, 86 Fed. 896, except that the relator introduced two credible witnesses, who were not Chinese, and who testified to a certain extent in his behalf. In fact, the entire testimony was introduced by him. Charles H. Leung, the relator, came from China to the United States about 15 years ago. In July, 1896, he returned to China, and came back to this country in January, 1897. On May 2, 1896, he received a certificate similar to that of Li Sing's, and which stated his business to be that of a missionary. This certificate was exhibited to the collector of customs at Malone, N. Y., and was canceled on January 14, 1897. Upon the affidavit of Inspector Scharf, asserting that Leung was unlawfully within the United States, and within the Southern district of New York, he was arrested and brought before John A. Shields, Esq., United States commissioner. Upon this examination the relator offered evidence to show that before he returned to China, and in China, and after his return to the United States, his business was that of a Christian missionary among his countrymen. The commissioner found that his occupation, in fact, during his residence in this country, was that of a laundryman. If a review of the commissioner's decision upon this question of fact could properly be had upon a writ of habeas corpus, we should find that the theory of the relator in regard to his occupation was not sustained by the testimony. He was an active, voluntary, unpaid teacher in a Sunday school, and he actively conversed with his countrymen upon religious subjects;

but his business and his chief occupation was that of a laundryman, during his entire residence in this country. The question of a statutory law which is attempted to be raised—that, if a Chinaman is a missionary, he cannot properly be styled a “laborer”—does not exist. The commissioner’s conclusion that he never was, in any proper sense of the word, a missionary, is fully justified by the testimony which the relator introduced. The order of the circuit court is affirmed.

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UNITED STATES v. JOHN KELSO CO.

(District Court, N. D. California. April 11, 1898.)

No. 3,461.

1. CRIMINAL LAW—CORPORATIONS—EIGHT-HOUR LAW.

A corporation may be guilty of a crime when the only intention required is an intention to do the prohibited act; therefore a corporation may be subject to fine for violating the eight-hour law (Act Aug. 1, 1892).

2. SAME—PROCESS.

A court having jurisdiction of a particular crime, may, when that crime is committed by a corporation, obtain jurisdiction over it, in the absence of statutory provision, by any appropriate writ for that purpose.

3. SAME—SUMMONS.

Jurisdiction over a corporation, in a criminal proceeding to punish it for violating the federal eight-hour law, may be obtained, in California, by serving a summons upon its president, in the general form prescribed by Pen. Code Cal. § 1390.

Samuel Knight, Asst. U. S. Atty.

R. Percy Wright and Edwin L. Forster, for defendant.

DE HAVEN, District Judge. On October 9, 1897, there was filed in this court by the United States district attorney for this district, an information charging the defendant, a corporation, with the violation of “An act relating to the limitation of the hours of daily service of laborers and mechanics employed upon the public works of the United States and of the District of Columbia,” approved August 1, 1892 (2 Supp. Rev. St. p. 62). Upon the filing of this information, the court, upon motion of the district attorney, directed that a summons in the general form prescribed by section 1390 of the Penal Code of this state, be served upon said corporation, and accordingly on said date a summons was issued, directing the defendant to appear before the judge of said court in the court room of the United States district court for this district on the 21st day of October, 1897, to answer the charge contained in the information. The summons stated generally the nature of the charge, and for a more complete statement of such offense referred to the information on file. On the day named in said summons for its appearance, the defendant corporation appeared specially by its attorney, and moved to quash the summons, and to set aside the service thereof, upon grounds hereinafter stated. Upon the argument of this motion, it was claimed in behalf of the defendant: First, that the act of congress above referred to does not apply to corporations, because the intention is a necessary element of the crime therein defined, and a corporation as such is incapable of enter-

taining a criminal intention; second, that, conceding that a corporation may be guilty of a violation of said act, congress has provided no mode for obtaining jurisdiction of a corporation in a criminal proceeding, and for that reason the summons issued by the court was unauthorized by law, and its service a nullity. It will be seen that the first objection goes directly to the sufficiency of the information, and presents precisely the same question as would a general demurrer, attacking the information on the ground of an alleged failure to charge the defendant with the commission of a public offense. This objection is one which would not ordinarily be considered upon a motion like that now before the court, when the party making the objection refuses to acknowledge the jurisdiction of the court, or to make any other than a special appearance for the purpose of attacking its jurisdiction; but, in view of the conclusion which I have reached upon the second point urged by the defendant, it becomes necessary for me to determine whether the act of congress above referred to is applicable to a corporation, and whether a corporation can be guilty of the crime of violating the provisions of said act. Section 1 of that act makes it unlawful for a contractor or subcontractor upon any of the public works of the United States, whose duty it shall be to employ, direct, or control the services of laborers or mechanics upon such public works, "to require or permit any such laborer or mechanic to work more than eight hours in any calendar day except in case of extraordinary emergency." And section 2 of the act provides "that \* \* \* any contractor whose duty it shall be to employ, direct, or control any laborer or mechanic employed upon any public works of the United States \* \* \* who shall intentionally violate any provision of this act, shall be deemed guilty of a misdemeanor, and for each and every offense shall upon conviction be punished by a fine not to exceed one thousand dollars or by imprisonment for not more than six months, or by both such fine and imprisonment, in the discretion of the court having jurisdiction thereof." It will be observed that by the express language of this statute there must be an intentional violation of its provisions, in order to constitute the offense which the statute defines. In view of this express declaration, it is claimed in behalf of defendant that the act is not applicable to corporations, because it is not possible for a corporation to commit the crime described in the statute. The argument advanced to sustain this position is, in substance, this: That a corporation is only an artificial creation, without animate body or mind, and therefore, from its very nature, incapable of entertaining the specific intention which, by the statute, is made an essential element of the crime therein defined. The case of *State v. Great Works M. & M. Co.*, 20 Me. 41, supports the proposition that a corporation is not amenable to prosecution for a positive act of misfeasance, involving a specific intention to do an unlawful act, and it must be conceded there are to be found dicta in many other cases to the same effect. In a general sense, it may be said that no crime can be committed without a joint operation of act and intention. In many crimes, however, the only intention required is an intention to do the prohibited act,—that is to say, the crime is complete when the prohibited act has been intentionally done; and

the more recent and better considered cases hold that a corporation may be charged with an offense which only involves this kind of intention, and may be properly convicted when, in its corporate capacity, and by direction of those controlling its corporate action, it does the prohibited act. In such a case the intention of its directors that the prohibited act should be done is imputed to the corporation itself. *State v. Morris E. R. Co.*, 23 N. J. Law, 360; *Reg. v. Great North of England Ry. Co.*, 58 E. C. L. 315; *Com. v. Proprietors of New Bedford Bridge*, 2 Gray, 339. See, also, *State v. Baltimore & O. R. Co.*, 15 W. Va. 380. That a corporation may be liable civilly for that class of torts in which a specific malicious intention is an essential element is not disputed at this day. Thus an action for malicious prosecution will lie against a banking corporation. *Reed v. Bank*, 130 Mass. 434; *Goodspeed v. Bank*, 22 Conn. 530. An action will lie also against a corporation for a malicious libel. *Railroad Co. v. Quigley*, 21 How. 202; *Maynard v. Insurance Co.*, 34 Cal. 48. The opinion in the latter case, delivered by Currey, C. J., is an able exposition of the law relating to the liability of corporations for malicious libel, and in the course of which that learned judge, in answer to the contention that corporations are mere legal entities existing only in abstract contemplation, utterly incapable of malevolence, and without power to will good or evil, said:

"The directors are the chosen representatives of the corporation, and constitute, as already observed, to all purposes of dealing with others, the corporation. What they do within the scope of the objects and purposes of the corporation, the corporation does. If they do any injury to another, even though it necessarily involves in its commission a malicious intent, the corporation must be deemed by imputation to be guilty of the wrong, and answerable for it, as an individual would be in such case."

The rules of evidence in relation to the manner of proving the fact of intention are necessarily the same in a criminal as in a civil case, and the same evidence which in a civil case would be sufficient to prove a specific or malicious intention upon the part of a corporation defendant would be sufficient to show a like intention upon the part of a corporation charged criminally with the doing of an act prohibited by the law. Of course, there are certain crimes of which a corporation cannot be guilty; as, for instance, bigamy, perjury, rape, murder, and other offenses, which will readily suggest themselves to the mind. Crimes like these just mentioned can only be committed by natural persons, and statutes in relation thereto are for this reason never construed as referring to corporations; but when a statute in general terms prohibits the doing of an act which can be performed by a corporation, and does not expressly exempt corporations from its provisions, there is no reason why such statute should be construed as not applying to them, when the punishment provided for its infraction is one that can be inflicted upon a corporation,—as, for instance, a fine. In the act of congress now under consideration it is made an offense for any contractor or subcontractor whose duty it shall be to employ, direct, or control any laborer employed upon any of the public works of the United States, to require or permit such laborer to work more than eight hours in any

calendar day. A corporation may be a contractor or subcontractor in carrying on public works of the United States, and as such it has the power or capacity to violate this provision of the law. Corporations are, therefore, within the letter, and, as it is as much against the policy of the law for a corporation to violate these provisions as for a natural person so to do, they are also within the spirit of this statute; and no reason is perceived why a corporation which does the prohibited act should be exempt from the punishment prescribed therefor. If the law should receive the construction contended for by the defendant, the result would be that a corporation, in contracting for the doing of any public work, would be given a privilege denied to a natural person. Such an intention should not be imputed to congress, unless its language will admit of no other interpretation.

2. The second ground upon which the defendant bases its motion to quash the summons issued in this proceeding, namely, that congress has made no specific provision for the issuance of such a summons in a proceeding like this, will now be examined. Section 1014 of the Revised Statutes of the United States provides that offenders against the laws of the United States may be arrested, and imprisoned, or bailed, as the case may be, for trial, and agreeably to the usual mode of process against offenders in such state. I agree with counsel for the defendant that this section relates only to natural persons, but it does not follow from this that the summons issued in this case, and served upon the defendant, is without authority of law, and therefore void. That the court has jurisdiction to try all offenses arising under the act of congress upon which this information is based is certain, and that a corporation may be guilty of the commission of such an offense we have already seen; but no court has jurisdiction to proceed in a criminal trial until it has first obtained jurisdiction over the person of the defendant. In the case of a natural person, this jurisdiction is obtained by arrest, and specific provision is made for such proceeding in section 1014, before referred to; and, in the absence of any statutory provision for obtaining jurisdiction over a corporation defendant, the court may resort to any appropriate means for that purpose. The court having general jurisdiction to try the defendant for its alleged violation of the law under consideration may, as a necessary incident to such jurisdiction, issue any appropriate writ for the purpose of bringing the defendant before it to answer such charge. In the case of *People v. Jordan*, 65 Cal. 644, 4 Pac. 683, it was said, after referring to the fact that the supreme court of the state has appellate jurisdiction in certain cases, and that under the constitution such court is expressly authorized to issue all writs necessary for the complete exercise of its jurisdiction:

"The power to issue the writs specified, or any other writ, in a case where it may be necessary or proper to resort to it to secure the complete exercise of the appellate jurisdiction of the court, would exist had the constitution been silent on the subject. It may be conceded for our present purposes that, where machinery has been supplied for the employment of its jurisdiction by legislative enactment, such machinery must be adopted or accepted by the court. But when a certain jurisdiction has been conferred on this or any court, it is the duty of the court to exercise it; a duty of which it is not relieved by the failure



of the legislature to provide a mode for its exercise. \* \* \* The power of courts to establish a system of procedure by means of which parties may seek the exercise of their jurisdiction, at least when a system has not been established by legislative authority, is inherent."

And in the case of *Riggs v. Johnson Co.*, 6 Wall. 166, it was held by the supreme court of the United States that a court which has jurisdiction to render a particular judgment has also authority to issue the proper process for its enforcement; the court saying:

"Jurisdiction is defined to be the power to hear and determine the subject-matter in controversy in the suit before the court, and the rule is universal that, if the power is conferred to render the judgment or enter the decree, it also includes the power to issue proper process to enforce such judgment or decree."

It is believed that the doctrine of the two cases just cited in relation to the inherent powers of courts in the exercise of their admitted jurisdiction is undisputed, and the principle is simply recognized and declared in section 716 of the Revised Statutes of the United States, which reads as follows:

"The supreme court and the circuit and district courts shall have power to issue writs of *scire facias*. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdiction, and agreeable to the usages and principles of law."

It was necessary in the pending case that jurisdiction over the defendant should be acquired, and, as congress has made no specific provision as to the manner in which this should be done, the court had the right to resort to any appropriate method for that purpose. The course adopted by the court was to follow the practice prescribed by the Penal Code of this state, and there was served upon its president a summons, giving full information of the offense charged against the defendant corporation, and naming the day for the defendant to appear in court, and answer such charge. This is the usual mode in which notice is given to a corporation of the pendency of any action against it in a court, and it is certainly conformable to natural justice, as it affords to the defendant full opportunity to interpose any defense which it may desire to make. The defendant has thus been properly notified of the offense charged against it, and when and where it is required to appear and make its defense, and this is all that is required to give the court jurisdiction to proceed with the trial of the case. The motion of the defendant will be denied.

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#### UNITED STATES v. REED.

(Circuit Court, S. D. New York. May 25, 1897.)

##### 1. PROTECTION OF SEAMEN—UNSUITABLE FOOD—PENALTY—EVIDENCE.

In order to justify a conviction under Rev. St. § 5347, imposing a penalty upon the master or other officer of a vessel who withholds suitable food and nourishment from the crew, each of the statutory elements of lack of a suitable food supply, absence of justifiable cause, and the presence of malice, hatred or revenge, must be found beyond a reasonable doubt.

##### 2. SAME—SCURVY—EVIDENCE.

Where there is evidence that every one of a crew was afflicted with scurvy, of which several died, and that the ordinary cause of that disease is lack of

suitable food, the jury are justified, unless some other cause is shown, in finding that there was such lack of suitable food.

**3. SAME—PROVISIONING OF VESSEL.**

Every master, when sailing to or from a foreign port, is bound to see before he sets sail that his vessel is properly provisioned, including a surplus to meet all reasonable contingencies of the seas, and if, in consequence of an omission to do so, there is a short allowance, the withholding of suitable food is not justifiable.

**4. SAME—CHANGE IN VOYAGE.**

If, during a voyage, a master meets with difficulty at sea, it is his duty before changing his voyage for a much longer one, to exercise exactly the same care as when first setting sail, to see that he is properly provisioned for the change of course, and to provision his vessel by any practicable methods the circumstances reasonably admit.

**5. CRIMINAL LAW—MALICE DEFINED.**

Malice consists in one's willful doing of an act, or willful neglect of a known obligation, which he knows is liable to injure another, regardless of the consequences, and a malignant spirit or a specific intention to hurt a particular individual or crew is not an essential element.

**6. PROTECTION OF SEAMEN—INSUFFICIENT FOOD—NEGLIGENCE.**

Under section 5347, the captain is not to be condemned for any mere error of judgment, or for mere negligence, standing alone.

This was an indictment, under Rev. St. § 5347, against Edward W. Reed, master of the American vessel T. F. Oakes, for withholding suitable food and nourishment from members of the crew.

Wallace Macfarlane, U. S. Atty., Jason Hinman, Asst. U. S. Atty., and Max J. Kohler, Asst. U. S. Atty.

Abram J. Rose and David McClure, for defendant.

BROWN, District Judge. Gentlemen of the Jury: Most civilized governments have found it necessary to pass statutes for the protection of seamen. As a class they have been found to be persons who need special statutory protection. They are improvident for the most part and have very little learning. They go hither and thither over the world with little except the statutes and the kindness of their masters, when they do have kind masters, to give them their rights. Universally, the law has made the master a monarch upon the ship. His authority is absolute. That is a necessity of navigation. At times it has been found to lead to such lack of consideration on the part of masters, or of owners, that the seamen suffer in their just right to humane treatment. Therefore statutory enactments have been found necessary to protect them. Our own government has repeatedly passed statutes for this purpose from the time of its organization.

The disease of scurvy was formerly much more prevalent than now. Latterly, as you know by this testimony, it is infrequent. The provisions of our own law were enacted the better to prevent that disease and dreadful scourge upon long voyages. The act (Rev. St. § 4511, and schedule following Rev. St. § 4612), which has been mentioned to you, was passed, I think, first in 1872. It provided specifically for the kinds of food, and a certain variety of food, which should be furnished, and which it was believed, if furnished in sufficient quantities, would be a guaranty against this disorder. The fact that

in later years this disorder has been so infrequent is proof of the wisdom of the provision, and of the good resulting from the observance of the law. Besides this statute there is a much older one (Rev. St. § 5347), the one under which this indictment is framed, which provided in 1835 that if the master, or any other officer of an American vessel, should through malice, hatred or revenge, and without justifiable cause, withhold from the crew suitable food and nourishment or inflict upon them cruel or unusual punishment, he should be subjected to a penalty.

This indictment charges that the defendant did withhold suitable food and nourishment, maliciously and without justifiable cause. You are to determine this case upon the evidence before you, and upon no other considerations. The three main elements which enter into it and which you will be called upon to find, you will observe, are, first, whether there was a lack of suitable food supply; second, if you find that there was, then, whether this was withheld without justifiable cause; and finally, if so, whether this was done from malice, hatred or revenge. There is no evidence here that there was any hatred or revenge on the part of this master towards any individual of the crew, or towards the whole of the crew, and the indictment does not so charge; but the indictment does charge that it was from malice, and that is one of the three necessary ingredients which you must find. In order to convict this defendant you have to find that each of these three elements existed in this case, and beyond a reasonable doubt. If you find beyond a reasonable doubt that there was a lack of proper food, that it was withheld from the crew without justifiable cause, and from malice, then it is your duty to find for the government, and to find the defendant guilty. Nor should you have any hesitation in rendering that verdict, providing you are satisfied beyond a reasonable doubt that these facts are true; not only from a regard to the law itself, but certainly and surely from a regard for that protection to the lives and health of seamen, which the law was designed to secure, and which humanity itself demands.

If there was unreasonable and unjustifiable treatment, a withholding of proper nourishment, without justifiable cause, and if this was done maliciously, by every consideration of humanity and reason, you must say so by your verdict; but you should be satisfied of it beyond a reasonable doubt. That is a question for you to determine, honestly and truly, in view of this evidence.

Now, as regards the lack of proper food, the conclusive evidence upon which the government relies is the result. They say to you that here is a most extraordinary result, a result which cannot be accounted for in any other way; a disorder, a disease, produced by such lack of food and by nothing else; and they say that these four cases which resulted in death, and other cases of sickness of the seamen, were all cases of scurvy. I say four deaths. I do not say all the deaths were from this cause; because it is admitted that the death of the first officer was from some other cause. Now, it is for you to say whether you are satisfied, beyond a reasonable doubt, that there was a most unusual prevalence of scurvy among the seamen upon this ship. There is no medical testimony opposed to that which the

government has introduced from the hospital, that of the persons who received the men and examined them, who saw the disorder of the men, and who say their disorder was scurvy, and who say that the symptoms of the four seamen who died, were the symptoms of that disease also. It is contended that every one of the seamen, every man on the ship who did not eat in the cabin, had scurvy. Those cases that were milder were like the last witness, Reagan, who says that he did not have swelling of the gums; that he had no trouble with the mouth, but that the trouble began with his feet. That is the same way in which the other seamen said their trouble began. His case seems to have been quite light; he procured some asparagus water, and about that time, or soon after, the Kasbeck was hailed and furnished the ship with provisions.

Now, the government relies upon this remarkable fact, that out of a dozen or more seamen, every one who was in the forecabin, and even those two that were aft but not in the cabin, had very marked symptoms of scurvy, or the beginnings of it. If you are satisfied from the evidence that this is true, and there seems to be little to contradict it, you will find that there was some adequate cause; and unless you can find in the evidence some other cause for the prevalence of the disorder, you would naturally attribute it to the cause that has been assigned, and which has been proved to be the ordinary cause of that disorder, namely, the lack of a proper variety of food, and particularly of vegetable food.

If you find that that was the fact, and that here was scurvy produced by a lack of vegetable food, your next inquiry will be whether the vegetable food was withheld without justifiable cause. What is justifiable cause? It might be from some unexpected contingency, or situation that deprives the master, or the owner, or the officer who may be in command, of the power to supply the necessary food. If a vessel sails on her voyage, well provisioned, with all that is required, and by stress of weather she is detained long beyond the usual passage, and there are no ports where any food can be procured, so that the allowance must be shortened in order to enable the vessel to reach a port, it is very plain that the shortening of the allowance is necessary, and the crew are therefore put on what is termed a short allowance, that is, shorter than is prescribed. That is a justifiable cause. Under those circumstances, the necessary food may be lessened, and there is no criminality in that, because it is justifiable.

But every master when sailing to or from a foreign port is bound to see before he sets sail that his vessel is properly provisioned for the intended voyage. By "properly provisioned" is not meant a bare sufficiency for a quick passage. He is bound to make reasonable provision for what is liable to happen upon the seas, though it be unexpected. He is bound to provide for such storms, such delays, such calms as often happen, which may prolong a voyage. Those are among the ordinary contingencies of the sea. The captain is bound to provide a reasonable surplus, a reasonable margin for all known contingencies of the sea; and if he sails without doing so, and in consequence of not having made such provision there is a short allowance, the withholding is not justifiable, because he ought to

have seen that the vessel was supplied with proper provisions. This is a sufficient illustration, I think, to distinguish between what may be called a justifiable cause, and one that is not justifiable.

The third element is that of malice. By "malice" is not necessarily meant in the law a malignant spirit, a malignant intention to produce a particular evil. If a man intentionally does a wrongful act, an act which he knows is likely to injure another, that in law is malice; it is the willful purpose, the willful doing of an act which he knows is liable to injure another, regardless of the consequences. That is malice, although the man may not have had a specific intention to hurt a particular individual, or crew. So, if a man willfully neglects a known obligation, with the same reckless disregard of the consequences, that is malicious conduct in the sense of the law.

Now, your inquiry on that branch of the case will be whether, if you find that there was a lack of food, there was any sufficient cause for it, and whether the master did here deliberately and willfully neglect his duty, knowing what was likely to happen and the probable consequences. What was the duty of the master of this ship in regard to provisions? It was, first, to obey the statute. He was bound, first, to have such articles on board as the statute required and a sufficiency of them for the voyage, or those substitutes which the statute provides. He was bound to provision the ship, as I said before, sufficiently, with a reasonable margin that would satisfy the judgment of any reasonable man who knew the contingencies, or the liabilities of delay, in the course of a long sea voyage.

In the next place, if a master meets with difficulty, with trouble at sea, if he is blown out of his course, as was testified to in this case, it is his duty before changing his route for a very much longer one, to exercise exactly the same care to see that he is properly provisioned for the new voyage, as for the former route; and to provision his vessel by any practical methods that the circumstances reasonably admit. He is not bound to do an unreasonable thing; he is bound to do whatever is reasonable, in view of the evil consequences that may arise by reason of any neglect of duty. He has no right to jeopardize the health or lives of his crew by saying, "I will take the risk of so and so," and not provide properly and reasonably for the voyage.

Therefore I say in regard to the provisioning of this vessel, if soon after the beginning of her voyage from Hong Kong, by reason of storms in the China Sea it became a subject for the master to determine whether he should change his course or not, it was evidently his duty to consider the question of the provisions of the ship, just as much as it was his duty to consider that question at Hong Kong before he left port; and so at future stages of the voyage, it was just as much his obligation to look out for the proper provisioning of the crew and to take such measures as he reasonably could to procure a sufficiency if he found that he was short, or was likely to be short. The master in this case was a man of experience. He cannot plead that he did not know what effect was likely to be produced by a shortness of provisions. The very nature of the duty to supply food for a long voyage, requires a master of any knowledge or experience to make proper provision at the start and at subsequent stages of the voyage, as opportunity arises,

to make reasonable efforts to supply any deficiency which he may find to exist.

Now, that is a question which you must decide wholly. I cannot help you there. It is contended on behalf of the government that when this change was made, the change from the route by way of the Cape of Good Hope to a voyage around Cape Horn, that lengthened the voyage in a very substantial degree. The captain himself said that it was 5,000 miles more. One of the seamen, I think, put it about 7,000 miles more. On running over the map, or the chart, I find by a little computation, in a very rapid estimate, that those figures are probably not far out of the way. You have the means before you in the chart itself, if you choose to examine it, and you can say pretty nearly what the true difference in the distances is. So far as I have been able to estimate, I do not perceive that the captain's estimate is by any means too small. It is a very substantial lengthening of the voyage by taking the route around Cape Horn, whether it was six or seven thousand miles further from Hong Kong. Was that a reasonable thing for him to do? Was he provisioned for a voyage some five or six thousand miles more than he had set out for; and when he passed Honolulu, Buenos Ayres and Rio without seeking food, was that a reasonable thing to do? Now, the question before you is not simply and nakedly whether it was reasonable and proper; but whether, along with the captain's omission to call at any of those places, taking the other circumstances into account, there was in your judgment such willfulness in omitting to call there, as makes it something more than a mere error of judgment, or mere negligence.

I have been requested to charge you, and do charge you, that the captain is not to be condemned for any mere error of judgment. He is not to be condemned either for mere negligence, if it was nothing more than that. He is to be condemned, if you find the other elements to exist, for the additional element of malice in connection with them, in the sense in which I have described it, not as a malignant intention to do a particular harm to anybody, but in the sense of a willful disregard of what he knew to be his duty. That is all. If you find that he willfully disregarded an obligation which he knew and understood, knowing his act was liable to produce injury to the crew, that is malice in the sense of the law. If you find that the circumstances when he turned to go around Cape Horn, were such and were known to him to be such, that he could not go around Cape Horn and reach New York without other provisions, and that he willfully omitted to go back to Hong Kong, or willfully omitted to go into Honolulu, or Buenos Ayres, or Rio, because he preferred to take the consequences of keeping right on till he reached New York, that constitutes malice. It is for you to say upon all these circumstances, upon the condition of the men, upon the applications that the men swore they made to him to be put upon the government allowance, and what you find upon the evidence must have been the condition of the captain,—whether his conduct in these particulars was a deliberate and willful violation and known disregard of the rights of seamen as to provisions for which the statute provides, or whether there was no such willful element in the case, as I have described.

Mr. Rose: I desire to call your honor's attention to the fact that your honor has not charged the requests submitted by us. There are a number of them there.

The Court: Some of them I have declined, yes. I do not think I need to charge all of them. I have already said to the jury that under the law in this court the wife is not a competent witness in such a case as this. I will say to you, gentlemen, that the fact that she does not testify raises no presumption one way or the other; you simply disregard it as wholly out of the case. Of course, you will judge of the captain's conduct not from what appears after the event, but according to the circumstances at the time. I do not see anything else.

Mr. Rose: There is one request with reference to the schedule.

The Court: I am asked to charge you that the captain was not obliged by statute or by law to furnish any vegetable food except peas, rice and barley. Those I believe are the three articles that are mentioned in the statute. They may be substituted for potatoes. I am further asked to charge you that the fact that the captain has no pecuniary interest in decreasing the quantity of food is to be taken in consideration by the jury. That may be taken by you in consideration in your deliberations.

Mr. Rose: I wish to except to that portion of your honor's charge speaking of the scurvy, unless you find other causes for it you will naturally attribute the lack of sufficient food as the cause.

The Court: The stenographer may note what you say.

Mr. Rose: I except to your honor's refusal to charge as requested, a separate exception to each refusal.

The Court: Yes.

Mr. Rose: I think your honor has unintentionally omitted to state that the burden is upon the government, that there is a presumption of innocence on the part of the defendant which has to be overcome, and that the defendant is entitled to every reasonable doubt.

The Court: I stated that at the outset, I believe, two or three times.

Mr. Rose: The list of the provisions on board at the time the vessel left Hong Kong although offered in evidence was not read this morning. I think the jury should take that with them.

#### Defendant's Requests to Charge.

Defendant is not chargeable for bad judgment.

Charged.

If he honestly took the course he did, and believed it to be for the best interest of the ship and her crew to come by the way of the Horn, and to cut down the allowance of food, he cannot be convicted of the charges in the indictment.

Denied.

If jury find defendant acted without malice.

Charged.

He is to be judged not by what may appear now to be wrong, but by the situation as it was then presented to him.

Charged.

There is no proof that when he left Hong Kong he had not sufficient provisions for the usual voyage on which he was bound.

Denied.

He had the right to change from his course, by the way of the Cape of Good Hope, to by the way of the Horn.

Denied.

Malice means intentional wrongdoing, from hatred, revenge or a desire to injure.

Denied.

If defendant deprived the crew of food from good motives, with desire to husband his resources, the verdict must be, not guilty.

Denied.

Malice must be found by the jury on the part of the captain against the whole crew or the verdict must be, not guilty.

Denied.

The first mate is part of the crew.

Denied.

The captain was not obliged by statute or by law to furnish any vegetable food except peas, rice and barley.

Charged.

The fact that the captain has no pecuniary interest in decreasing the quantity of food is to be taken into consideration by the jury.

Charged.

The defendant was acquitted.

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CAMPBELL PRINTING-PRESS & MANUFACTURING CO. V. DUPLEX  
PRINTING-PRESS CO.

(Circuit Court, E. D. Michigan. January 17, 1898.)

1. PATENTS—SPECIFICATIONS.

Where the specifications describe the machine with particularity and detail, and the file wrapper, specification, and drawings contain no suggestion of any alternative arrangement of parts, and a studied repetition, to avoid conflict with prior constructions, of the phrases "substantially as described," etc., is appended to each claim, the patent is limited to the precise construction shown.

2. SAME—PRINTING PRESSES—INFRINGEMENT.

Where the horizontal stationary type beds of defendant's machine would not work in complainant's machine, nor the vertical type beds of the latter work in the machine of the former, without reconstruction, such interchangeability or noninterchangeability is an important test in determining the question of infringement.

3. SAME—EQUIVALENTS.

Complainant having made the position of his type beds and other arrangements relative to the web-feeding mechanism, and impression cylinders an essential feature of his press, he must be restricted to that construction, unless defendant's horizontal type beds or some other part of his machine are mere equivalents, substituted in an arrangement of parts in other respects a duplication. He cannot have the benefit of the doctrine of equivalents if either more or less than his combination is essential to the operation of defendant's machine.



## 4. SAME—PRESUMPTIONS.

The presumption from the granting of a later patent relating to the same subject-matter is that there is a substantial difference between the inventions, and this presumption is fortified by the success of the machines under the later patent, and the fact that the machines under the earlier one did not meet the requirements of the trade, so that the patent has remained moribund for nearly three-fourths of its term.

## 5. SAME.

Where the owner of a patent neglects for 10 years to reduce his invention to practice, or even to put his conception into a tangible form, it seems to be a mere disembodied idea, which, whatever its merit, is not entitled to equitable aid, or within the spirit of the patent system, which requires diligence in giving to the public the benefit of the improvement.

## 6. SAME.

Where other skilled workers in the art, working under the plans and specifications of complainant's claim, could not produce a printing press with type beds located as are defendant's type beds, the latter machine is not an infringement.

## 7. SAME.

The use of the phrases "substantially as described," and "substantially as and for the purposes set forth," restricts the invention to the mechanism described and designated by reference letters and shown in the drawings.

## 8. SAME—CONSTRUCTION OF CLAIMS.

While the specifications may be referred to, to limit the claim, they can never be made available to expand it.

## 9. SAME—KIDDER AND STONEMETZ PATENTS.

The Kidder patent, No. 291,521, for a printing machine, and the Stonemetz patent, No. 376,053, for a web-printing machine, construed, and *held* not infringed.

This was a suit in equity by the Campbell Printing-Press & Manufacturing Company against the Duplex Printing-Press Company for alleged infringement of two patents for improvements in printing presses.

Louis W. Southgate and Geo. H. Lothrop, for complainant.

T. H. Alexander, Arthur E. Dowell, and Dallas Boudeman, for defendant.

SWAN, District Judge. Complainant is owner of letters patent No. 291,521, granted January 8, 1884, to Wellington P. Kidder, for a printing machine, and No. 376,053, granted January 3, 1888, to John H. Stonemetz, for a web-printing machine. Its bill charges the defendant with infringement of both said patents by the manufacture and sale of a certain web-printing machine.

In January, 1895, a preliminary injunction was granted by this court against the defendant, restraining it from the manufacture and sale of the alleged infringing machine until the further order of the court, but directing that the injunction be stayed pending an appeal to the circuit court of appeals, so far as the same would affect the making, shipping, or selling of certain completed and uncompleted machines in defendant's possession upon the defendant filing a bond in the penal sum of \$7,000 to answer to the complainant for any damages or profits accruing by reason of the making or sale of said machines then completed or in course of construction. This injunction was granted out of deference to the decision of the late Judge Carpenter, in a suit brought July 11, 1892, by the complainant against Marden

& Rowell in the circuit court of the United States for the district of Massachusetts, wherein the validity of certain claims of the Kidder and Stonemetz patents was passed upon, and a preliminary injunction awarded against the defendants. An appeal was taken from the injunction order, which forbade the further use of the alleged infringing machine. Pending this appeal the suit was compromised by complainant and Marden & Rowell, and for that reason the appeal was dismissed, as there no longer existed any real controversy. While this appeal was pending Judge Carpenter entered a final decree for complainant, from which the defendant appealed. The circuit court of appeals of the Second circuit vacated the final decree made by Judge Carpenter, thereby depriving it of all effect as an adjudication upon the validity of the patents involved and the question of infringement thereof by the defendant. A supplemental bill filed before this last decision of the court of appeals has been voluntarily dismissed by the complainant because of that decision. The defendant admits that it sold, prior to July 11, 1892, the machine passed upon by Judge Carpenter in the suit against Marden & Rowell in Massachusetts, and that, after it was notified of complainant's claim that defendant's machine was an infringement of the Kidder and Stonemetz patents, defendant has continued to make and sell printing presses substantially like that it made and sold to Marden & Rowell. Complainant purchased the Kidder patent May 31, 1892, and the Stonemetz patent June 25, 1892, a few weeks before the suit brought in Massachusetts.

In addition to the letters patent put in evidence in the Massachusetts case, the record in this case contains three foreign patents,—the Senefelder English patent of 1891, the Baummayer French patent of 1845, and the Tannahill English patent of 1854, which were presented to the court, and were to some extent considered by the circuit court of appeals upon the appeal by defendant from the order of this court granting a preliminary injunction. In passing upon the propriety of that order the court of appeals said:

"We are to consider the correctness of the order from the same standpoint as that occupied by the court granting it, and if we find, after a consideration of the questions presented to that court for its action, that its legal discretion to grant or withhold the order was not improvidently exercised, we should not disturb its action. The judgment of the circuit court of Massachusetts is entitled to the same consideration in this court, as a reason for granting a preliminary injunction, as it had in the court below. \* \* \* Upon a final hearing upon the merits, it would be different; for then considerations of comity might properly have weight with the court below, which we should not hesitate as an appellate court to disregard in finally settling the rights of the parties." 16 C. C. A. 220, 69 Fed. 252.

Again (page 225, 16 C. C. A., and page 255, 69 Fed.), Judge Taft says:

"We do not think, therefore, that on a hearing for a preliminary injunction the fact that the Massachusetts court did not have before it the Tannahill patent ought to affect materially its decree as a basis for preserving the status quo pending the hearing in the court below"—

And held that an adjudication of another circuit court, finding the validity of a patent and its infringement, is a sufficient ground, not only in the circuit court for an order granting a preliminary injunction, but also in the appellate court for affirming such order.

Again (page 226, 16 C. C. A., and page 256, 69 Fed.), Judge Taft says:

"We reach this conclusion without any intention of foreclosing the action of the court below or of this court upon any of the points so mooted when the case comes on for final hearing."

In view of these limitations put by the appellate court upon the effect to be given to its decree affirming the injunction order of the circuit court, and in view of the fact that the decision of Judge Carpenter was vacated and has ceased to be *res adjudicata* of the matters in controversy upon which he passed, this court is not only at liberty to pass upon the validity of the patents sued upon and the question of infringement, but is required to decide these issues upon its own views of the merits of the controversy, untrammelled by any expressions *arguendo* of the circuit court of appeals of this circuit.

#### The Kidder Patent.

This patent was issued January 8, 1884, in this country, and letters patent granted in England for the same invention for the term of 14 years on the 10th of October, 1882, and therefore, under section 4887 of the Revised Statutes, the term of the patent expired here October 10, 1896. The claims charged to be infringed by the defendant are Nos. 1, 2, and 7. These are, respectively, as follows:

"(1) In combination with a stationary bed and an impression cylinder traveling over it, guides for the web, one at each side of the impression cylinder, and a feeding device which feeds the proper length of web while the impression is thrown off, all substantially as described.

"(2) In combination, two stationary beds, two traveling impression cylinders, and a feeding mechanism, substantially as described, combined together and with suitable guides, substantially as described, and operating to print both sides of a web, as set forth.

"(7) The web perfecting press above described, consisting of the two stationary beds, the two traversing impression cylinders, the two sets of inking apparatus, the web-guiding mechanism, substantially as described, and the intermittently operating web-feeding mechanism, substantially as described, all operating together substantially as described."

The proofs show without contradiction that prior to the commencement of this suit but two presses were made under the Kidder patent and that only one of these was sold or used; that the utmost capacity of that press was 1,200 sheets per hour; that the press could not be operated with the type beds in horizontal position, or without the throw-off attachment to prevent the contact of the web with the type bed on the return movement of the impression cylinder; that running the press at a greater speed than 1,200 sheets per hour would break the web; that the two type beds are set between two upright frames; and that, if horizontally placed, would present one form upside down, and it would be impossible to bolt the plates on the bed, and the type would fall out of the upper form. The defendant's press is capable of running off from 3,500 to 4,000 sheets per hour. This, of itself, tends to show patentable invention over the Kidder press. *Ballard v. McCluskey*, 58 Fed. 880-882.

Kidder's was in no sense a primary invention. Its every element was old, and selected from prior patents and machines well known to the trade. His patent does not disclose a single original device which

enters into its combinations. From his file wrapper it appears that he laid claim to parts of his machine, but these were rejected by the patent office, and he submitted to its action; that his original first claim for an improved method of presenting the web to the form or impression cylinder was twice rejected, as anticipated by Cummings' patent of October 22, 1868, and this he also accepted as final. His original claims 2, 3, and 11 met the same fate for the same reason. Claim 2 of his original application read thus:

"(2) In combination with a form and impression cylinder, guides for the web, one at each side of the impression cylinder, and a feeding device which feeds the proper length of web, while the impression is thrown off, all substantially as described."

This, on the requirement of the patent office, he amended by substituting for the word "form" the words "stationary bed," and after the word "cylinder" the words "traveling over it," to avoid the Cummings patent, in which the cylinder is stationary and the platen is reciprocated; but this reversal of parts is not invention. *Many v. Jagger*, 1 Blatchf. 387, Fed. Cas. No. 9,055; *Hartshorn v. Barrel Co.*, 119 U. S. 664, 675, 7 Sup. Ct. 421; *Factory v. Warner*, 1 Blatchf. 278, Fed. Cas. No. 1,521.

With this amendment his original second claim became claim 1 of the patent as issued. A corresponding change was made in his original claim 3, by substituting for the word "form" the words "two stationary beds," and adding before "impression" the word "traveling," after which that claim became the present claim 2 of his patent, which is also qualified by the phrases "all substantially as described" and "as set forth," qualifying the words "operating to print" in the fourth line of claim 2 of the patent. His drawings and specification describe only a press having vertical and parallel stationary beds, between which the impression cylinders travel up and down. There is not a word in his specification or a line in his drawings that suggests any other position than the vertical for the type bed, whether one or two type beds are used. Figs. 3 and 4 of his drawings are simply illustrations of what he calls "this main feature of my invention, where only one form is used, instead of two forms, as in my perfecting press"; the word "form" being used as a synonym for "type bed." "This main feature" of his invention, so called, is the presentation of the web to receive the impression and the delivery of the printed sheet, the claim for which was rejected by the patent office. Figs. 5 and 6 he describes as "side elevations showing the impression cylinders in position to begin the impression stroke," and as "showing the opposite side and the impression cylinders after the impression stroke." In the first paragraph of page 1 of his patent he claims to have "invented certain improvements in printing machines, of which the following is a specification, reference being had to the accompanying drawings, showing a printing machine which is the best form of apparatus now known to me for putting my invention into practice. \* \* \*" On page 3 of his patent, line 65, he says:

"I am aware of patent No. 83,471, of 1868, granted to Royal Cummings, and disclaim all that is therein shown; my mode of presenting the web differing

radically from his, in that in his mode the feed is simultaneous with the printing, while in my mode the feed takes place while the impression is thrown off."

It is the contention of the complainant that Kidder is entitled, under his patent, to claim, broadly, a printing machine having either vertical or horizontal type beds. Assuming that his combinations were patentable, which to me admits of some doubt, in view of the state of the art, and the facts that his machine is scarcely an improvement in the art, and certainly not a commercial success, that its capacity did not exceed that of presses then in use, and it failed to meet the demands of the trade for expedition and cheapness, while the defendant's machine has met with a large sale, and prints more than three times as rapidly as Kidder's, while but one of the latter has been put in use since the issue of the patent in 1884, a radical difference in operation and mechanism between the Kidder machine and that of defendant is strongly, if not conclusively, suggested. The idea of printing from a continuous web was confessedly old. It had been done by Tannahill in 1840, Montague in 1853, Smith and Orris in 1860, by Cummings in 1868, and by others. Kidder, therefore, could only patent the device by which such printing could be effected, and, as is said in *Wicke v. Ostrum*, 103 U. S. 469, "by his patent he appropriated to himself only so much of the field of invention which his idea embraced as was covered by the machine described in his specification and claimed in his application."

A fair test of the scope of his claims and the interpretation to be given to his specification and drawings to apprise the world of the extent and character of his invention would be the machine produced by a skilled mechanic, taking them for his guide in the work of construction. No such workman would proffer either a perfecting or nonperfecting press with horizontal type beds as satisfying the requirements of either claims, drawings, or specification.

It is argued for complainant that, by claims 1, 2, and 5, Kidder covered both the horizontal and vertical stationary beds, and that claims 1 and 2, by the use of the words "vertical" and "vertically" in claim 5, secure to Kidder horizontal type beds. Claim 5 reads as follows:

"(5) In combination, the two vertical stationary beds, their traversing impression cylinders, and the carriage reciprocating vertically between the beds, arranged together so that the type beds face each other, and the carriage reciprocates vertically between them, as set forth."

It is clear that the arrangement of the beds to face each other, "as set forth," is both an essential element of Kidder's machine, as the same is described and illustrated in the specification and drawings, and is also the same arrangement implied in claims 1, 2, and 7. *McCormick v. Talcott*, 20 How. 407. No skilled mechanic would regard the language of this claim as calling for any other arrangement of the type beds or the cylinders than such as set forth in the drawings and specification, which simply describe and portray more exactly, by the use of the words "vertical" and "vertically," the exact form and position of two of the elements of claims 1 and 2, as is made clear by the references to the specification and drawings contained in the words "substantially as described" and "operating \* \* \* as set forth."

The use of the definite article in claim 5, preceding the words "vertical stationary beds," points only to "the stationary beds" mentioned in claims 1 and 2, and the specification and drawings to which the inventor has expressly referred in his patent, for none other are even hinted at in either. *National Meter Co. v. Yonkers Water Com'rs*, 149 U. S. 48-55, 13 Sup. Ct. 774, second paragraph; *Manufacturing Co. v. Ladd*, 102 U. S. 409, 410.

The words "vertical" and "vertically," in claim 5, are clearly implied in claims 1 and 2 by the phrases "all substantially as described," "substantially as described," and "operating to print both sides of a web, as set forth." The manifest purpose of claim 5 was not to expand the meaning of "stationary beds" in claims 1 and 2, but to secure to Kidder the combination of the only stationary beds described in the patent, the traversing impression-cylinders, and the reciprocating carriage, "arranged together, so that the type beds face each other, and the carriage reciprocates vertically between them, as set forth." The combination in claim 5 is not in terms covered by claims 1 and 2; yet it is clear that it is not an independent invention, or a machine complete in itself, but is designed for use with the combination embraced in claims 1, 2, and 7; for without the reciprocating carriage Kidder's machine would be inoperative, and his specification makes it an essential as the vehicle on which the cylinders are mounted and moved in his construction. The carriage could not thus be used in the combinations covered by claims 1, 2, and 7 of the patent, if these are held to include horizontal type beds not facing each other, for it could not be operated to print both sides of the web "as set forth," for the undisputed reasons stated in the proofs, nor could it reciprocate vertically between them, as specifically required by claim 5. Unless claim 5 be held auxiliary to the devices covered by claims 1, 2, and 7, and intended to co-act with their elements to a common end, it would be void, because "it would attempt to unite what could not be united in a single patent." *Densmore v. Schofield*, 4 Fish. Pat. Cas. 154, Fed. Cas. No. 3,809; *Hogg v. Emerson*, 6 How. 483. It is, of course, true that an inventor, after claiming a combination, may also claim for a combination of some of its parts, if such combination is new and subsidiary. *Roberts v. H. P. Nail Co.*, 53 Fed. 920.

It seems to me clear, from these considerations, the conspicuous absence of the adjective "horizontal,"—the most natural expression,—qualifying the words "stationary beds" in claims 1, 2, and 7, and in the specification, the fact that Kidder never constructed any other than a vertical bed, that the horizontal bed could not be used in his machine without reconstruction or invention, and that if, in claims 1, 2, and 7, the inventor had used the word "horizontal," before the words "stationary beds," it would be impossible to reconcile his claim, specification, and drawings, and in view of the precision which he has evinced in the description of his press and its method of operation (page 2 of patent, lines 24 to 57, inclusive), that the "stationary beds" in claims 1 and 2 are necessarily the "vertical stationary beds" mentioned in claim 5. The particularity and detail of the specification, the absence of suggestion in the file wrapper, specification, and drawings of any alternative arrangement of parts,

and the studied repetition, to avoid conflict with prior constructions, of the qualifying phrases appended to each claim, pointing to the designated construction, are to me convincing, in view of the state of the art, that Kidder had in mind only, and his press must be limited to, the precise construction shown in the patent.

Weir v. Morden, 125 U. S. 98, 104-108, 8 Sup. Ct. 869, presents a strikingly analogous question of the construction to be given to one claim of a patent where a subsequent claim is qualified by the phrase "substantially as shown." See, also, McCormick Harvesting-Mach. Co. v. C. Aultman & Co., 16 C. C. A. 259, 69 Fed. 393, 394; Washing Machine Co. v. Tool Co., 20 Wall. 342.

In Deering v. Harvester Works, 155 U. S. 286, 294, 295, 15 Sup. Ct. 118, the suit was brought for the infringement of Olin's patent for an improvement in harvesters. The court say:

"The real question in this case, as between two devices, is whether the first claim of the Olin patent, describing a swinging elevator located upon the grain or ascending side of the main belt, pivoted at its lower end and movable at its upper end, can be construed to cover a similar device located upon the stubble side, pivoted at its upper end and swinging at its lower end. We are of opinion that it cannot."

This was held because the patent in suit was not for a pioneer invention, and because of the statements of the specification and the absence of suggestion of another location for the elevator, which was an element in all but one of the claims.

It is apparent that defendant's horizontal stationary type beds could not be made to work in the Kidder machine without reconstruction of the latter, nor could Kidder's vertical type beds operate in defendant's machine without an entire rearrangement of parts. This interchangeability or noninterchangeability is an important test in determining the question of infringement. Miller v. Manufacturing Co., 151 U. S. 208, 14 Sup. Ct. 310. Mr. Livermore, complainant's leading expert, says upon this subject:

"Cross-Ques. 270. Is not the operation of respacing the web in the machine described and shown in the Kidder patent dependent on some means for throwing the cylinders away from the printing plane, in order to enable the web to be respaced as described in said patent, while the impression is thrown off? Ans. Yes; in the machine shown and described in the Kidder patent the operation of respacing the web is dependent upon the separation of the cylinders from the printing planes in their return stroke in order to secure the nonimpression interval in which the web is respaced. I think I have already stated this before in this deposition.

"Cross-Ques. 271. Could the Kidder press be arranged horizontally, and print from ordinary movable type? Ans. I suppose you refer to the perfecting-press of the Kidder patent. I should judge that it could not, for the reason that one of the type beds would face downward, and the type would be likely to be jarred out of the forms on the downwardly-facing bed in the operation of the machine. I believe there has been testimony to that effect before in this case on the part of those more familiar with the practical operation of this kind of apparatus than I am, and I see no reason to question the soundness of their statements.

"Cross-Ques. 272. Could the web be perfected by the cylinders, and transferred from one to the other, as described by Kidder, if the beds were not face to face and cylinders did not travel between the beds? Ans. The Kidder patent so describes these elements, and describes no other arrangement, so that the web could not be perfected as described in the Kidder patent, unless the arrangements suggested in the question were present.

"Cross-Ques. 274. Could a feed mechanism like Kidder's, which feeds the

proper length of web 'during the back stroke of the impression cylinder,' be usefully employed in defendant's machine without making other alterations? Ans. No; a feed mechanism which feeds the web during substantially the whole of one stroke of the machine, as does this specific feed mechanism of the Kidder patent, would not be operative in defendant's machine without further alterations in said machine."

Again:

"Cross-Ques. 167. You have said that Kidder's beds are vertical, parallel, and facing one another. Could they be otherwise in his perfecting press? Ans. That depends on what you mean by his perfecting press. In the specific press shown by him, I should say they could not depart materially from that position and arrangement and operate satisfactorily; but I think that other arrangements might be devised that would embody Kidder's invention,—I mean would embody what, in comparison with the prior state of the art, is in my opinion a novel combination of elements, combined and operating in a novel manner to produce a new result, as pointed out by me in answer to question 5 of my direct examination.

"Cross-Ques. 168. Is there any suggestion in Kidder's patent that the beds of his perfecting press might be arranged to face other than in opposite directions? Ans. No. The patent merely describes a single specific operative structure embodying the invention. There is no statement in the specification that the vertical arrangement, or that the face to face arrangement, of the printing beds is essential."

Cox and Stockbridge, for defendant, agree with Livermore (Cox's testimony) that the feeding mechanism of defendant's press cannot be used in Kidder's, and, vice versa, is amply sustained by the reasons which he gives, and is confirmed by that of Stockbridge. There is much other testimony in the record confirming the views of Livermore, Cox, and Stockbridge; but it is not needed to show what is obvious on the inspection of the machines.

Hoffheins v. Russell, 107 U. S. 132, 140-147, 1 Sup. Ct. 570, and Wicke v. Ostrum, 103 U. S. 461, 469, are instances of devices held not infringed because parts of one could not be substituted in the other without rearrangement. Kidder, therefore, has made the position of his type beds and other arrangement relative to the web-feeding mechanism and impression cylinders an essential feature of his press, and his rights under the patent must be restricted to the construction which he has chosen unless defendant's horizontal type beds or some other part of his machine are merely equivalents substituted in an arrangement of parts in other respects a duplication of Kidder's. He cannot have the benefit of the doctrine of equivalents if either more or less than his combination is essential to the operativeness of the defendant's machine. *Water-Meter Co. v. Desper*, 101 U. S. 332-337; *Crawford v. Heysinger*, 123 U. S. 589, 8 Sup. Ct. 399; *Boyd v. Tool Co.*, 158 U. S. 260, 15 Sup. Ct. 837; *U. S. v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 552, 555, 15 Sup. Ct. 420; *Ney v. Manufacturing Co.*, 16 C. C. A. 293, 69 Fed. 405-407.

Of course, if Kidder's were a pioneer invention, no mere change of the position of any of the parts, not necessitating a reconstruction of the machine, and obviously evasive, would relieve an infringer; but we are dealing with a patent without a single novel element. It is sought to expand its claims to cover a construction which complainant's own expert, Wood, admits was unknown



to the art before Cox devised it. In cross-question 226 Wood is asked:

"Did the art show at the date of Kidder's application a web-perfecting press containing two stationary beds, one above the other, so arranged that the printing forms, when laid on those beds, were horizontal one above the other, and facing in the same direction, in combination with impression cylinders traveling over said beds? Ans. To the best of my knowledge and belief, it did not.

"Cross-Ques. 227. Where do you first find in the art the structure or mechanism described in the last question, No. 226? Ans. In United States patent No. 459,813 of September 2, 1891, to J. L. Cox."

Wood repeats this admission.

Complainant's expert, Livermore, says:

"At the date of Kidder's application, was a feed mechanism like that employed by defendant known? Ans. To the best of my knowledge and belief, it was not."

It may be here remarked that, in form and relative position of the type beds and impression cylinders, Kidder's press has its prototype in Kerr's patent of 1870. There are other differences, however, between Kidder's and defendant's machines, equally pronounced. It is an element of Kidder's first and second claims that the feeding mechanism "shall feed the proper length of web while the impression is thrown off." This implies, of course, if it does not in terms require, a throw-off mechanism, and is effected by such mechanism described in lines 43 to 49, page 2, of Kidder's patent, and is the subject of his sixth claim, which the complainant does not assert to be infringed. Such is not the mechanism nor the operation of Cox's machine. It has no throw-off,—to use the language of Wood, complainant's vice president, no "auxiliary cylinder manipulating device." Wood says:

"In the Kidder machine, however, there is an auxiliary cylinder manipulating device which operates as in my answers to cross-questions 205, 206, etc. \* \* \* In the Cox machine and the Cox model referred to I do not find this auxiliary cylinder manipulating device. The web-feeding device is so arranged in the said Cox devices that all the proper length of web may be fed while the cylinder is completing one reverse when off the impression, and the auxiliary device referred to is therefore not necessary."

Notwithstanding Wood's error in stating that the web is fed in Cox's machine "when off the impression," this is a direct concession of a vital difference between Kidder's and Cox's combinations. Wood also admits that the auxiliary cylinder manipulating device or throw-off mechanism is necessary to the Kidder press, and without it the web could not be fed.

The difference between the Kidder and Cox feeding mechanisms is well stated by A. P. Warner, an experienced printer and pressman, in answer 8, Detroit record, pages 292, 293. He defines the throw-off mechanism to be "a mechanical device whereby the cylinder may be moved away from the type and bearer line, so that no impression will be taken as the bed passes under the cylinder or the cylinder over the bed." And in answers 9 and 12, Detroit record, pages 292, 293:

"I should say that Kidder's object in providing these throw-off devices was that he might throw the cylinders from their forms in their return stroke, which would

give him an opportunity to feed the proper length of web while the impression was thrown off mechanically. \* \* \* As Kidder has only provided an intermittent feeding device, he must feed his paper while the impression is thrown off, and consequently has provided the throw-off device for that purpose."

In answer 13 he says:

"There are no such devices used or required in defendant's press; on the contrary, the feed used on defendant's is a rotary and continuous one, and the impression cylinders are never thrown off, but remain on the type line."

Many practical printers and pressmen familiar with the operation of the machines corroborate Warner upon this point, and demonstrate beyond doubt the correctness of his testimony. Cox emphasizes the same fact in his patent of 1892, page 4, line 25, in the statement therein that "the web is being all the time fed into the press by the calendars, even during the taking of the impression." See, also, lines 85 to 155, where the statement is repeated; also, claim 9, that the web "can be fed into and delivered from the press continuously, and yet have portions thereof stopped during the taking of an impression thereon, substantially as specified."

The intimation of the court of appeals (16 C. C. A. 225, 226, 69 Fed. 254, 255) is that the Tannahill patent of 1854 "would confine the scope of the Kidder invention to the particular form therein shown of moving a cylinder in a moving fold of a web," and adds, "But that particular form seems to be shown in the defendant's machine." This, though not expressed as a final conclusion, clearly disapproves Judge Carpenter's view that "the substance of the Kidder patent in the original patent and the improvement of Stone-metz seems to be a production of a device which shall print a web of paper stationary at the two ends thereof, by means of an impression cylinder moving in the moving fold of that web." The court of appeals held that the Tannahill machine, if operative, would so print by means of such a cylinder so moving. The correctness of that conclusion is demonstrated by the actual working of the model of the Tannahill machine, which was not before that court. Inspection of it and its operation discloses no patentable difference between it and the combinations of claims 1 and 2 of the Kidder machine. It can scarcely be claimed that the fact that one end of Tannahill's web is not exactly stationary would excuse Kidder, if the Tannahill patent were in force, from the charge of infringement. If Tannahill anticipated Kidder's claims 1 and 2, Kidder would certainly be limited to his specific construction. The court of appeals, however, rather intimate that the guides in claim 1 of Kidder's patent "are not present in the Tannahill patent in such a way as to be effective as such." If, as it seems to me, Kidder, for the reasons above given, should be confined to his specific construction, which in other respects is not invaded, it is perhaps superfluous to discuss this intimation; but with deference it is suggested that the function of the guides in both Tannahill's and Kidder's devices and their arrangement is substantially the same, —namely, to lead the web into the proper position between the impression cylinders and the type bed. There seems to be no defect in the performance of that function by Tannahill's guides.

Whether Kidder took his guide from Tannahill or not is immaterial, for he disclaims all that is shown in the Cummings patent of 1868, and his attorney, after failing to cover the functions of the guides, canceled the claim therefor and admitted that "the paper-feed rolls of Cummings undoubtedly perform all the functions performed by the applicant's guides excluding register guide,  $h^4$ ;" while Livermore, as shown supra, supports the novelty of Cox's feed mechanism.

In the seventh claim of his original and amended applications Kidder attempted to include register guide,  $h^4$ ; but the examiner held this anticipated by patent No. 209,674, to Grimshaw, of November 5, 1878. There are other noticeable differences between the register in Kidder's and defendant's machines. In Kidder's, the register guide,  $h^4$ , is an adjustable shaft, under which the paper, after leaving impression cylinder,  $d$ , must be carried, "in order to obtain a correct register of any desired length of sheet to avoid the need of any exact relative adjustment of the types in each form." In defendant's machine, the patentee says, "all that is necessary to make a perfect register is to adjust the position of the roller,  $m'$ , without requiring any adjustment of the paper feeding or delivering rolls or the impression cylinders." Considering that registers were old devices, and their forms were innumerable, it does not seem that the reservation of the register guide,  $h$ , from the admission that Cummings' feed rolls perform all the functions of Kidder's guide, adds any strength to Kidder's claims. He certainly renounced all claim to that guide by submitting to its rejection by the patent office. If Kidder has not taken the Tannahill guides, he has certainly appropriated Cummings', which his patent disclaims. Examination of the guides of Bold, 1822; Carr and Smith, 1840; Montague, 1853; Tannahill, 1854; Cummings, 1868; Kerr, 1870; and Cox, 1878, 1879, 1882,—shows only formal variations between them and Kidder's. Cox's patent of 1879 shows rollers performing the same functions in substantially the same way, with "guides, one on each side of a stationary impression cylinder, and a feeding device which feeds the proper length of web intermittently," which is what Kidder uses.

In view, therefore, of the state of the art, while Kidder might be entitled to claim the combinations he has set forth, although each element thereof is taken from prior machines, and in some, notably Tannahill's, Carr and Smith's, and Cummings', and others, two or more of the elements claimed by Kidder are found in combination, it must necessarily follow, as it seems to me, that Kidder should be restricted to the "form of apparatus for putting his invention into practice" delineated in the drawings and described in the specification, to which he refers, and defendant has not infringed claims 1, 2, or 7 of Kidder's patent. Of course, the defendant must also be acquitted of infringement of the seventh claim if it has not infringed the first or second. The second claim is simply a duplication of the elements of the first, with the addition of the guides. The presumption from the granting of Cox's 1892 patent, in view of the issue of the Kidder patent, is that there is a substan-

tial difference between the inventions and that the latter is not an infringement of the earlier patent. *Boyd v. Tool Co.*, 158 U. S. 260, 15 Sup. Ct. 837; *Ney v. Manufacturing Co.*, 16 C. C. A. 293, 69 Fed. 405-408. That presumption is fortified by the success of the defendant's machine, and the fact that Kidder's has not met the requirements of the trade, nor justified its manufacture, and has remained moribund for nearly three-fourths of its term. This consideration is regarded by the courts. *Hoyt v. Horne*, 145 U. S. 308, 12 Sup. Ct. 922, second paragraph.

Complainant's argument that the throw-off device of the Kidder press should not be held an element of Kidder's first claim is not sustainable. He has made it material, and cannot now discard it; but, if it were discarded, it would not aid the case of complainant under the testimony of its own expert, Mr. Livermore. Complainant would then be confronted with the defense of prior use, which, to say the least, is supported by a strong array of intelligent, unimpeached, and uncontradicted witnesses, some of whom are practical machinists. These testify in varied language substantially that in 1877-78 Cox made and used in his business as a printer at Lafayette, Ind., a web-printing machine in which the impressions were made on the web by means of a reciprocating or locomotive impression cylinder, which was moved back and forth on a stationary form of type by pitmen connected to wheels. This printed but one side of the web. After each impression, and while the cylinder was reversing its movement at the end of the stroke, the web was pulled forward over the bed, thereby removing the printed sheet and drawing a portion of the unprinted web forward to be printed while the printed sheets were cut off the web by automatic shears. Defendant's "Exhibit Cox Model A," which was used on the Cox-Eckerson interference hearing before the patent office in 1890, illustrates his Lafayette press. Speaking of the effect of the elimination of Kidder's throw-off mechanism as an element of his first claim, Livermore, in reply to cross-question 477:

"What element, called for in the combination recited in Kidder's first claim, if the throw-off device for removing the cylinder off the printing plane is not an element of said combination, is not represented in said model?"

—Answers:

"There are none. In my opinion the mechanism in said model clearly embodies the combination shown and described in the Kidder patent, and referred to in claim 1 thereof."

While defendant has produced 34 witnesses in support of this defense, many of them do not speak with such definiteness as to the anticipating device as to entitle their testimony to much weight. There are, however, 13 or 14 whose testimony is not open to this criticism, all or most of whom saw it in operation in 1878 or 1879 at the Curtis Block in Lafayette, Ind., and describe its working so as clearly to identify it as possessing the features claimed for Kidder. These are King, who had work done upon it; Smith, a printer, who witnessed its actual operation; Crapp, a manufacturer of woodenware, who assisted in its construction; Paul

F. Cox, a pressman and brother of the inventor, who operated the press in 1879 and describes fully its working; Lovell, a salesman, who recollected as a particular feature of the press that it stopped feeding when the impression was made; Philbin, a jeweler, who gives a general description of it; Rice, foreman of the Daily Call newspaper, who describes with much particularity the mechanism and operation of the press, and characterizes it generally as "a fully-developed printing press with many new devices"; Vaughn, an implement maker, who also recalls its improvements over prior presses and the movement of the cylinder and of the web, having frequently seen it in operation. Dr. J. M. Smith is equally positive and descriptive from observation of its operation. Johnson, editor of a newspaper, and Townsend, a newspaper publisher of Lafayette, Ind., describe clearly the features and working of the press. Joseph L. Cox, its inventor, is more elaborate and exact in his description. Some of these witnesses testified in the interference between Cox and Eckerson in the patent office, where the evidence established to the satisfaction of the examiners Cox's use of this press at Lafayette in 1878-79.

There is no testimony opposing that of these witnesses. In point of numbers, and definite and positive averments, their evidence more than meets the rigid requirements necessary to this defense. In *Coffin v. Ogden*, 18 Wall. 120-125, it was held that the testimony of five witnesses to prior use brought the proofs within the severest legal tests which could be applied to them, and that defense was held "fully made out." The want of opposing testimony, in addition to the apparent credit to be given to these witnesses, is a feature which distinguishes the case at bar from that of the Barbed Wire Patent, 143 U. S. 275, 12 Sup. Ct. 443, 450, where on a like issue a large number of witnesses were sworn on each side. There is no conflict between the latter case and *Coffin v. Ogden* (which it cites) as to the degree of proof required to establish prior use. Certain it is that if after the lapse of two years from Cox's open use of this Lafayette machine he had sought a patent for it the testimony here adduced would have sufficed to defeat his application, although the only use proved was that made by himself in his own business. *Smith & Griggs Mfg. Co. v. Sprague*, 123 U. S. 249, 257, 258, 8 Sup. Ct. 122. The quantum and quality of evidence adduced by defendant on this point exceeds that offered in *Standard Cartridge Co. v. Peters Cartridge Co.*, 10 Wall. 630, 636, on the question of invention, for in that case the evidence was conflicting.

#### The Stonemetz Patent.

This was issued January 3, 1888, for a web-printing machine. Thus far it has proved utterly sterile,—an unproductive conception rather than an invention,—no machine having been built under it, as is admitted by Wood, complainant's vice president. It is claimed in explanation of this fact that the Stonemetz Company was advised by three patent lawyers that its patent was tributary to Kidder's and would be pursued as an infringement if made. The testimony cited to this statement is that of Wood, who says that Mr.

Vorhees, a patent lawyer of New York, employed by complainant in 1890 or 1891, gave an opinion "for the benefit of the Stonemetz Company \* \* \* that it would not be clear in view of the Kidder patent \* \* \* in building a press under the Stonemetz patent," and that "early in 1892 L. W. Southgate, patent lawyer and expert employed by the Campbell Printing-Press & Manufacturing Company, gave an opinion for the benefit of the Stonemetz Company to the effect that if it did build under the Stonemetz patent \* \* \* it would infringe patent to Kidder," and that at some time not stated J. C. Sturgeon, Esq., of Erie, patent lawyer, gave the Stonemetz Company an opinion to the same effect, as he (Wood) was informed by Sturgeon and members of the latter company. Wood does not say that either Vorhees or Southgate advised the Stonemetz Company, and his testimony as to statements of the members of that company and of Mr. Sturgeon as to the latter's opinion are hearsay and incompetent. Perhaps the acquisition of the Stonemetz patent by complainant and the near approach of the expiration of the Kidder patent has thrown a stronger light on Stonemetz's press, and modified the opinions imputed to counsel by Mr. Wood. Now that the patent has become the property of a corporation which manufactures presses, a more charitable view of its imperfections is taken. The effect of such change of ownership is not unnoticed by the courts. *Manufacturing Co. v. Ladd*, 102 U. S. 411.

Stonemetz's file wrapper shows that J. C. Sturgeon was Stonemetz's attorney to prosecute the application for his patent, and had his attention specially called to Kidder's patent, to avoid which he amended Stonemetz's application. Evidently Mr. Wood misapprehended Mr. Sturgeon's statement. It is significant that neither Mr. Sturgeon nor any member of the Stonemetz Company was called as a witness to excuse the failure to manufacture his press. It would be true that, if these opinions of counsel had eventually proved correct, they would have been "for the benefit of the Stonemetz Company"; but this guarded phrase is far from asserting that that company ever heard of or acted upon the opinion, and is in marked contrast with the direct statement imputed to Sturgeon. It seems highly improbable that the owner of a patent would renounce his rights under it on the advice of counsel employed by the owner of an alleged conflicting patent, especially as the Stonemetz patent was not acquired by complainant until June 25, 1892, a few weeks before the suit against Marden & Rowell. It is significant, as bearing on the defense, that Stonemetz's press is inoperative; that the proofs show that the construction of a press ostensibly under Stonemetz's patent was begun by complainant in 1892 and has not yet been completed. Mr. Wood declined to state whether that press was being constructed strictly under the Stonemetz patent or varied from it. He admits that the machine he mentions in answer to cross-questions 689, 690, as built under the Stonemetz patent, is the same machine mentioned in his answers to cross-questions 641-643 of record, where he testifies that it is built under the Kidder patent. He declined to permit defendant's counsel or ex-

perts to examine the alleged Stonemetz machine, "as the machine \* \* \* contains many improvements, the same being inventions which are not yet secured by patent," etc., and admits that the inking device and the web-manipulating devices were improvements, and that the web-feeding devices were different in the uncompleted press from those in Stonemetz's patent, and that the drawings were not precisely like the machines, illustrated in the exhibit, "you [defendant's counsel] mention, but contain improvements which are inventions."

There is evidently nothing in Wood's testimony repelling the charge that Stonemetz's press is inoperative. The inferences from it are strongly to the contrary. The testimony of Mr. Quimby, defendant's expert, is reasoned and positive that the Stonemetz press cannot be made to work profitably. Certainly, if its feeding mechanism is so defective that, as he says, "there can be no certainty that its imprint upon opposite sides of the web will always be opposite each other," its utility is questionable, and the dormancy of the machine is fully explained. Mr. Cox, whose interest in defendant's device is akin to that of Vice President Wood in Kidder's and Stonemetz's, is a press builder, inventor, and operator of printing presses of many years' experience. His reasoning against the utility and practicability of Stonemetz's press is not met by anything in complainant's proofs and is apparently unanswerable. Mr. Livermore, complainant's expert, frankly disclaims "sufficient experience with the actual running of machines of this character to form any judgment" upon the question:

"Do you think that any feed which depended in any degree upon the momentum movement of a looping roller to shift the web would be a reliable and satisfactory operative feed mechanism?"

Mr. Livermore says: "I really do not know anything about it." This detracts materially from the weight of his opinion against the operativeness of the Tannahill press.

Stockbridge, defendant's witness, who served in the patent office for 15 years as assistant examiner on the appeal board and assistant commissioner of patents, speaking of the tenth claim of Stonemetz's patent, affirms his belief to be that:

"No machine has been or can be made which would be practically operative according to the organization and combination disclosed in the Stonemetz patent, which includes what I call the loop-forming device, which consists in the roller, W<sup>2</sup>, and the means of operating it."

The least effect which can be given to this testimony is to discredit the presumption of utility arising from the patent, and if, upon a jury trial, a verdict adverse to Stonemetz were rendered, it could not be set aside upon this record for want of evidence in its support. It is to be regretted that no model accompanied the application for the patent, that the machine has not been exemplified or its operativeness tested, and that neither Stonemetz nor any practical pressman has been called in to defend it.

In *Deering v. Harvester Works*, 155 U. S. 295, 15 Sup. Ct. 118, it was held, in view of prior devices, that the fact that an inven-

tion was of doubtful utility, and never went into practical use, negatived a broad construction of the patent, "which would operate rather to the discouragement than the promotion of inventive talent."

In *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 489, 11 Sup. Ct. 846, the failure of Conant to put his alleged invention into visible form in the shape of a machine of itself determined the controversy on the question of infringement. The court there said:

"It is evident that the invention was not completed until the construction of the machine. A conception of the mind is not an invention until represented in some physical form, and successful experiments or projects, abandoned by the inventor, are equally destitute of that character. These propositions have been so often reiterated as to be elementary."

This test is fatal to Stonemetz's claim of invention. During the 10 years of inactivity of the owners of the Stonemetz patent the defendant has been making and selling as many as 60 of Cox's presses per annum. The presumption of the utility of Stonemetz's press is not supplemented even by effort toward its manufacture or sale, nor does it appear, save by the assignment of the patent to complainant, that it has attracted capital, investment, or the faith or interest of the trade. The later patent to Cox creates an equally strong presumption of the novelty and utility of his construction. *Ney v. Manufacturing Co.*, 16 C. C. A. 293, 69 Fed. 405. And this presumption is verified by its successful working and its favor with the craft. Because of these considerations,—notably the neglect of Stonemetz and his assigns for 10 years to reduce his invention to practice, or even to put his conception into a tangible form,—the Stonemetz press, though covered by a patent, seems to me a mere disembodied idea, which, whatever its merit, is not here entitled to equitable aid, nor within the spirit of the patent system, which requires diligence in giving to the public the benefit of his improvement. *Christie v. Seybold*, 5 C. C. A. 33, 55 Fed. 69, 75. On this ground Judge Blodgett refused an injunction, both on motion and on interlocutory decree. *Hoe v. Knap*, 27 Fed. 212.

Upon the uncontradicted testimony of the experts and because of the failure to manufacture it even by its present owners, who, holding both the Kidder and Stonemetz patents, are yet unwilling to put it in competition with other machines or to invest their money in its production, I am of the opinion that Stonemetz's press fails to meet the end for which it was designed, is uncertain and defective in operation and without merit. Three years of effort have been spent upon the production of a single press without result, although supposed improvements were added to it; but neither the patented construction nor its additions have yet seen the light. Whether styled an abandoned patented experiment, or an inoperative conception, there is no evidence which establishes its utility except the issue of the patent, the *prima facie* effect of which is overcome by the proofs. The later patent to Cox, which has demonstrated its utility, ought not to be held an infringement of a mere paper design.



Detailed examination of Stonemetz's claims equally fails to sustain the charge of infringement. The claims alleged to be infringed are Nos. 5, 7, 10, 12, and 17. Judge Carpenter ruled that defendant did not infringe claims 5, 7, 10, and 17, and that claim 8 was void for want of invention, but that claim 12 was infringed. Complainant has since disclaimed claim 8. In order to an understanding of the scope of Stonemetz's invention, recourse must be had to the file wrapper for the action of the patent office upon his application. He says in his original application:

"My invention consists principally of a web-printing machine, having stationary flat type beds secured to the frame of the machine and a traveling carriage carrying impression cylinders and inking rollers back and forth from type forms on the stationary type beds and mechanism for carrying a web of paper through the machine."

This was erased by the patent office. This application contained 34 claims. November 23, 1886, the patent office rejected 25 of these as anticipated by prior patents. Thereupon Stonemetz's attorney on June 30, 1887, filed an amendment withdrawing the statement of invention quoted and all the original claims, in lieu of which he substituted 25 claims, in support of which he called "the attention of the examiners to the facts that the impression cylinders operate in contact with the type on the type beds, both in their forward and backward movements," and that "the type beds are located substantially on the same horizontal plane, end to end," claiming for this arrangement great superiority over Kidder, and added: "I have endeavored so to amend applicant's claims as to limit him to his construction, and trust they will prove satisfactory." These amendments, it will be observed, greatly narrowed the original claims by the words "substantially in the same horizontal plane, end to end," which were not contained in any of the original claims. The second and fifth amended claims for "the combination, in a printing machine, of stationary type beds with traveling impression cylinders and inking rollers," etc., operating on the type beds both in their forward and backward movement, —a special feature to which the examiner's attention was called, as above stated,—were rejected as anticipated by Kidder's inking rollers. Stonemetz acquiesced in this ruling. Claim 7 of the substituted claims was claim 9 of the original claims. Limited by the words "located on the same horizontal plane," after the word "type beds," it became claim 5 of the patent as allowed. Substituted claim 3, limited by the words "located on substantially the same horizontal plane of the frame of the machine," became claim 10 of the patent. This limitation made the plane and relative positions of the type beds necessary elements in the press, and, these claims having been allowed on Stonemetz's application as differentiating his construction from Kidder's, complainant cannot be heard to say that parallel type beds located in different planes infringed the specific device and mode of operation described in the patent and restricted by the final clause of claims 5 and 10. *Jeffrey Mfg. Co. v. Independent Electric Co.*, 27 C. C. A. 512, 83 Fed. 200.

In the introductory paragraph of his specification Stonemetz declares "the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same, reference being had to the accompanying drawings, and to the letters of reference marked thereon, forming part of this specification." "Others skilled in the art," working under the plan and directions of the specification and drawings thus emphasized, could never produce a printing machine with its type beds located in different planes or dream that a press having one type bed above and parallel to the other could by any stretch of imagination be evolved from a plan which specified and delineated a structure having its type beds located in the same horizontal plane. If Stonemetz had been a pioneer in this line, and defendant's machine differed from his in no other particular than the position of its type beds, the doctrine of equivalents would probably hold defendant's press an infringement; but Stonemetz was treading on well-beaten ground and closely in the footsteps of many predecessors. There is certainly as wide a difference between his press and defendant's as between his and Kidder's, and this is a circumstance against Stonemetz's broad claims. *Pope Mfg. Co. v. Gormully & Jeffery Mfg. Co.*, 144 U. S. 242, 12 Sup. Ct. 637.

It must be admitted that complainant's vice president, Wood, in answer to cross-question 333, maintains otherwise. He is asked:

"If the claims of the Stonemetz patent are limited to a mechanism containing type beds located on substantially the same plane, giving these words their ordinary meaning in mathematics or mechanics, would you say that the Cox machine contained stationary type beds located in substantially the same horizontal plane in the sense of those words? Ans. You say 'giving those words their ordinary meaning in mathematics or mechanics.' I should therefore, by virtue of the word 'substantially,' consider that the Cox machine contained stationary type beds located on substantially the same horizontal plane in the sense of those words."

While there is nothing in mechanics or mathematics which anticipates the discovery or invention disclosed in this answer or the novelty of its conclusion, it lacks utility. In reply to cross-question 341 the same witness says:

"I do not think that they [the type beds] can be in the same horizontal plane, but I think that as Mr. Stonemetz has used the words 'substantially the same horizontal plane' with respect to his device, they can be considered as substantially the same horizontal plane."

No weight can be attached to such testimony, given with evident knowledge of the action of the patent office on Stonemetz's application, and his attorney's insistence in support of the substituted claims that the location of the type beds "on substantially the same horizontal plane, end to end," distinguished Stonemetz's press from Kidder's, and his concession that Stonemetz was limited to his construction. Stonemetz's references to "the accompanying drawings, and to the letters of reference marked thereon, forming part of this specification," of themselves exclude the broad construction now asserted for claims 5 and 10, and evidence beyond mistake his conception. While he states that "many other mod-

ifications may be made in the mechanism of his machine without departing from the spirit of his invention, \* \* \* therefore I do not desire to limit myself to the exact construction shown," that clause is a mere relic of his original application, and must be confined to the construction and claims there set forth, all of which were withdrawn, and manifestly is no answer to his consent to be limited to the construction shown, nor would it add anything to his invention. The law so interprets his claims as to protect him against colorable evasions. *Winans v. Denmead*, 15 How. 330. "Such a statement does not assist to construe a patent unless it is first determined whether the patent relates to a substantial advance in the state of the art or concerns only improvements in mere details." *Hart & Hegeman Mfg. Co. v. Anchor Electric Co.*, 82 Fed. 912. The patent office defined his invention in the substituted claims, at his request, by incorporating the limitation which he suggested to escape prior patents. *Burns v. Meyer*, 100 U. S. 671; *Yale Lock Mfg. Co. v. Sargent*, 117 U. S. 373, 6 Sup. Ct. 931. Both claims 5 and 10 are also carefully limited by the use in each of the phrases "substantially as described" and "substantially as and for the purposes set forth." This restricted him to the mechanism described and marked by reference letters and shown in the drawings. *Brown v. Davis*, 116 U. S. 251, 6 Sup. Ct. 379; *Sargent v. Burgess*, 129 U. S. 19-26, 9 Sup. Ct. 220; *Pope Mfg. Co. v. Gormully & Jeffery Mfg. Co.*, 144 U. S. 248, 252, 12 Sup. Ct. 643. Any construction which would enlarge either claim 5 or 10 to cover a press whose type beds are not substantially in the same horizontal plane restores to Stonemetz all that he asked by his original claims 9 and 15, both of which were rejected. Volume 3, pages 392 and 393, show the original claims, and pages 397 and 398 the action of the patent office and Mr. Sturgeon's letter assenting to the limitation clause.

Stonemetz's seventh claim reads as follows:

"(7) The combination, in a printing machine, of stationary type beds secured to the frame of the machine, and a travelling carriage carrying impression cylinders and inking rollers and web-carrying rollers thereon, a vertically moving roller for taking up the slack of the web as it is unwound from the web roll, and the vertically moving roller for drawing the web forward, substantially as and for the purpose set forth."

Whatever of merit the feeding device here mentioned may have is limited strictly to the improvements described by the patentee. Lake's patent (English) of May 6, 1883, as well as Cox's patent, No. 332,138, of December, 1885, both show mechanism which performs in substantially the same way the function of Stonemetz's vertically moving rollers, one of which is positively actuated and the other by gravity. Defendant's rollers are both positively actuated. A like difference repelled the charge of infringement in *Joyce v. Foundry*, 127 U. S. 557, 8 Sup. Ct. 1311, and differentiated a pawl actuated by a spring from one which acted by gravity. See, also, *McCormick v. Graham's Adm'r.*, 129 U. S. 1, 9 Sup. Ct. 213.

In Stonemetz's device there is admittedly a slack in the web, which it is the function of the gravity roller to meet and overcome.

Defendant's press carries no slack, and neither has nor needs the vertically moving roller. Neither has defendant used the vertically moving roller for drawing the web forward, operated one way by the web as it is drawn out, for in his machine the looping rollers are not operative either way by the web, but are journaled in a vertically guided frame which is mechanically reciprocated by cams, and the looping rollers are thus made to co-operate with a continuous rotary web feed and delivery. Complainant's expert, Livermore, admits the difference in mode of operation of the web-feeding mechanism of Stonemetz and Cox. Quimby, defendant's expert, corroborates Livermore. Again, Stonemetz's feed is intermittent, while defendant's is continuous and employs a totally diverse mechanism. Without adverting to other differences, there is no invasion of Stonemetz's seventh claim. This was the conclusion reached by Judge Carpenter. This construction of the claim is also evidenced in the qualifying phrase, "substantially as and for the purpose set forth." "The purpose set forth" and the described method of its accomplishment are obviously the taking of the slack web and drawing it forward by the means described, —namely, vertically moving rollers, one of which is actuated by gravity. The absence from defendant's press of this feature alone repels the charge of infringement, even if the claim is not restricted to the exact mechanism described. The phrase quoted confines the invention within the purposes and operation therein specifically named. 2 Rob. Pat. p. 131, § 517.

The seventeenth claim of Stonemetz's patent is not infringed for the reasons stated in the discussion of the seventh claim. Defendant's machine does not have the roller-supporting arms, w, w, nor yet the cutting cylinders, s, s', but has the discharge rollers of Cox's patent, No. 332,138, of December 8, 1885.

Stonemetz's twelfth claim reads as follows:

"(12) The combination, in a printing machine, of the side frames, A, A', the stationary type beds, B, B', with the traveling cylinder carriage, I, carrying the impression cylinders, E, E' (which operate both forward and backward on said type beds), substantially as and for the purpose set forth."

This is his original rejected claim 20, with the addition of the words in parentheses. The structure to which we are referred by the letters of reference in the claim and the preamble to the specification in appearance and parts has not the least resemblance to defendant's machine, which has many more parts, differently arranged and more complicated. Defendant has retained the form and general features of his Grand Rapids press of 1885. The type beds, B, B', in Stonemetz's drawings are horizontal in position and located in the same plane. The traveling carriage, I, carries the impression cylinders, E, E', which bring the web into contact with the type beds. In the English patent to Smith, No. 6,793 of 1835, is shown a machine with corresponding side frames, type beds arranged in the same horizontal plane, end to end, a traveling cylinder carriage like Stonemetz's carriage, I, and impression cylinders which operate both backward and forward on the type bed. The Winch English patent and Bold English patent of 1822 show a

combination in all material elements anticipatory of Stonemetz. The machines shown in these patents were intended to print on sheets and not upon continuous web. This difference, however, is immaterial on the question of anticipation. Mr. Livermore, complainant's witness, concurs with Stockbridge. He says:

"What language, in Stonemetz's claim points out their relations [of the elements] by which they can be distinguished from the prior art? Ans. There is none. That is substantially what I meant to say in the last part of my answer.

"Cross-Ques. 422. Are there no other patents than Smith's which embody the combination of the side frames, stationary beds, and a carriage carrying impression cylinders and inking rollers back and forth over the beds? Ans. I should say that the British patent to Bold, No. 4,690 of 1822, contains a combination including the elements in question. I do not think now of any other."

Quimby testifies for defendant to the same effect. Wood makes substantially the same admissions:

"Cross-Ques. 280. Was there not known in the art, for more than two years prior to the date of filing the application for the Stonemetz patent, a press in which were two flat form beds arranged end to end in substantially the same horizontal plane and two reciprocating impression cylinders traveling thereon and co-acting therewith? Ans. There was. British patent No. 6,793 of 1834 to Andrew Smith shows a device which contains the parts you mention operating to print upon sheets of paper."

In answer to cross-question 281 he adds:

"In British patent No. 4,464 of 1820 to Robert Winch is shown such a device, and also in British patents No. 4,690 of 1822 to John Bold and No. 243 of 1866 to William Clark. In all of these devices the mechanism was shown as adapted to print upon sheets."

So far, therefore, as the novelty of the general combination set forth in claim 12 is concerned, it was long anticipated. The feature claimed for Stonemetz's press as novel was in feeding the web between the forward and backward movement of the cylinders and between their backward and forward movements, thereby doubling the capacity of the press, as his attorney claimed to the patent office. This was accomplished by Cox's Grand Rapids press in 1885, in which the type beds moved instead of the cylinders. Tannahill and Kidder had long anticipated this reversal of the movements of the type beds and cylinders. The express references to the construction and parts shown in the drawings and specification and the final clause of the claim, "substantially as and for the purpose set forth," also negative a broad construction of the claim. *Weir v. Morden*, 125 U. S. 98, 8 Sup. Ct. 869; *Muller v. Machine Co.*, 23 C. C. A. 357, 77 Fed. 627.

Stonemetz, like Kidder, designates by the definite article each of the four elements of this claim. In view of Smith's, Bold's, and Winch's machines the drawings and references thereto and the final clause were limitations forced upon Stonemetz's acceptance as a condition of his patent. Whatever of novelty Stonemetz's press possessed as a whole is not found in the combination of claim 12. His original claim 8 contained the identical parts, with the addition of the inking rollers, and was rejected by the patent office. If there is any invention in claim 12 over Bold, Smith, and Winch, which is very doubtful, it must consist in the specific ar-

rangement of the parts designated with so much particularity and qualified by the final clause to save it from anticipations. Mr. Livermore, complainant's expert, when asked, "What element or elements is recited in Stonemetz's twelfth claim that is and are not recited in the third and fourth claims?" answered, "The side frames, A, A'." These side frames are mere formal variations from Bold's side frames, a, a, and there is nothing new or useful in the form of Stonemetz's frames. The bill does not charge infringement of either claim 3 or 4.

Again, Livermore says:

"\* \* \* Considering merely the elements that are recited in claim 12 apart from their relations by which they constitute a definite combination in the machine of the patent, I should say there is nothing in the phraseology of the claim that distinguishes the combination there referred to from other and different combinations of the prior art containing the same elements, but having substantially different operative relations, so that the combination as a whole into which they enter is different from the combination of the Stonemetz machine referred to in the twelfth claim of the patent."

To accord, therefore, to the claim in question a broad scope, is not only to give Stonemetz what he expressly renounced by insisting on the fact that his type beds are "located on substantially the same horizontal plane, end to end," and therein differ from other constructions,—a limitation which I think was meant to apply to all his claims as a condition of his patent,—but also requires that there should be implied or read into the twelfth claim inking mechanism, a web feeding and delivery device, web guide rollers, and a web-moving mechanism. Judge Carpenter, for the purpose of charging defendant with infringement, held that the words "substantially as and for the purpose set forth" implied a perfecting press. In *McCarty v. Railroad Co.*, 160 U. S. 110, 116, 16 Sup. Ct. 240, the right to thus simplify a claim is emphatically repudiated, the court saying:

"We know of no principle of law which would authorize us to read into a claim that which was not present, for the purpose of making out a case of novelty or infringement. \* \* \* It might require us to read into the fourth claim the flanges and pillars described in the third. This doctrine is too manifestly untenable to require argument."

To the same point is *Adams Electric Ry. Co. v. Lindell Ry. Co.*, 23 C. C. A. 223, 77 Fed. 432, 449.

The principle of these rulings is stated in *White v. Dunbar*, 119 U. S. 47, 7 Sup. Ct. 72, where the court say:

"The claim is a statutory requirement prescribed for the very purpose of making the patentee define precisely what his invention is, and it is unjust to the public as well as an evasion of the law to construe it in any manner different from the plain import of its words."

The claim is the measure of his (the patentee's) right to relief, and, while the specification may be referred to, to limit the claim, it can never be made available to expand it. *McClain v. Ortmyer*, 141 U. S. 424, 12 Sup. Ct. 76. To the same effect is *Brown v. Stillwell & Bierce Co.*, 67 Fed. 731, 740.

As the prior art negatives the novelty of the general combination, and the claim fails to distinguish the arrangement of its parts from

prior devices, the broad construction asked for would invalidate it. *Mathews v. Machine Co.*, 105 U. S. 58, 59; *Jeffrey Mfg. Co. v. Independent Electric Co.*, 27 C. C. A. 512, 83 Fed. 192-201.

If there could be implied into this claim the parts necessary to organize it into a perfecting press, complainant has not met the burden of showing a combination infringing the completed machine. In view of the success of defendant's press, the utter failure of that of Stonemetz, and the differences in parts and construction between the two, the language of the court in *U. S. v. Berdan Fire-Arms Mfg. Co.*, 156 U. S. 565, 15 Sup. Ct. 420, is not inapt:

"For where several elements, no one of which is novel, are united in a combination which is the subject of a patent, and these several elements are thereafter united with another element into a new combination, and this new combination performs work which the patented combination could not, there is no infringement."

The language of the court in *Consolidated Safety-Valve Co. v. Crosby Steam Gauge & Valve Co.*, 113 U. S. 157, 179, 5 Sup. Ct. 513, in speaking of the Richardson valve, is equally applicable to Cox's machine:

"Richardson's invention brought to success what prior inventors had essayed and partly accomplished. He used some things which had been used before, but he added just what was necessary to make the whole a practical, valuable, and economical apparatus. The fact that the known valves were not used, and the speedy and extensive adoption of Richardson's valves, are facts in harmony with the evidence that his valve contains just what the prior valves lack, and go far to sustain the conclusion at which we have arrived on the question of novelty."

There are several patents to which no reference has been made. To discuss these and the many other questions presented by the record would extend this opinion to a still more unreasonable length, although it would, in my judgment, confirm the conclusions here reached. For the reasons stated, the defendant has not infringed either the Kidder or Stonemetz patent, and complainant's bill should be dismissed, with costs.

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OVERWEIGHT COUNTERBALANCE ELEVATOR CO. v. CAHILL &  
HALL ELEVATOR CO. et al.

(Circuit Court, N. D. California. April 4, 1898.

No. 12,521.

PATENTS—PRELIMINARY INJUNCTION.

Where complainant was not manufacturing the patented machine, but had established a regular license fee, and defendants were solvent, and able to respond in damages to the amount of such fee for each machine made by them, *held*, that a preliminary injunction would be denied.

This was a suit in equity by the Overweight Counterbalance Elevator Company against the Cahill & Hall Elevator Company and others for alleged infringement of a patent for an improvement in elevators. The cause was heard on a motion for a preliminary injunction.

S. C. Denson and W. H. H. Hart, for complainant.

John H. Miller, for defendants.

DE HAVEN, District Judge. The complainant seeks by the bill filed in this case to obtain a decree enjoining the defendants from making, using, or vending elevators embodying the invention described in letters patent for an improvement in elevators granted to Philip Hinkle on May 16, 1882, and numbered 257,943. The question now before the court arises on the application of the complainant for an injunction pendente lite. The complainant is not engaged in manufacturing elevators, and it further appears that, prior to the commencement of this action, by resolution of its board of directors it established a royalty or license fee of \$250 for each elevator in which is used the invention covered by the patent in suit. Upon these facts it is clear that damages in an amount equal to the license fee thus established, multiplied by the number of infringing elevators which the defendant corporation may manufacture during the pendency of this action if not restrained, would fully compensate the complainant for any injury which it would suffer by reason of the threatened action of said defendant. It also appears that the defendant corporation is solvent, and able to satisfy any judgment for damages which may be awarded in favor of the complainant, if it shall finally succeed in this action. When it appears that damages will adequately compensate a complainant, and that the defendant is solvent and able to respond in damages, a motion for a preliminary injunction will be denied. *Pullman v. Railroad Co.*, 5 Fed. 72; *New York Grape-Sugar Co. v. American Grape-Sugar Co.*, 10 Fed. 837; *Kane v. Candy Co.*, 44 Fed. 287. It is always a material circumstance, in passing upon an application like this, that the defendant is responsible for any damages which may be decreed against him upon the final hearing. *Morris v. Manufacturing Co.*, 3 Fish. Pat. Cas. 67, Fed. Cas. No. 9,833. The foregoing cases are sound in principle. The office of a preliminary injunction is to preserve the rights of a complainant during the pendency of the litigation, and unless it appears that the alleged wrong threatened by the defendant might work an injury to the complainant, which in the view of a court of equity would be irreparable, such an injunction will not be granted. "The damage threatened to be done, and which it is legitimate to prevent, during the pendency of the suit, must be, in an equitable point of view, of an irreparable character. Such is the clear language and mandate of the cases, from the earliest to the latest." *Citizens' Coach Co. v. Camden Horse R. Co.*, 29 N. J. Eq. 303. To justify the issuance of an injunction pendente lite, the complainant must show a probable right, and also "a probable danger that the right would be defeated without this special interposition of the court." *Georgia v. Brailsford*, 2 Dall. 402; *Railroad Co. v. Earl*, 27 C. C. A. 185, 82 Fed. 690. Inasmuch as damages will compensate the complainant, and the defendant corporation is able to respond in damages, it is clear that the complainant is in no danger of being defeated in its rights, and thereby suffering irreparable injury, if the present application should be denied. I have not overlooked the fact that the solvency of the defendant corporation is attacked in one of the affidavits filed in behalf of complainant, but in my judgment the opposing affidavits of the president and secretary of that corporation are entitled to greater



weight in considering the question of its financial ability. The views here expressed render it unnecessary to consider at this time the other questions presented by the affidavits, and discussed by counsel. The application for a preliminary injunction will be denied upon the ground that complainant has not shown that it will sustain irreparable injury unless such injunction be granted.

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THE ST. PAUL.

INTERNATIONAL NAV. CO. v. THE ST. PAUL (CROSSMAN et al.,  
Interveners).

(Circuit Court of Appeals, Second Circuit. April 7, 1898.)

Nos. 91 and 92.

**1. SALVAGE—VESSEL AND CARGO—SEPARATE CLAIMS.**

Where by one series of operations the cargo is salvaged, and by another the ship, it is proper for the salvors to bring separate proceedings against ship and cargo, and for the court to award separate sums, each bearing a different ratio to the amount salvaged.

**2. SAME—ERROR IN VALUATION OF VESSEL.**

Where the court valued the vessel salvaged at \$2,000,000, while its actual value was \$1,888,500, the error is not material, as, where the total amount salvaged is so large, the difference between the two sums is too small to affect the amount of award.

**3. SAME—COMPENSATION.**

An award of \$131,012.48 as salvage against the liner St. Paul, valued at \$2,000,000, will not be disturbed as excessive, where she was stranded, and called into service the resources of two wrecking companies with equipment, valued at \$400,000. The salvors responded promptly, enabling them to take advantage of the favorable condition of the water on the day she grounded; and the services were rendered by a large force, and occupied 11 days, during which time the liner was exposed to risk of loss.

**4. SAME—UNLOADING AND DELIVERY OF CARGO—LIGHTERAGE OR SALVAGE.**

Where the operations of the salvors in righting and securing a stranded vessel save the cargo, valued at \$2,000,000, from a risk to which it was fairly exposed, and the cargo is then removed by them, the award should be for salvage, and not merely the cost of lighterage, and one of \$28,987.52, though most liberal, will not be disturbed on appeal.

**5. SAME—CHARGE AGAINST SPECIE CARGO.**

No distinction can be made between the proportions of salvage charged against the different kinds of cargo, and specie must bear its share of the common burden.

Appeal from the District Court of the United States for the Southern District of New York.

These are two salvage suits growing out of the stranding of the American Line Steamship St. Paul in January and February, 1897. The first action is in rem against the steamer and her freight moneys, and the second is in personam to recover salvage in respect to her cargo. The two actions were tried together in the district court, Southern district of New York, the testimony being given in open court, resulting in salvage awards of \$131,012.48 against the vessel and of \$28,987.52 against the cargo. The St. Paul, 82 Fed. 104. Appeals have been taken by respondents in both causes, and by libelants in the second one.

Samuel Park and Harrington Putnam, for libelants.

H. Galbraith Ward, for International Nav. Co.

E. L. Baylies, for intervener Van Bergen.

Wilhelmus Mynderse, for intervener Crossman.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge. It will be unnecessary to write a long opinion in this case. The district judge has made an elaborate and careful presentation of the facts, as to most of which there is no dispute. The authorities bearing upon the question, "What amount should be awarded as salvage?" will be found in the opinion in *The Lamington*, handed down herewith, and in the note filed with that opinion. 86 Fed. 675. It will be sufficient briefly to refer to the following points presented on the briefs:

1. The argument has taken a scope far beyond the limits of discussion warranted by these appeals. The libels were filed by salvors to obtain an award for their service. That service was begun when ship and cargo were ashore on the Jersey coast. Before it had proceeded four days the salvors removed the cargo, and subsequently continued their operations on the ship for a week more. The actual services which they rendered to the cargo after they took it from the ship's tackles were materially different from the service they subsequently rendered to the ship itself. When the question of a salvor's remuneration is to be determined, it is eminently proper to inquire exactly what he has done, and to regulate such remuneration accordingly. The cases are numerous where one rate of award has been given on the proceeds of the ship and another and different one on the proceeds of the cargo. It is sufficient to refer to *The City of Worcester*, 42 Fed. 916. It was, therefore, quite proper in the case at bar for the salvors to bring separate proceedings against ship and cargo, and for the court to award separate sums, which did not bear the same ratio to the amounts salvaged. But in so doing it was not necessary to decide, and we do not understand that the district court did decide, whether the community of interest between ship and cargo ended, or when it ended, or to what extent the expense of getting the ship afloat was a common charge, or what should be the measure of contribution as between ship and cargo to any expenses whatever, or, indeed, any of the questions which present themselves when an apportionment of general average is under review, as in the case of *L'Amerique*, 35 Fed. 835. With none of these questions have the salvors any concern. By one series of operations they have salvaged the cargo, by another series of operations they have salvaged the ship. Their libels demand the rewards for these services, and the district court, as its decrees plainly show, has decided only that libelants are entitled to recover as salvage \$131,012.48 against the ship and freight and \$28,987.52 against the cargo.

2. It is contended that the district judge erred in valuing the *St. Paul* at \$2,000,000. It was stipulated in the proceeding against the ship that her value should be taken at \$1,500,000. Subsequently this stipulation seems to have been waived, and testimony was taken bearing on the question of her value. It appeared that the *St. Paul*, which was built in this country, had been completed but a few months, and that she cost \$2,650,000. The president of the International Navigation Company (her owner) testified that this was 30 per cent. more than she could be built for in England. She was so new that a proper valuation would be her fair cost, and, if the \$2,650,000 represents the cost of building such a ship and 30 per cent. on such cost, then such cost would be 130:100::\$2,650,000; (in round numbers)

\$2,038,500. From this should, however, be deducted the depreciation caused by her stranding, which would be fairly represented by what it cost to repair her, viz. \$150,000. This would leave \$1,888,500. When the total amount salvaged is so large, the difference between this sum and \$2,000,000 is too small to affect the amount of award for salvage.

3. It is contended that too large an award was made for salvage, and it is suggested that it is the largest reported in the books, except *The Thetis*, 3 Hagg. Adm. 14. The value of the property salvaged, however, was very greatly in excess of any reported in the books, and, while it is true that the percentage of award diminishes as the amount salvaged increases, no case can be found which does not sustain the proposition that the amount salvaged is an important element to be considered in determining the amount to be awarded. Reference is made to *L'Amerique*, 2 Asp. 460, where an award of £30,000 was reduced on appeal to £18,000. The services in that case were not especially meritorious. Salvors (their vessels being worth \$200,000) fell in with a steamship which had been abandoned in a panic. There was considerable water in her, but it did not come from any leak, and she was in no danger of sinking. Salvors towed her about 100 miles to port, and their services, as the court found, "fall very far short of services which in other cases have been remunerated by much smaller sums." But in the case even of *L'Amerique*, the value of the salvaged property was only £190,000, so that the reduced award was over 9 per cent. Here there is an award against ship and freight, valued at \$2,000,000 of \$131,012, about 6½ per cent. It is unnecessary to rehearse the facts which induced the fixing of the award at that sum. They are fully set forth in the opinion of the district judge. Whatever force there may be in some of the minor criticisms as to his findings, they are on all material points abundantly sustained by the evidence. The appellant contends that the district court was in error in its conclusions as to the difficulty of getting the vessel off, and as to the degree of danger to which she was exposed while she remained aground. Undoubtedly, it is apparent that all the tugs which could be made fast to her could not have pulled her off, and that it needed a heaping up of the water under an easterly wind to make such movement possible. So, too, if the *St. Paul* had procured the necessary cables, and bent them to her own heavy anchors, and planted those anchors just where the wrecker's anchors were planted, and had hired tugs, and pulled and hauled under the same conditions and at the same time, she would have accomplished the same result. But she did none of those things. She promptly called for the salvor's aid on the usual salvage terms, "No cure, no pay," and it may reasonably be supposed that her owners and underwriters felt much more comfortable in their minds when they knew that the resources of two fully equipped wrecking companies (the equipment in service was worth \$400,000) were engaged in the operation, directed by the skill acquired through long years' experience in conducting just such operations on that very coast. Moreover, the element of promptness characterized the service. The wrecking steamer, fully equipped, was sent through a dense fog to the relief of the *St. Paul*, running down the coast on a course determined by the casting of the lead. One result of the salvor's promptness was that a favorable condition of the water on the very day she grounded was

availed of, and the ship moved 160 feet. The exertions of the next eight days, in calm weather and smooth sea, moved her only 77 feet. We cannot say, on this record, whether, had it not been for that 160 feet, the moderate easterly breeze and swell of February 4th would have freed her from her bed sufficiently to accomplish removal, or whether she might not have had to wait for some heavier storm, with the chance of meeting the same misadventure as *L'Amerique*, 35 Fed. 835, breaking her cables and getting still further up on the beach. The appellant, moreover, underrates the danger to which the *St. Paul* was exposed. There was, of course, no "imminent danger," possibly no remote danger, of her breaking up. She had made a bed for herself in the sand, her keel resting on a substratum of tough clay, and, so far as the proof shows, although there were rocks near her, there were none under her. The water was likely to cut out the sand at one place and heap it up at another; but, although that would subject the ship to unequal strain, it may be that she was too strongly built to break her back, so long as her keel rested on the clay. But even if, as appellant contends, she might have remained there in safety for an indefinite time, we cannot accede to the proposition that she was not thereby exposed to risk of loss. Granted that the structure would remain intact high up on the beach, an object of interest to curiosity seekers in calm weather, and that she was so strongly built that, lying nearly broadside to the Atlantic, she would withstand the buffeting of the seas sent in by an easterly gale, and remain intact, a monument to the thoroughness and conscientiousness of American shipwrights, nevertheless she was not built or bought for any such purpose. While she lay on the Jersey beach she was making nothing for her owners, either in money or reputation, but quite the reverse, and her value as an ocean liner was certainly exposed to great risk of deterioration. In the 11 days she lay there the strains to which she was exposed produced such a condition of affairs that it cost \$100,000 for repairs to her hull. It is entirely unreasonable to insist that continued exposure would not have seriously increased this charge. We find nothing in the record or in the arguments of counsel which would require this court to disturb the award of \$131,012.48 as salvage against the ship.

4. The cargo salvaged was worth about \$2,000,000. The award, \$28,987.52, is about 1.45 per cent. It was at once determined to lighten the steamer by removing the cargo, and that operation began on Sunday,—the day after she stranded,—being completed by the Wednesday ensuing. Respondents contend that allowance should be made only of the cost of lighterage at schedule rates of libelants and their actual expenditures,—something less than \$3,000. We are unable to assent to this proposition. The cargo was on board the ship, and exposed to its risks, when the salvors took hold; and remained on board during the operations which resulted in placing the anchors where they proved effectual, and in moving the vessel 160 feet. Salvaged property pays not only for avoidance of the certainty of future mishap, but for avoidance of the risk of such mishap. Calm weather and smooth seas facilitated the work, and, by reducing the element of actual service rendered, reduced the award, but the anchors and cables which the salvors laid down saved the cargo from a risk to which it was fairly exposed; not, indeed of total loss, but of increased cost of

lightering and forwarding, since a slight change in the position of the ship might have so reduced the depth of water alongside as to make the discharge and forwarding of the cargo a much more expensive operation. The award of the district court has undoubtedly been most liberal. If the matter were before us as a court of first instance, we might be inclined to fix the awards against the cargo at 1 per cent.; but, as it is, we do not feel warranted in reversing the decree when the percentage of difference is so small.

5. About \$1,000,000 of the cargo was gold, contained in 21 kegs. The interveners to whom it was consigned insist that salvors should recover only \$100, because the gold was conveniently stowed, easily handled, its discharge into the lighter occupying only one hour, and because it paid a high rate of freight. No authority is cited in support of this proposition, except the dictum of Dr. Lushington in *The Emma* (1844) 2 W. Rob. Adm. 315. The weight of authority, however, is decidedly against differentiating the awards against different kinds of cargo, or relieving specie from bearing its share of the common burden when it is not removed to a place of safety before salvaging operations are begun. *Nelson v. Belmont* 21 N. Y. 36; *McAndrews v. Thatcher*, 3 Wall. 347; *Coast Wrecking Co. v. Phoenix Ins. Co.*, 13 Fed. 127; *Pacific Mail S. S. Co. v. New York H. & R. Min. Co.*, 20 C. C. A. 349, 74 Fed. 564; *The Longford*, 4 Asp. 385.

The decrees of the district court are affirmed, with interest and costs in the first suit, and with neither interest nor costs in the second, both sides having appealed.

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#### McRAE v. BOWERS DREDGING CO.

(Circuit Court, D. Washington, W. D. March 31, 1898.)

##### 1. EQUITY JURISDICTION—INSOLVENT CORPORATION—EXISTING LIENS.

When a court of equity takes control and custody of the assets of an insolvent corporation, it does not destroy existing liens, but assumes the burden of protecting the rights of all parties. It will not surrender the property in its custody, to be disposed of by other courts, but will, when necessary, order a sale of the assets, and distribute the funds.

##### 2. DREDGING VESSEL—MARITIME LIEN.

A dredge designed to facilitate navigation, to be used in deepening harbors and channels, and removing obstructions from navigable rivers, and to bear afloat heavy machinery for that class of work, may become subject to a maritime lien.

##### 3. SAME—WAGES OF CREW.

The services of the engineer, firemen, deck hands, and captain, who work on board a dredging vessel, the mechanics employed in keeping the machinery in repair, the pipe men engaged in laying, connecting, and moving the lines of pipe, and the laborers engaged upon and about the filled area, are required in the prosecution of the work in which the vessel is employed, and they have maritime liens for wages.

##### 4. SAME—PERSONS ENTITLED TO LIENS.

The right to claim a maritime lien for wages is not restricted to mariners who serve the ship with peculiar nautical skill, but extends to all whose services are in furtherance of the main object of the enterprise in which the ship is engaged.

##### 5. SAME—COAL.

Where coal was furnished to dredging vessels on the orders of the manager of the company owning the vessels, and was necessary to enable the dredgers to do their work, and where the manager did not have means to

procure the coal, except upon the credit of the dredgers, this raises a conclusive presumption of the necessity for using the credit of the vessels.

**6. SAME—APPORTIONMENT OF LIEN.**

Where persons were employed on, and coal furnished, two or more vessels, and the evidence shows the time which each man devoted to the service of each vessel, and the amount of coal used on each, the amounts will be fairly apportioned between the vessels.

**7. SAME—STATE LAW CREATING LIEN.**

2 Ballinger's Codes & St. Wash. § 5953, which provides that "all steamers, vessels and boats, their tackle, apparel and furniture, are liable," etc., creates liens upon ships and vessels for services, supplies, and work done and furnished within the state, without regard to the residence of the owners of the vessels.

Hudson & Holt, for plaintiff.

T. D. Powell, for receiver.

Thomas Burke, L. C. Gilman, S. H. Piles, Gorham & Gorham, Ira Bronson, and Geo. E. De Steiguer, for interveners.

HANFORD, District Judge. The defendant is an insolvent corporation, and its property and business are in the hands of a receiver appointed by this court, upon the petition of the complainant, with the acquiescence of the defendant. The property which has come under control of the receiver consists chiefly of patent rights, including the right to own and operate, within certain territory, vessels, machinery, and apparatus for dredging, constructed according to plans and specifications covered by the several patents granted to Alphonso B. Bowers; also, the dredgers Anaconda and Python, with their machinery and equipments. During the years 1895, 1896, and 1897, the defendant was engaged in operating said dredgers in the harbor of Seattle, cutting water ways and filling tide flats, under a contract with the Seattle & Lake Washington Water-Way Company, a corporation which has undertaken to fill a large area of tide flats, and in connection therewith to cut and deepen water ways across said area, and to cut and construct a ship canal, with a lock, to connect Lake Washington with said water ways; said improvements being authorized by a contract made and entered into by the state of Washington with the water-way company. The defendant, under its contract, during the time it was engaged in said work, dredged a water way more than 2,500 feet in length, 500 feet wide, and with a depth of water of 26 feet at low tide, and, with the material excavated by dredging said water way, filled in and made from 75 to 100 acres of land; covering a space theretofore submerged except at low tide. In doing said work the defendant contracted debts for necessary supplies and materials, for repairs to its vessels and machinery, and for wages earned by the men employed in operating the dredgers, and handling the pipes by which the material taken from the water ways was conducted to the filled area. The Anaconda and Python are vessels designed to operate afloat, and to navigate from place to place where their services may be required in dredging and deepening rivers, harbors, and water ways. Before coming to Seattle, they have each been employed at other distant places, and have made voyages by being towed upon the Pacific Ocean. Their machinery consists of rotary cutters, for digging in mud and sand

beneath the water; and centrifugal pumps, by which the sand, mud, and material loosened up by the rotary cutters, and drawn up in a state of solution, is forced through lines of pipe to places of deposit; and engines for driving the cutters and pumps. The interveners are all creditors of the defendant, and by their petitions seek to have their claims adjudicated, and payment thereof decreed to be made out of the proceeds of the assets in the hands of the receiver. Some of them allege that they extended credit to the dredgers for supplies and materials necessary for their use in the business in which they were engaged, and for repairs; and others allege that they have earned wages, as engineers, firemen, and deck hands, in operating the dredgers and the machinery connected therewith, and in doing work necessary in watching and handling the pipes used in connection with the dredgers. All of these interveners claim to have maritime liens upon the dredgers and their equipments for the amounts due to them, respectively, and that the dredgers and their equipments, if not in the custody of the receiver, would be subject to process in suits which might be prosecuted in admiralty to enforce their alleged liens; and for these reasons they ask this court to allow their claims as preferential debts to be paid out of the proceeds to be derived by sale of the dredgers and their equipments. When a court of equity takes control and custody of the assets of an insolvent corporation, it does not assume to destroy existing liens, or to divest the rights of lien creditors. The court assumes the burden of protecting as far as may be the rights of all parties having interests. Therefore it will not surrender property in its custody, to be disposed of under process from other courts, but will, when necessary to enable creditors to collect their dues, order a sale of the assets, and distribute the funds according to the rights and priorities of the owners and creditors. *Pratt v. Coke Co.*, 168 U. S. 259, 18 Sup. Ct. 62; *In re Scott*, Fed. Cas. No. 12,517; *In re People's Mail Steamship Co.*, Id. 10,970. Therefore I hold that the interveners have a standing in this court to assert their claims, and, if they succeed in establishing maritime liens, they should be paid from the proceeds in preference to the general creditors of the defendant corporation.

The main question in the case is whether the dredgers are vessels subject to admiralty process, whether the work which they were doing was a maritime service, whether the contracts under which they were supplied and kept in repair are maritime, and whether their crews have maritime liens for their wages. The writers and judges who have expounded maritime laws, and the rules by which the jurisdiction of admiralty courts must be measured, have not succeeded in making known any satisfactory test by which floating structures which are subjects of admiralty jurisdiction, and to which maritime liens may attach, may be distinguished from those which have no place in the realm of maritime jurisprudence. There are numerous decisions which tell that adaptability to float on the water, masts, sails, propelling machinery, steering apparatus, capacity for carrying merchandise or passengers, and mobility, are features by which a subject of admiralty jurisdiction may be recognized; but the decisions are not all con-

sistent with any guiding principle which makes admiralty jurisdiction depend upon the size or shape of a vessel, her means of propulsion, or her adaptability for use. According to the decisions, a ship, although afloat, is not a ship if her original construction, rigging, and furnishing remain incomplete. Men employed on board of a vessel for her preservation do not acquire maritime liens for their wages if she is out of commission; that is, if she has no voyage in contemplation. A ship is not employed in a maritime service when used merely as a warehouse to hold her cargo after the completion of a voyage, and while navigation is suspended. The actual employment of a structure designed for use in the transportation of merchandise or passengers by sea is not under all circumstances conclusive. Wharves and warehouses are necessary for the transportation and preservation of merchandise to be carried in ships to a distance, and yet such structures, although in fact instruments of commerce and aids to navigation, are not maritime vessels. Floating dry docks, used in the repair of vessels, are not maritime things. On the other hand, a private yacht or pleasure boat, not designed for nor employed in trade or commerce, is a vessel which may be a subject of admiralty jurisdiction. The width of a stream or the length of a voyage is no criterion by which to determine the character of the service, nor the question of admiralty jurisdiction. Neither will jurisdiction of a floating structure be denied by a court of admiralty because it does not carry masts, propelling machinery, or steering apparatus, or lacks accommodations for a crew. There is great confusion in the decisions as to whether particular structures, such as pile drivers, wharf boats, rafts, and dismantled vessels, are to be classed within or without the pale of admiralty jurisdiction. The following is a list of cases in which the jurisdiction has been sustained over a great variety of floating structures, including a floating elevator, a harbor tugboat of less than five tons, a scow, a canal boat used only upon an artificial canal wholly within one state, a barge without masts, sails, propelling machinery, rudder or anchor, a ferry boat, a steam derrick boat, a floating boat house, a floating bath house, a pile driver, a dredger, and a raft of timber: 1 Am. & Eng. Enc. Law (2d Ed.) p. 255; *The Cheeseman v. Two Ferry Boats*, Fed. Cas. No. 2,633; *The Dick Keys*, Fed. Cas. No. 3,898; *The E. M. McChesney*, Fed. Cas. No. 4,463; *Id.*, Fed. Cas. No. 4,464; *Fifty Thousand Feet of Timber*, Fed. Cas. No. 4,783; *The Florence*, Fed. Cas. No. 4,880; *The Gate City*, Fed. Cas. No. 5,267; *The General Cass*, Fed. Cas. No. 5,307; *The Hezekiah Baldwin*, Fed. Cas. No. 6,449; *The Kate Tremaine*, Fed. Cas. No. 7,622; *Maltby v. Steam Derrick Boat*, Fed. Cas. No. 9,000; *Raft of Spars*, Fed. Cas. No. 11,528; *The W. J. Walsh*, Fed. Cas. No. 17,922; *Malony v. City of Milwaukee*, 1 Fed. 611; *Murray v. The F. B. Nimick*, 2 Fed. 86; *Endner v. Greco*, 3 Fed. 411; *The Old Natchez*, 9 Fed. 476; *U. S. v. One Raft of Timber*, 13 Fed. 796; *Muntz v. Raft of Timber*, 15 Fed. 555, 557; *The B. & C.*, 18 Fed. 543, affirmed in *Ex parte Boyer*, 109 U. S. 629-632, 3 Sup. Ct. 434; *The Alabama*, 19 Fed. 544; *Id.*, 22 Fed. 449; *The Ella B.*, 24 Fed. 508; *The Murphy Tugs*, 28 Fed. 429; *The Pioneer*, 30 Fed. 206; *Woodruff v. One Covered Scow*, 30 Fed. 269; *Disbrow v. The Walsh Bros.*, 36 Fed. 607;



*Aitcheson v. The Endless Chain Dredge*, 40 Fed. 253; *Coasting Co. v. The Commodore*, 40 Fed. 258; *Seabrook v. Raft of Railroad Cross-Ties*, 40 Fed. 596; *Bywater v. Raft of Piles*, 42 Fed. 917; *The City of Pittsburgh*, 45 Fed. 699; *The Progresso*, 46 Fed. 292; *The St. Louis*, 48 Fed. 313; *The Wilmington*, 48 Fed. 566; *Stebbins v. Five Mud Scows*, 50 Fed. 227; *Id.*, 12 C. C. A. 359, 64 Fed. 495; *The Atlantic*, 53 Fed. 607; *The Starbuck*, 61 Fed. 502; *The Public Bath No. 13*, 61 Fed. 692; *Saylor v. Taylor*, 23 C. C. A. 343, 77 Fed. 476; *The International*, 83 Fed. 840; *Lawrence v. Flatboat*, 84 Fed. 200; *Ex parte Easton*, 95 U. S. 68-78. A dredging vessel, designed to facilitate navigation, by going from place to place, to be used in deepening harbors and channels, and removing obstructions from navigable rivers, and to bear afloat heavy machinery and appliances for use in that class of work, may commit, or be injured by, a marine tort, and she may become subject to a maritime lien for salvage. She has mobility, and her element is the water. She can be used afloat, and not otherwise. She has carrying capacity, and her employment has direct reference to commerce and navigation. I perceive no reason for exempting such a vessel from the liabilities arising from nonpayment of the wages of her crew, or from such unfulfilled contracts as would subject other vessels to liens enforceable by a court of admiralty.

I find no difficulty in pronouncing in favor of the engineers, firemen, deck hands, and captains who worked on board of the dredgers. They have maritime liens for the balances due to them for wages. The captains were not clothed with the authority of masters, but were simply foremen in charge of the working crews. Therefore the rule that the master of a vessel has no lien for wages does not apply to them. Those who worked as general mechanics in keeping the machinery in repair, and the pipe men, who attended to laying, connecting, and moving the lines of pipe, and those who performed necessary labor upon and about the filled area, are also entitled to liens. Their services were required in prosecution of the enterprise in which the vessels were employed. The right to claim a lien for wages under the general maritime law is not restricted to favor only mariners who serve the ship with peculiar nautical skill, but extends to all whose services are in furtherance of the main object of the enterprise in which the ship is engaged. *The Minna*, 11 Fed. 759; *The Ocean Spray*, Fed. Cas. No. 10,412. It is true that some of the men worked upon and in connection with both vessels, and the law does not admit of a lien upon one vessel for wages earned in service upon a different vessel; but the evidence shows with approximate accuracy the time which each man devoted to the service of each vessel, and the amounts can be fairly apportioned.

All of the coal consumed by both vessels while engaged in the work was purchased of the intervener C. J. Smith, as receiver of the Oregon Improvement Company. The evidence shows that the defendant is a corporation organized under the laws of the state of Illinois. Its president and general officers, except a general manager, were not inhabitants of this state, and it had no general office in this state while the work referred to was being done.

The coal was furnished upon the request of the general manager, and was delivered in scows, from which it was received on board the dredgers as required for use. The evidence shows the average daily consumption of each of the dredgers, and the number of hours each was in operation; and from this data a close estimate of the amount supplied to each can be ascertained, and a fair apportionment made, so that the liens upon each vessel will not be for a greater amount than the price of the coal which she consumed. Five thousand dollars is claimed as a set-off for work done by the dredgers in front of a wharf owned by the Oregon Improvement Company in Seattle harbor. The receiver has allowed a credit of \$4,000 for this work, and I find from the evidence that this amount is full compensation for the service of the dredgers under the contract which the defendant made with Receiver Smith. It is earnestly contended in opposition to the demand of this intervenor that the evidence is insufficient to prove that there was necessity for purchasing supplies of coal upon the credit of the dredgers, and that without such necessity there can be no lien. The proof is ample to show that the supplies were ordered by the general manager of the defendant corporation, that such supplies were necessary to enable the dredgers to do their work, and that the general manager did not have money to pay for or means to procure said supplies, otherwise than upon the credit of the dredgers. This evidence is sufficient to raise a conclusive presumption of necessity for using the credit of the vessels. *The Grapeshot*, 9 Wall. 129-145; *The Lulu*, 10 Wall. 192-204.

The claims to liens for wages and for supplies and repairs are founded, not only upon the general maritime law, but also upon a statute in force in this state, which provides that:

"All steamers, vessels and boats, their tackle, apparel and furniture, are liable: (1) For services rendered on board at the request of or on contract with their respective owners, masters, agents, or consignees. (2) For supplies furnished in this state for their use at the request of their respective owners, masters, agents, or consignees. (3) For work done or material furnished in this state, for their construction, repair, or equipment, at the request of their respective owners, masters, agents, consignees, contractors, subcontractors, or other person or persons having charge in whole or in part of their construction, alteration, repair, or equipment." 2 Ballinger's Codes & St. Wash. § 5953.

From the evidence and stipulations of the parties, I find that the claims of C. J. Smith, receiver of the Oregon Improvement Company, the Moran Bros. Company, and P. J. Sullivan, for supplies and materials furnished, and for repairs, come clearly within the letter and spirit of this statute. The power of the legislature to create a lien upon a vessel owned by a nonresident of this state is denied, and a number of decisions have been cited to the effect that the maritime law is not subject to amendment or change either by congress or the legislature of any state. It is well established, however, by repeated decisions of the supreme court, that the state legislatures can create liens upon ships and vessels, and that such liens, when given to secure debts or liabilities cognizable in a court of admiralty, may be enforced by the process of a court of admiralty. See *The J. E. Rumbell*, 148 U. S. 1-21, 13 Sup. Ct. 498, in which the previous rulings of the supreme court

relating to this subject are reviewed and fully explained. The legislature may confer a right of action, and create a lien for its security; but, when process in rem against a vessel is necessary to give effect to such statutes, the remedy must be sought in a federal court of admiralty jurisdiction. This doctrine is illustrated by the decisions as to the right of the family of a deceased person to sue for damages. The supreme court of the United States has decided that, unless authorized by a statute, a suit in admiralty cannot be maintained to recover damages for a death, caused by a wrongful act or negligence, upon navigable waters within the United States. *The Corsair*, 145 U. S. 335-341, 12 Sup. Ct. 949. But where by a state statute a right of action is conferred upon the personal representatives of a deceased person, to recover damages for his death, when caused by the wrongful act or negligence or fault of another, if the tort occurred on navigable waters within the state, and a lien is also given upon a vessel in fault, a suit in rem in admiralty can be maintained to recover such damages. 1 Am. & Eng. Enc. Law, pp. 658, 659; *The Oregon*, 45 Fed. 62; *The Willamette*, 59 Fed. 797, affirmed in 70 Fed. 874; *In re Humboldt Lumber Mfrs. Ass'n*, 60 Fed. 428, affirmed in 19 C. C. A. 481, 73 Fed. 239; *The Oceanic*, 61 Fed. 338, affirmed in 20 C. C. A. 419, 74 Fed. 261. The valid laws of a state, which by their terms are not restricted in their application to property owned by citizens or inhabitants, must be treated as of general application. In the matter of liens upon vessels, it is not ownership within the state which renders the vessel subject to the statute, but the fact of the transaction being within the state. There would be no reason or justice in exempting vessels owned by nonresidents, when employed within this state, from liabilities and burdens imposed upon vessels having resident owners; and there is no provision of the constitution limiting the power of the legislature of a state which can possibly be so construed as to make such exemption of foreign vessels necessary.

I am unable to find from the evidence that the Washington Rubber Company, the Puget Sound Machinery Depot, the Seattle Hardware Company, or the Gutta-Percha & Rubber Manufacturing Company have liens upon either of the vessels, either under the general maritime law or the statute. As to each of these interveners there is a failure of proof to show that the supplies and materials sold to the defendant company were necessary for use in connection with the work of either of the dredgers, or that they were so used. Their demands in the amounts claimed will be recognized as valid debts of the corporation, but not as preferential.

The question of interest will be determined when there are funds to distribute. If the assets should be insufficient to pay all the debts of the defendant, with legal interest, or the contract rate, where there have been promises in writing to pay interest, then each creditor will receive a dividend upon a pro rata distribution of the funds, based upon a computation of the principal amounts.

The payments to be credited against the claim of P. J. Sullivan will be applied as he has shown by his amended petition that he has applied the same.

Attorney fees will be allowed as follows: To National Bank of Commerce, \$250; to Merchants' National Bank of Portland, \$300; to First National Bank of Portland, \$125.

A decree will be entered allowing the claims of all the interveners for the amounts admitted to be due, and directing that the Anaconda and Python be sold separately, and that the debts due to the employes, and to C. J. Smith, the Moran Bros. Company, and P. J. Sullivan, rank as preferred claims against the proceeds for the several amounts which the evidence shows to be properly chargeable against each vessel.

## THE HUMBOLDT.

GRAUMAN v. THE HUMBOLDT et al.

(District Court, D. Washington, N. D. March 15, 1898.)

### 1. MARITIME CONTRACT—SUIT IN REM.

A contract constituting a person general passenger and freight agent of a steamship, and giving him entire control of her passenger and freight business, is not a maritime contract, and a suit in rem in admiralty will not lie for a breach of such contract.

### 2. ADMIRALTY—JURISDICTION—LIEN.

A contract for services such as are usually performed by ships' brokers and business agents, and performed on land, is not a maritime contract, and cannot be made the basis of a maritime lien, which may be enforced in a court of admiralty.

Metcalfe & Jurey, for libellant.

Gorham & Gorham and Fred Rice Rowell, for claimant.

HANFORD, District Judge. This is a suit in rem by D. J. Grauman against the steamship Humboldt, to recover damages for breach of a contract alleged to have been made by and between the libellant and the charterer of the steamship, with the knowledge and consent of her owner, by which the libellant was constituted the general passenger and freight agent of the vessel at Seattle during the term for which she was under charter. Under the contract, the libellant was to have entire control of the passenger and freight business of said steamship, and was to receive as his compensation 10 per cent. of her earnings during said period, and for said compensation the steamship and her earnings were to be liable to him. The libel also alleges that the libellant removed from his former place of residence to Seattle, and, relying upon the credit of the ship, entered upon the performance of his duties, and that he declined to accept other offers of lucrative employment; that his commission on the amount of earnings of the steamship, if the contract had not been broken, would have amounted to \$10,000; and the said contract has been wrongfully canceled, thereby causing damage to the libellant in the amount of \$10,000. The case has been heard upon a plea to the jurisdiction in the form of exceptive allegations denying that the contract sued on is a maritime contract, and denying the right of the libellant to maintain a suit in rem founded upon said contract.

The designation of the libelant in the contract as "General Passenger and Freight Agent" must be understood as indicating the nature of the services for which he was engaged, and the inferences to be drawn therefrom, and from the failure of the libel to show anything different, are that the services were not of a maritime nature, but were to be performed on land, and were similar to the ordinary work of solicitors, ships' brokers, and business agents, who have no part in the navigation of vessels. Such a contract is not maritime, and cannot be made the basis of a maritime lien. A lien does not attach to a vessel as security for the performance of a contract of affreightment, or for the transportation of passengers, until the freight or passengers have been taken on board, or placed in the care of the ship's master or a duly-authorized agent of the owners. *The Freeman v. Buckingham*, 18 How. 182; *Vandewater v. Mills*, 19 How. 82; *The Lady Franklin*, 8 Wall. 325; *The Keokuk*, 9 Wall. 517; *The Delaware*, 14 Wall. 579; *The General Sheridan*, Fed. Cas. No. 5,319; *The Ira Chaffee*, 2 Fed. 401; *The Monte A.*, 12 Fed. 331; *The Eugene*, 83 Fed. 222. An agreement to solicit business for a ship, and to act as agent in making maritime contracts, is at least one degree more remote from the business of a ship, as such, than an executory contract of affreightment or passenger contract, and the ground for claiming a lien is correspondingly less. The authorities cited which seem to resemble most nearly the case under consideration are *The Thames*, 10 Fed. 848; *The J. C. Williams*, 15 Fed. 558; *The Crystal Stream*, 25 Fed. 575; *The Paola R.*, 32 Fed. 174; *Doolittle v. Knobeloch*, 39 Fed. 40. These cases all deny the right to claim a lien for commissions of a ship's agent or broker. The cases cited by counsel for the libelant, in which liens were sustained, were all based upon services which were considered to be necessary to enable a ship to discharge the obligations of a maritime contract, as in the cases of *The Canada*, 7 Fed. 124, and *The Wivanhoe*, 26 Fed. 927, in which liens were claimed for delivering cargo on board the vessels; or cases in which, on account of the known insolvency of the owners, freight was hypothecated to obtain necessary credit for disbursing a ship in a foreign port. so as to avoid detention, as in the following cases: *Freights of The Kate*, 63 Fed. 707; *The Advance*, 19 C. C. A. 194; 72 Fed. 793; *The Allianca*, Id.; *The Vigilancia*, Id. The alleged agreement that the ship and her earnings shall be liable for the libelant's compensation under the contract, even if made with all the formalities necessary to constitute a valid hypothecation of a vessel, would not change the nature of the contract, nor confer jurisdiction upon a court of admiralty to enforce it. A lien so created would not be essentially different from a mortgage, and it is settled law in this country that a suit in rem in admiralty cannot be maintained to foreclose a mortgage upon a vessel. A decree will be entered sustaining the plea and dismissing the suit.

## HOLLINGSWORTH v. SOUTHERN RY. CO.

(Circuit Court, D. South Carolina. April 15, 1898.)

**STATUTE ADOPTING FOREIGN CORPORATION—JURISDICTION OF UNITED STATES COURTS—DIVERSITY OF CITIZENSHIP.**

Act March 9, 1896 (22 St. at Large S. C. p. 114), prescribes the necessary steps to authorize a foreign corporation to transact business in the state, and provides that any foreign corporation complying with such requirements shall become a domestic corporation, enjoy the rights and be subject to the liabilities of such domestic corporation, may sue and be sued in the state courts, and shall be subject to the jurisdiction of the state as fully as though originally created under the laws of South Carolina. *Held*, that a foreign corporation does not, by complying with such statute, become a citizen of South Carolina, so as to affect the jurisdiction of the United States courts over it.

Sheppard & Geier, for plaintiff.

B. L. Abney, for defendant.

SIMONTON, Circuit Judge. This case comes up upon a motion to remand. The cause was originally brought in the court of common pleas of Greenwood county, S. C., against the defendant. The complaint made the following allegations as to the status and citizenship of the defendant:

First. "That the defendants are a body politic and corporate, created by and organized according to law."

Second. "That the plaintiff is informed and believes and alleges that the defendants are a body politic and corporate, chartered by and organized under the laws of the state of Virginia."

Third. "That the plaintiff is informed and believes and alleges that the defendants have complied with the provisions of an act of the general assembly of the state of South Carolina, approved March 9th, A. D. 1896, entitled 'An act to provide the manner in which railroad companies incorporated under the laws of other states or countries may become incorporated in this state,' and are doing business in this state, under the name and style of 'Southern Railway Company.'"

Fourth. "That in and by the provisions of the act of the general assembly of South Carolina mentioned in the next preceding paragraph hereof, and in the 3rd section thereof, it is provided 'that when a foreign corporation complies with the provisions and requirements of this act, it shall ipso facto become a domestic corporation, and shall enjoy the rights and be subject to the liabilities of such domestic corporations; it may sue and be sued in the courts of this state, and shall be subject to the jurisdiction of this state as if it were originally created under the laws of the state of South Carolina.'"

Fifth. "That the defendants are now, and at the times hereinafter mentioned were, the owners of a railroad which runs from the city of Columbia, in said state, to the city of Greenville, in the said state, which is commonly known as the Columbia and Greenville Railroad, which said railroad passes through the town of Greenwood, in the county of Greenwood, in the said state, together with the engines, cars, locomotives, tracks, and side tracks, or sidings appurtenant or belonging thereunto."

Sixth. "That the defendants are now, and at the times hereinafter mentioned were, operating the said railroad, running as aforesaid, from the city of Columbia, through the town of Greenwood, to the city of Greenville, together with the engines, cars, locomotives, tracks, and side tracks, or sidings thereunto belonging."

After complaint filed, the defendant filed its petition for removal, on the ground of diversity of citizenship, and gave the proper bond. The

cause was removed into this court, the plaintiff not assenting, but giving notice of the motion to remand.

The motion to remand is based upon the statute of the state of South Carolina, of March 9, 1896 (22 St. at Large, p. 114), and the proceeding of this defendant thereunder. The statute is in these words:

"Section 1. Be it enacted by the general assembly of the state of South Carolina, that each and every railroad company or railroad corporation created or organized under or by virtue of any government other than that of this state desiring to own property or carry on business, or exercise any corporate franchise in this state of any kind whatsoever, shall first file in the office of the secretary of state a copy of its charter, paying therefor such fees as may be required by law, and cause a copy of such charter to be recorded in the office of the register of mesne conveyances of clerk of court of common pleas in each county in which such company or corporation desires or proposes to carry on its business or to acquire or own property. Such copy of the charter shall be authenticated in the manner directed by law for the authentication of the statutes of the state or country under whose laws such corporation is chartered or organized.

"Sec. 2. That if any such charter or any part thereof, filed as aforesaid in the office of the secretary of state, shall be in contravention or violation of the laws of this state, such charter or such parts thereof so in conflict with the laws of this state shall be null and void.

"Sec. 3. That when a foreign corporation complies with the provisions and requirements of this act it shall ipso facto become a domestic corporation, and shall enjoy the rights and be subject to the liabilities of such domestic corporation; it may sue and be sued in the courts of this state, and shall be subject to the jurisdiction of this state, as fully as if it were originally created under the laws of the state of South Carolina.

"Sec. 4. That it shall be unlawful for any such foreign corporation to do business, or attempt to do business, in this state without first having complied with the requirements of this act, and any violation of this act shall be punished by the forfeiture to the state by the party offending of a penalty of five hundred dollars, to be recovered by suit in the court of common pleas for any county in which such offender does or attempts to do business, or in any other court of competent jurisdiction.

"Approved the ninth day of March, A. D. 1896."

The defendant company complied with the provisions of this act, and insisted upon its right to them. This contention was sustained by the supreme court of the state. *State v. Tompkins*, 48 S. C. 49, 25 S. E. 982. The motion to remand is based on this statute of the state. The plaintiff contends that, by the operation of the statute and the action of the defendant thereunder, it has become in all respects a corporation of the state of South Carolina, and has lost any right of removal into this court. If the intent of this statute is to impose as a condition upon foreign corporations, before they are allowed to do business in this state, such action on their part as will deprive them of, or prevent them from seeking, the jurisdiction of the federal court, it is inoperative and void. No state legislature can lawfully impose such a condition in express terms upon any corporation seeking to do business in a state, nor would the acceptance of any such condition bind such corporation, nor can any state legislature by indirection accomplish that which it cannot do directly. In *Insurance Co. v. Morse*, 20 Wall. 445, a condition prescribed for corporations before doing business in a state that they must first agree not to remove a suit for trial into the United States circuit court or federal courts is repugnant to the constitution of the United States and the laws in pursuance thereof, and is null and void; and, further, the agreement filed by a

corporation under such an act is also void." This case was affirmed (*Barron v. Burnside*, 121 U. S. 186, 7 Sup. Ct. 931); and this case emphasizes the doctrine that all legislation, the intent and purpose of which is to deprive a foreign corporation of the privilege of suit in the federal courts,—a privilege secured to it by the constitution,—is wholly null and void. So, also, the doctrine is fully sustained in *Southern Pac. Co. v. Denton*, 146 U. S. 202, 13 Sup. Ct. 44. All the cases sustain this proposition also: "That agreements in advance to oust the courts of jurisdiction conferred by law are illegal and void, and that, while the right to remove a suit may be waived or its exercise omitted in each recurring case, a party could not bind himself in advance by an agreement which might be specifically enforced thus to forfeit his right at all times and on all occasions whenever the case might be presented." *Barron v. Burnside*, *supra*. This being so, if the purpose of the act was to impose a condition of this sort, and that purpose was expressed, there can be no doubt it would be invalid; and if the purpose is in the act without frank expression, but is there to all intents and purposes, then that purpose would be unlawful, and to this extent the act would be invalid. *Moore v. Railway Co.*, 21 Fed., at page 819.

Whatever may be the purpose of the act, or whether it be valid or invalid, do its provisions prevent the Southern Railway Company from seeking the jurisdiction of this court? Is it made so far a corporation of the state of South Carolina as to deprive this court of jurisdiction over a suit between it and a citizen of South Carolina? It must first be noticed that the act of assembly now under discussion does not profess to create a corporation. It assumes a corporation already created and organized under the authority of some other state or power. It then, after certain formalities are observed, adopts that corporation as a domestic corporation.

A corporation is the creature of the state under whose legislation it is formed. It cannot divest itself of its paternity, nor can it ever lose it, nor can the subsequent act of any state or sovereign change it. On this point the supreme court, in *Nashua & L. R. Corp. v. Boston & L. R. Corp.*, 136 U. S., at page 372, 10 Sup. Ct. 1007, say:

"A more satisfactory answer would, perhaps, have been, that, whatever effect may be attributed to the legislation of Massachusetts in creating a new corporation by the same name with that of the complainant, or in allowing a union of its business and property with that of the complainant, it did not change the existence of the complainant as a corporation of New Hampshire, nor its character as a citizen of that state, for the enforcement of its rights of action in the national courts against citizens of other states. Indeed, no other state could, by its legislation, change this character of that corporation, however great the rights and privileges bestowed upon it. The new corporation created by Massachusetts, though bearing the same name, composed of the same stockholders, and designed to accomplish the same purposes, is not the same corporation with the one in New Hampshire. Identity of name, powers, and purposes does not create an identity of origin or existence, any more than any other statutes, alike in language, passed by different legislative bodies, can properly be said to owe their existence to both. To each statute, and to the corporation created by it, there can be but one legislative paternity."

The jurisdiction of the circuit courts of the United States, when based on diversity of citizenship, is confined to suits between citizens of states, and aliens. If plaintiff or defendant be a citizen of a terri-



tory or of the District of Columbia, jurisdiction will not attach. He must be a citizen and resident of a state. A corporation is not a citizen, within the meaning of the acts of congress. "It is a political being, created by the law, and cannot sustain the character of a citizen." Curt. Jur. U. S. Cts. 128. When a suit is brought by a corporation in the United States circuit court, based on diversity of citizenship, the jurisdiction is maintained upon the ground that, the corporation being a foreign corporation, the corporators are citizens of another state than the defendant. *Insurance Co. v. Boardman*, 5 Cranch, 57; *Bank v. Slocumb*, 14 Pet. 60; *Bank v. Deveaux*, 5 Cranch, 61. At first this fact had to be averred and proved. Subsequently the supreme court held that the court would presume as a matter of fact that the corporators of a corporation of another state were citizens of that state, and no averment or evidence to the contrary was admissible. *Railroad Co. v. Wheeler*, 1 Black, 286; *Railroad Co. v. Letson*, 2 How. 497. This presumption is conclusive. *Steamship Co. v. Tugman*, 106 U. S. 118, 1 Sup. Ct. 58. But the jurisdiction depends upon the fact, that is conclusively presumed, that the corporators are citizens of the state creating the corporation. So, when the Southern Railway Company comes into this court, and claims jurisdiction, the claim is not based upon the fact that it is a corporation of the state of Virginia or a citizen of Virginia, but upon the fact that its corporators are citizens of Virginia. Now, when the state of South Carolina adopts this corporation of the state of Virginia, and makes it a domestic corporation, it neither makes the corporation a citizen of this state, nor can it make the corporators of the Virginia corporation citizens of South Carolina. The courts will not do this; nor will they extend the doctrine that the corporators of a corporation are indisputably citizens of the state creating it, so as to presume in like manner that corporators of an adopted corporation are citizens of the state adopting it. *Railroad Co. v. James*, 161 U. S. 545, 16 Sup. Ct. 621.

In the circuit court of appeals of the Sixth circuit is a well-considered case on this subject. *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, 23 C. C. A. 378, 75 Fed. 437. The opinion of the court is delivered by a learned and accurate circuit judge (Taft). The Louisville, New Albany & Chicago Railroad Company had been incorporated by the state of Indiana. Subsequently the legislature of Kentucky passed an act, the first section of which is in these words:

"That the Louisville, New Albany & Chicago Railway Company, a corporation organized under the laws of the state of Indiana, is hereby constituted a corporation with power to sue and be sued, contract and be contracted with, to have and use a common seal with the power incident to corporations and authority to operate a railroad."

The plaintiff was a citizen of Kentucky, and to the suit brought in the circuit court of the United States it was contended that the defendant railway corporation was a corporation of the state of Kentucky, and so a citizen of that state, and that the court was without jurisdiction. After discussing the question whether or not the act of the legislature of Kentucky created a new corporation, or merely licensed and recognized the Indiana corporation, the court say:

"But even if the Kentucky acts did create a new corporation out of the Louisville, New Albany & Chicago Railway Company, in 1880, the new corporation, though created by Kentucky law, was, for the purposes of federal jurisdiction, a citizen of Indiana."

For this the court rely on *Railway Co. v. James*, supra.

The doctrine is summed up in these words by the supreme court, in *Railroad Co. v. Steele*:

"While a railroad company owning and operating a line running through several states may receive and exercise powers granted by each, and may for many purposes be regarded as a corporation of each, such legislation does not avail to make the same corporation a citizen of every state it passes through, within the meaning of the jurisdiction clause of the constitution of the United States." 167 U. S. 659, 17 Sup. Ct. 925.

So, whether we construe the act of assembly of the state of South Carolina as imposing a condition upon foreign corporations, which conflicts with the constitution of the United States and the laws passed thereunder, or whether we construe the act as adopting foreign corporations, and as making them for many purposes domestic corporations, still, the jurisdiction of this court over such corporation is not affected thereby, and it can seek and receive the exercise of this jurisdiction notwithstanding the existence of this act. The motion to remand is refused.

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#### BROWN v. ELLIS.

(Circuit Court, D. Vermont. March 4, 1898.)

#### FEDERAL COURTS — JURISDICTION — NATIONAL BANKS — ASSESSMENT AGAINST SHAREHOLDER'S ESTATE.

An assessment against the estate of an owner of national bank stock, in the hands of his executrix, is enforceable in the federal courts, though proceedings for settlement of the estate are pending in the probate court of Vermont.

This was a suit in equity by Jonathan W. Brown against Rosette R. Ellis, executrix of the estate of J. R. Ellis, to recover an assessment made by the comptroller of the currency against such estate on shares of national bank stock.

Thomas J. Boynton, for plaintiff.

Hiram A. Huse, for defendant.

WHEELER, District Judge. Section 5151 of the Revised Statutes of the United States provides that the shareholders of national banks shall be holden for the debts and obligations of the banks; and section 5152 that:

"Persons holding stock as executors, administrators, guardians or trustees shall not be personally subject to any liabilities as stockholders but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust would be, if living and competent to act and hold the stock in his own name."

The plaintiff is receiver of the Sioux National Bank, and the defendant is executrix of the estate of J. R. Ellis, who is alleged to have

held 24 shares of the stock of that bank, which came to her hands as executrix, after his death, January 9, 1892, and upon which, while so in her hands, the comptroller of the currency, on March 5, 1897, assessed \$75 per share for payment of the debts of the bank. This bill is brought to recover this assessment out of the assets of the estate in her hands. The answer denies holding the stock, and alleges the appointment of commissioners of claims against the estate by, and the return of their proceedings to, the probate court of the state having jurisdiction of the settlement of the estate, which is still pending, as exclusive of this suit. The plaintiff has excepted to this part of the answer as impertinent, and this exception has been argued.

Nearly all questions relating to the liability of assets in the hands of an executor for such an assessment, in a suit in equity like this, that have been raised here now, were raised and fully considered in *Witters v. Sowles*, 32 Fed. 130, and decided in favor of the plaintiff. That decision was referred to in *Keyser v. Hitz*, 133 U. S. 138, 10 Sup. Ct. 290, with reference to the effect of the statute in laying this liability, and has not been questioned so far as has been noticed. The question of reaching the assets otherwise than through proceedings in the probate court has been more fully argued here, without noticing that case, and has been again examined and considered. The claim did not, as shown, so accrue in the life of J. R. Ellis that commissioners on his estate would have jurisdiction of it. It never was a claim against him. *Sawyer v. Hebard's Estate*, 58 Vt. 375, 3 Atl. 529; *Hatch v. Hatch's Estate*, 60 Vt. 160, 13 Atl. 791. The federal statute puts the liability directly upon the assets. The question here is whether they are so in the custody of the probate court that they cannot be reached but through proceedings in that court. An executor or administrator here does not take title from the probate court, as a receiver of a court does, but under the will or by representation of the testator or intestate; and, while the assets of an estate are subject to the control of that court as to all proceedings within its jurisdiction, they are liable to judgment or decree in other courts as to matters without its jurisdiction. *Sparhawk v. Buell's Adm'r*, 9 Vt. 74; *Brown v. Sumner's Estate*, 31 Vt. 671. In *Holmes v. Bridgman*, 37 Vt. 28, the supreme court decreed payment by the administrator, out of the estate of Bridgman, of claims arising in the settlement of another estate, which had never been presented or passed upon in any proceedings in the probate court in the settlement of Bridgman's. And decrees in chancery affecting the assets of estates in matters within equity, and without probate, jurisdiction, are common. *Williams v. Benedict*, 8 How. 107, and *Yonley v. Lavender*, 21 Wall. 276, were cases where the probate court had jurisdiction of the debts for the purpose of distribution of the assets ratably among the creditors; and the jurisdiction of the federal courts over distribution of assets, or application of them to claims established there, was denied. But in *Bank v. Jolly's Adm'rs*, 18 How. 503, and *Green's Adm'x v. Creighton*, 23 How. 503, the power of the federal courts to reach assets in the hands of executors and administrators for the satisfaction of equitable claims of which those courts have jurisdiction was, after full examination, upheld. This court has jurisdiction of this matter on account of

its federal nature, as well as of the citizenship of the parties, and in equity, because the assets are held by the executrix in trust. Exception sustained.

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SMITH et al. v. CONSUMERS' COTTON-OIL CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1898.)

No. 594.

1. FEDERAL JURISDICTION—DIVERSE CITIZENSHIP—DISMISSAL OF PARTY.

In an action against the members of a firm for breach of a firm contract, where one of the defendants is a citizen of the same state with plaintiffs, he may be dismissed without prejudice, and the action continued against the others.

2. TRIAL—INSTRUCTIONS—BREACH OF WARRANTY.

Contractors for putting on asbestos roofing warranted the roofs to remain water-tight for five years, provided the roofs were not damaged by fire "or other accident not traceable to the use of defective material or poor workmanship." The evidence tended to show that, before beginning work, the contractor called the attention of the owners to the unusually wide spacings between the rafters, but were assured that this was all right, and that the responsibility therefor was with the owners, and not the contractors. In an action for breach of the warranty, it was claimed that the leakages resulted from defective construction of the building. *Held*, that it was error to charge that as the contractors saw the building and the manner and materials of its construction, and went forward without modifying their contract, it was a warranty that the roof would remain water-tight on the building as constructed.

3. CONTRACTS—MODIFICATION BY PAROL.

A written contract may be modified before performance by parol agreement or understanding.

In Error to the Circuit Court of the United States for the Eastern District of Texas.

Pressly K. Ewing and H. F. Ring, for plaintiffs in error.

J. C. Hutcheson, for defendants in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. The Consumers' Cotton-Oil Company and Swift & Co., both Illinois corporations, being about to build certain oil-mill plants, contracted with H. F. Watson Company, a Pennsylvania corporation, and Smith, Peden & Co., the agents of H. F. Watson Company, to cover the same with asbestos roofing, and took from them a written guaranty, dated April 18, 1893, to the effect that they warranted the roofs to remain water-tight for the term of five years, and would repair any leakages free of charge for that time, provided the roofs were not damaged by fire or other accident not traceable to the use of defective material or poor workmanship. On March 13, 1896, the defendants in error brought their suit against "Ralph P. Smith, Edward A. Peden, and David D. Peden, Sr., late co-partners, doing business under the firm name and style of Smith, Peden & Co., at the cities of Houston and Waco, in the state of Texas," all of whom were alleged to be citizens of the state of Texas, and resident within

the Eastern district of Texas. The petition showed that H. F. Watson Company was not made a party, because it was not an inhabitant of or to be found within the state of Texas. It charged that the roofing put on the oil mill did not remain water-tight as warranted, and that the defendants did not repair it; that petitioners had been compelled to repair it, at a large expense, which they claimed the right to recover. The defendants Peden, besides other pleadings not necessary to detail, answered:

"That the plaintiffs solicited bids for roofing for said oil-mill plants, and solicited defendants and H. F. Watson Company to make bids to put on said building an asbestos roof. That defendants, together with Watson Company, did make bids to put on a certain kind of asbestos roofing on said oil-mill plants; and that, at the time of making said bids for said roofing, defendants were not advised of the plans and specifications of said oil-mill plants further than to ascertain the number of squares necessary to make said roof. That they had no knowledge or notice of the kind or character of superstructure that the plaintiffs intended to build to receive said roofing, but relied upon and supposed, of course, that the superstructure that plaintiffs would build to receive said roof would be the kind and character usually and ordinarily adopted and used in such buildings. Defendants were not advised by plaintiffs of anything to the contrary at the time of making said bid, or at any other time. That defendants made a bid to do said work, viz. to furnish the asbestos roofing, and put it on; plaintiffs being required by the terms of said agreement to do all the other work, so far as superstructure and material were concerned, to receive said roof. Defendants had no notice from any source whatever that the superstructure for said roofs were to be other than the ordinary and usual superstructure for roofs used upon such buildings, and never knew that the superstructure for said roofs was not the ordinary and usual superstructure used in erecting such character of building until after they had begun to do the work of placing the asbestos roofing on said mill plants. That, when they first began to put said roofing on said mill plants, it was immediately after the carpenters had first put the boards on the rafters of said mill plants to receive the roofing, and before the said boards so placed by said carpenters on said rafters had had time to warp or season by the effect of the weather and sun, or show that they would do so. That defendants had put but little roofing on said mill plants before they discovered that something was wrong with the superstructure of said roofs. Up to that time they had not seen, nor were they called upon to investigate, what the superstructure of said roofs was; but the surface of said roofs immediately after they were laid by the carpenters had the appearance of being tight and smooth, and presented a surface upon which roofs of the kind and character that defendants undertook to lay for plaintiffs could be laid with safety. But soon thereafter they saw that when the sun and weather had an opportunity to dry out the planks put upon said rafters on said mill plants to receive the roofing to be put thereon by defendants, that because plaintiff had put green and inferior lumber in said roof, the effect of the sun and weather on the said lumber was to dry out, shrink it, and cause said lumber to cup and warp and become loose and uneven. And, immediately upon noticing said defects in the superstructure of said mill plants, these defendants called the attention of plaintiffs and their agents and employes in charge of said mill plants thereto, and insisted upon the plaintiffs building under said roof more and additional support in the way of rafters or something else; but the plaintiffs refused to do so, assuring defendants that said superstructure was all right, and would be sufficient to hold said roofing in the proper manner, and would not warp and injure the roofing to be placed thereon by defendants. Defendants, however, advised and cautioned plaintiffs in regard thereto, and told them that such superstructure was not the kind and character of superstructure that they had figured upon putting said roofing upon, and was not the kind and character of superstructure ordinarily adopted and used for such character of buildings. Defendants, after receiving such instructions, and relying on said assurance from plaintiffs, proceeded to complete said roofing, and did put upon the superstructure placed there by plaintiffs a good and sufficient asbestos roof, of good material and in good workmanlike

manner; and that, if said roofs so placed there by defendants have leaked and given away in any manner, it was due and traceable to no fault of defendants' roof, material, or workmanship, but was due and traceable alone and exclusively to the deck or superstructure upon which said roofs were placed, defendant having no interest in, concern with, or control over the construction of said superstructure or deck upon which said roofing was placed. That, if the roofs placed upon said buildings by defendants have leaks in them, said leaks were caused and brought about exclusively on account of the following defective construction of said mill plants and the superstructure of said roofs, and is due to no other cause whatever: In the first place, defendants say that the rafters supporting said roof, and what is commonly known as the 'bearings' in said roofs, are ten feet apart, when they should only have been two feet apart. That the boards of which the superstructure is made, and upon which this roofing was laid, are less than two inches thick, and are eight inches wide, and twenty feet long. That they were placed in said roof while in a green, unseasoned state; and, as soon as the heat of the sun and the effect of the weather could dry out and season said boards, they warped up, some coming up in the center, some going down, some twisting up at both ends, and presenting and making such an uneven surface under said roofing that it tore the felting in many places, and that the warping and twisting and shrinking of said boards tore said roofing, and destroyed its usefulness as a roof. A great many of said boards so placed to receive said roofing shrunk so much that the shiplaps made to support and hold the boards against each other were pulled apart, and did not touch, and furnished no support whatever to the respective boards. That it was impossible to put any roofing of the kind contracted for on such superstructure that would have lasted its proper length of time. The defendants never saw, nor did any one else so far as defendants knew ever have any experience with, any such superstructure as was furnished by plaintiffs upon said mill plants to receive said roofing. The defendants say that, if any leaks occurred in said roofs, it was due and traceable exclusively to the fact that plaintiffs did not put such a superstructure as it was their duty to place upon said mill plants to receive the roof to be constructed by defendants; and it was the duty of plaintiffs to put a suitable superstructure on said mill plants to receive the roofing that defendants contracted to put thereon; and it was no duty of defendants nor were they in any way responsible for the kind or character of superstructure placed upon said mill plants by the plaintiffs to receive said roofing, and they are in no way liable or responsible for the failure of said superstructure so placed upon said mill plants by plaintiffs. And the failure of said roofs, if any occurred, is due and traceable exclusively to the condition of said superstructure on said mill plants, put there by plaintiffs, and not by defendants."

The defendant Ralph P. Smith, though not served with process, voluntarily appeared, and answered by a plea to the jurisdiction of the court, to the effect that he was a necessary party, and that he was at the time of the bringing of the suit, and still is, a citizen of the state of Illinois, of which state the plaintiffs are citizens. The court allowed the plaintiffs to amend their petition so as to make only the Pedens, citizens of Texas, defendants to their suit, and, on Ralph P. Smith's plea to the jurisdiction, to dismiss him from the suit without prejudice. Thereupon the Pedens pleaded to the jurisdiction of the court, on the ground that defendant Smith was a necessary party, and that, he being a citizen of the same state as the plaintiffs, the court had no jurisdiction to entertain the suit against him or against them alone. The motions and pleas of the defendants were overruled, and the case, proceeding to trial, resulted in a verdict and judgment for the plaintiffs.

Eight errors are assigned. The first five of these relate to the rulings of the circuit court on the pleas and motions touching the jurisdiction. They are none of them well taken. The action of the court

of which they complain is fully authorized by the act of February 28, 1839 (Rev. St. § 737), as construed in the opinions of the supreme court in *Clearwater v. Meredith*, 21 How. 489, *Inbusch v. Farwell*, 1 Black, 566, *Barney v. Baltimore City*, 6 Wall. 280, and many other cases.

The sixth error assigned is that the court erred in this part of its general charge to the jury:

"I charge you that, under the facts in this case, it being shown that the defendants, when they undertook to perform this work, saw the building, and saw the material of which it was constructed, its manner of construction, and although there was some dispute and some conversation between the parties as to whether it would hold the roofing or not, that the parties do not contend that they modified or altered the contract in any way, but went forward and ordered the work done. In that state of the case, it is my conclusion that it was a warranty on the part of the defendants that the roof would remain water-tight on that building as it was constructed. It might be true that if the leakages had been caused by something in the construction of the building that was not patent, or that could not be inspected by either party, such a state of affairs would constitute a defense; but where it was patent as to the construction, and where the material used in the construction was open to the observation of both parties, and, without changing the contract, they went forward with the work, and put the roofs on, and were paid for it, it was a warranty that the roofs that they were putting on would remain water-tight upon that building as constructed, and upon the material of which it was constructed, for a period of five years."

We are of opinion that this assignment of error is well taken. There is substantial conflict in the testimony to which the above charge is applicable. The bill of exceptions shows that the plaintiffs gave substantial evidence tending in a reasonable degree to prove the averments in their pleadings that the construction of their buildings and the character of the material were of the most approved standard; also that—

"Before commencing the roofing, one of the defendants, jumping on the superstructure, declared that, if a man could not put a good roofing thereon, he could not do it at all; also, that, before defendants began the roofing, the nature and kind of construction and of material of the superstructure were patent and open to observation to them; and, without the contract sued on being modified or altered in any way (unless the contrary is shown by the hereinafter quoted testimony of Peden), the defendants went forward and ordered the work done, which was performed and paid for under said contract, without any intimation from defendants that they would defend against the warranty because of the condition of said superstructure (unless the contrary is shown by the hereinafter quoted testimony of Peden); and, in reliance upon such warranty, the plaintiffs made to defendants payment in full under said contract, as they would not otherwise have done, supposing they were protected in so doing by such warranty."

The testimony of Peden just referred to is given substantially thus in the bill of exceptions:

"The defendant Edward A. Peden testified, among other things, that, as the work progressed, he observed an apparent imperfection in the superstructure in applying the roofing, arising from the giving of the boards; and, further: 'I examined these roofs after they were completed,—the superstructure,—before the roof was laid. I did this when we first began the first part of the work. I never had any experience with a roof with the bearings ten feet apart. That is the first one I had ever seen. I had conversations with these parties about that particular point. I called Mr. Yopp's attention to the distance they were apart. Our foreman, Mr. Sullivan, called my attention to it. Mr. Yopp, plaintiffs' general manager, told me that the superstructure was all right; that it had been thoroughly considered before being adopted, and there would be no difficulty about it;

that, if we did our part all right, there would be no trouble in connection with the matter. This occurred after part of the work was done, and I did not proceed to put on the rest of the roofing until after we had discussed the matter very thoroughly, and he gave me every assurance that they knew it was all right, and that that responsibility was theirs, and not ours. I never heard the word "toe-nailing" until it was suggested by some of their men in connection with the work. It is a new term to me, and struck me as being peculiar at the time. It was by no means a suggestion of mine. My suggestion was that there ought to be more rafters. I supposed, after they had assured me, and before I went on with putting on the roof, that they had investigated the matter thoroughly,—that they knew exactly what they were talking about, and that it could be thoroughly relied upon. I looked at the superstructure before any of the roofing went on. I saw its appearance before the roof went on. The first time I looked at it, it had the external appearance of being smooth. \* \* \* I cannot tell the jury the exact words of Mr. Yopp in reference to the construction. I would not attempt to give his exact words. I cannot recall the exact words used by us at this long time. I said that the substance was that he thought the construction was sufficient. I stated more than that,—that they had made thorough investigation of that class of superstructure, and were fully satisfied that it was altogether sufficient, and that, if we did our work all right, there would be no harm to follow."

The pleadings of the parties and the testimony above recited present an issue of fact, which should have been submitted to the jury, but which was withdrawn from the jury by the language of the court's charge, wherein he says: "The parties do not contend that they modified or altered the contract in any way, but went forward and ordered the work done,"—which is repeated when he again says: "And, without changing the contract, they went forward with the work, and put the roofs on." The pleadings of the plaintiffs show that the contract was executed on behalf of the plaintiffs by one W. I. Yopp, thereunto duly authorized. The testimony of the defendants showed that after the execution of the written contract, and before any considerable part of the work was done, the defendants called Mr. Yopp's attention to the condition of the superstructure; and the result of their interview on that subject at that time was an assurance to the defendants that the plaintiffs knew "that the building was all right, and that the responsibility therefor was theirs [the plaintiffs]", and not ours [the defendants]." It is, indeed, not contended, either in the pleadings or in the proof, that there was any written modification of the written contract. But it was not necessary that the modification, if any, should be in writing; and, if the written contract requires or is susceptible of the construction placed upon it by the charge of the court (on which we express no opinion), it is clear to us that the testimony of the defendants tends to show a modification of it, and that that question, under the proper instruction, should have been submitted to the jury.

The seventh and eighth of the errors assigned relate to the refusal of the court to give certain requested charges. These charges sought to give the contract of warranty a construction that would limit the liability of the warrantors to such imperfections in the roof as were traceable to defective asbestos roofing material or to poor workmanship in putting it on the buildings. The occasion for such or similar requests may not recur on another trial when the issue as to the modification of the contract is submitted to the jury under proper instruction. In



anticipation, however, of the defendants' submitting such requests on another trial, we deem it appropriate to suggest that the requested charges refused are not formulated with sufficient clearness to convey helpful instruction to the jury. The tone is not judicial. The ramifications are too numerous and involved to require a trial judge to make a correct analysis and reduction of them, or permit their being given as tendered. On account of the error in the charge indicated above, the judgment of the circuit court is reversed, and the cause remanded to that court, with direction to award the defendants a new trial.

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WALKER et al. v. BROWN et al.

(Circuit Court, S. D. Iowa, C. D. July 15, 1897.)

No. 2,285.

**APPEAL—EFFECT OF DECISION.**

Where the supreme court has considered a case at length on its merits, and remanded it to the circuit for further proceedings not inconsistent with its opinion, the circuit court will not permit the defendant to amend his answer so as to deny a fact affirmatively passed upon and determined by the supreme court.

Willits, Robbins & Case, for plaintiffs.  
N. T. Guernsey, for defendants.

WOOLSON, District Judge. The bill herein was filed on November 2, 1891. On February 1, 1892, defendants filed their answer. By leave, an amendment to the bill was filed on November 4, 1892, and an amendment to the answer on November 14, 1892. Replication having been duly filed, the case proceeded to a hearing on the proofs presented, resulting on October 20, 1893, in a decree for defendants. 58 Fed. 23. Appeal was duly had to the circuit court of appeals for the Eighth circuit, resulting September 10, 1894, in the affirmance of such decree. 11 C. C. A. 135, 63 Fed. 204, and 27 U. S. App. 291. By writ of certiorari issuing from the supreme court of the United States, the suit was taken to the latter court, which court on March 1, 1897, reversed the decree. 165 U. S. 654, 17 Sup. Ct. 453. The mandate of the supreme court, filed in this court April 5, 1897, and addressed to the judges of this court, contains the following:

"On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said United States circuit court of appeals in this cause be, and the same is hereby, reversed, with costs, and that the said appellants recover against the appellees the sum of ——— for their costs. And it is further ordered that this cause be, and the same is hereby, remanded to the circuit court of the United States for the Southern district of Iowa for further proceedings not inconsistent with the opinion of this court. You therefore are hereby commanded that such execution and further proceedings be had in said cause, in conformity with the opinion and decree of this court, as, according to right and justice, and the laws of the United States, ought to be had, the said writ of certiorari notwithstanding."

Defendants now apply for leave to file an amendment to their answer. Plaintiffs resist, insisting that under the mandate in this case it is the duty of the court to enter a decree herein for plaintiffs, and

that the proposed amendment cannot be permitted. The general rules which prescribe the power and control the action of this court after mandate received are not seriously in dispute between counsel. The contention of counsel relates to the application of these rules, under what is claimed by defendants to be the peculiar conditions herein. Mr. Justice Gray, speaking for the supreme court in *Re Sanford Fork Co.*, 160 U. S. 247, 255, 16 Sup. Ct. 291, 293, says:

"When a case has once been decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree, as the law of the case, and must carry it into execution according to the mandate. The court cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it, even for apparent error, upon any matter decided on appeal, or intermeddle with it, further than to settle so much as has been remanded. \* \* \* But the circuit court may consider and decide any matters left open by the mandate of this court, and its decision of such matters can be reviewed by a new appeal only. The opinion delivered by this court at the time of rendering its decree may be consulted to ascertain what was intended by its mandate; and either upon an application for a writ of mandamus, or upon a new appeal, it is for this court to construe its own mandate, and to act accordingly."

That case went to the supreme court from a final decree entered for plaintiffs upon a decision sustaining exceptions to the answer, defendant having elected to stand on his answer. The appellate court reversed this decree, holding the exceptions not well taken. In the circuit court, defendant moved for a decree upon the mandate, which was refused, and leave granted to amend the bill. Whereupon defendant applied to the supreme court for a writ of mandamus to compel entry of decree upon the mandate. The supreme court clearly point out (page 257, 160 U. S., and page 291, 16 Sup. Ct.) the difference between such a case and one where the whole case is presented for final decree. In the former the case is not ready for final decree. When the exceptions to the answer are overruled in obedience to the mandate, the case stands before the circuit court in the same attitude as though the latter court had originally, and without appeal, overruled the exceptions, which leaves the parties at liberty to perfect the pleadings and present their proofs, preparatory to a final hearing:

"The case being thus left open, by the opinion and mandate of this court, and by the general rules of practice in equity, for further proceedings, with a right to plaintiffs to file a replication putting the cause at issue, the circuit court might, in its discretion, allow amendments of the pleadings for the purpose of more fully or clearly presenting the facts at issue between the parties. The case is quite different in this respect from those in which the whole case, or all but a subsidiary question of accounting, had been brought to and decided by this court upon the appeal, as in the cases principally relied upon by the petitioner. It must be remembered, however, that no question once considered and decided by this court can be examined at any stage of the same case."

The latest deliverance upon this general question appears to be the case of *In re Potts* (decided March 15, 1897) 166 U. S. 263, 17 Sup. Ct. 520. This was upon petition for a writ of mandamus to the circuit court to enter a decree for plaintiffs in a suit for infringement of letters patent. On the original hearing the circuit court had found adversely to plaintiffs,—sustaining the defense of want of novelty in the invention,—and dismissed the bill. 44 Fed. 680. Upon appeal

to the supreme court the decree entered below was reversed, and the cause remanded "for further proceedings in conformity with" that opinion. On receipt of the mandate the circuit court reversed its former decree, and sent the cause to a master to take an account of profits. But, before further action was had by the court, defendants filed a petition for rehearing, for newly-discovered evidence affecting the novelty of the invention. The circuit court, on notice to plaintiffs, heard the application, and, against plaintiffs' insistence that the circuit court was without power, under the mandate, so to do, granted the petition for rehearing. 71 Fed. 574. In his opinion, Judge Sage relies upon the decision in the Sanford Fork Case, *supra*, and adds:

"The opinion of the supreme court will, of course, be recognized as the law of the case; and unless the defendants, upon the matter suggested in their application for rehearing, can make a case radically different from that presented to the supreme court, the rehearing will not avail."

Mr. Justice Gray, delivering the opinion of the supreme court on the application for a writ of mandamus, quotes at length from the Sanford Fork Case, *supra*, and then adds:

"The case now in question comes exactly within the class of cases so referred to and distinguished [in the Sanford Fork Case]. It was originally heard in the circuit court, not merely upon a question of sufficiency of pleading, but upon the whole merits. That court, at a hearing upon pleading and proofs, involving the question of the novelty of the alleged invention, and of its infringement by defendants, entered a final decree dismissing the bill. Upon the appeal from that decree both these questions were presented to, and considered by, this court, and were by it decided in plaintiffs' favor. Its decision of those questions in that way was the ground of its opinion, decree, and mandate, reversing the decree of the circuit court, dismissing the bill, and remanding the cause to that court for further proceedings in conformity with the opinion of this court. The decision and decree of this court did not amount, indeed, technically speaking, to a final judgment, because the matter of accounting still remained to be disposed of. But they constituted an adjudication by this court of all questions, whether of law or fact, involved in the conclusion that the letters patent of the plaintiffs were valid, and had been infringed. Applying the rules stated at the beginning of this opinion, the questions of novelty and infringement were before this court, and disposed of by its decree, and must therefore be deemed to have been finally settled, and could not afterwards be reconsidered by the circuit court. When the merits of a case have once been decided by this court on appeal, the circuit court has no authority, without express leave of this court, to grant a new trial, a rehearing, or a review, or to permit new defenses on the merits to be introduced by amendment to answer."

And the court, having declared that "upon the record, as it stands, a clear case is shown for issuing a writ of mandamus to set aside those orders," etc., gave 20 days to defendants, within which to apply to that court for leave to file a petition for rehearing, and provided that, unless such petition was so presented, writ of mandamus should issue.

The case at bar was heard on its merits after proofs were all in. Plaintiffs claimed to have an equitable lien on certain municipal bonds; such lien arising because of a certain letter or written agreement signed by decedent, T. E. Brown, on the strength of which plaintiffs had sold a large amount of goods to the party named in such writing. The defendants had been duly appointed to administer on the estate of said decedent, Brown. By the pleadings it appeared that the bonds in question had been, in his lifetime, by decedent, given to

his wife, the defendant Anna L. Brown, and were at time of his death her individual property. Thereupon the bill was so amended as to aver that the bonds referred to were in the possession of said Anna L. Brown, and to ask for the recognition of an equitable lien on the bonds in her hands. *Bank v. Ayers*, 160 U. S. 660, 16 Sup. Ct. 412. The circuit court decided that the letter or agreement above referred to did not give to plaintiffs an equitable lien on said bonds. In affirming the decree entered below, the circuit court of appeals announced the same view. Under the pleadings and proofs, as construed in the light of the opinion rendered in the case by the supreme court, these decisions were erroneous. What questions did the supreme court consider and decide in this case, and to what extent? The appeal brought before that court the entire case. On page 664, 165 U. S., and page 457, 17 Sup. Ct., Mr. Justice White states:

"The questions which first require solution are, did the agreement embodied in the letter create an equitable lien in favor of Walker & Co. upon the bonds of Brown, pledged to the Union National Bank? And, if so, were they returned to Brown under such circumstances as to cause the lien, if any existed, to be operative against the bonds in the hands of Mrs. Brown, and therefore subject to such lien, if any attached to them, in the hands of Brown?"

In considering the legal principles by which the question of equitable lien is to be determined, the court say (*Id.*):

"It is clear that if the express intention of the parties was to create an equitable lien upon the bonds, or the value thereof, or if such intention arises by a necessary implication from the terms of the agreement construed with reference to the situation of the parties at the time of the contract, and by the attendant circumstances, such equitable lien will be enforced by a court of equity against the bonds in the hands of Brown, or against third persons who are volunteers, or who have notice."

With reference to the "words of the contract, embodied in the letter," the court say (page 665, 165 U. S., and page 457, 17 Sup. Ct.):

"This language certainly designates the bonds, or the value thereof, as a security for the debt to Walker & Co. It says that the bonds belonging to Brown shall not be returned to him so long as the debt to Walker is unpaid."

And on page 666, 165 U. S., and page 457, 17 Sup. Ct., the court declare:

"Manifestly, the dedication of Brown's bonds to the particular and special payment of Walker's debt \* \* \* left the bonds, as a necessary consequence of the equitable lien which the contract created, at the risk of the business; that is to say, if the business did not pay the debt which it owed to Walker & Co., the bonds, or their value, were submitted to the risk of such nonpayment, and therefore subject to the equitable lien, if the risk of the business made it necessary for Walker & Co. to exercise the lien which the contract gave that firm."

And on page 669, 165 U. S., and page 459, 17 Sup. Ct.:

"From these considerations we conclude that the contract provided for a lien upon the bonds, to secure Walker's debt, subordinate to the lien then outstanding, resulting from the existing pledge, and stipulated against a return of the bonds in the event of the payment of the debt by Loyd & Co., and imposed upon Brown the obligation not to assert, quoad the debt of Walker & Co., a claim against the assets of Loyd & Co. for the value in the event the risk of the business, the outstanding pledge, prevented the return of the bonds to the possession of Loyd & Co."

In their answer, defendants averred that the debt of Loyd & Co. to plaintiffs, for whose payment the supreme court find the letter or agreement executed by Brown gave to Walker & Co. an equitable lien on the bonds, had been extinguished by Walker & Co. having accepted chattel-mortgage security therefor, and afterwards having proceeded with reference thereto, in Washington, in the manner particularly set out in such answer. As to this contention the supreme court (pages 673, 674, 165 U. S., and page 460, 17 Sup. Ct.) decide that such contention—

"Is fully answered by the statement that there is no proof whatever of any agreement that the taking of security should extinguish the original claim; and the proof is also clear that the acts of Walker as to the purchase of the rights of attaching creditors, and the subsequent dealings with the property, were upon the express understanding with Brown that these transactions should in no way impair the rights of Walker & Co. under the contract which we have considered."

On page 672, 165 U. S., and page 460, 17 Sup. Ct., the court say:

"Without going into details as to result of [chattel] mortgages and attachments, it suffices to say that nothing was paid on account of Walker & Co.'s debt."

The opinion closes as follows (pages 674, 675, 165 U. S., and page 461, 17 Sup. Ct.):

"As the Memphis bonds are admittedly in the hands of Mrs. Brown as a gift from her husband, the enforcement of the lien thereon presents no question as to the jurisdiction of a court of equity over the estate of a decedent. It follows from the foregoing that the court below erred in refusing to recognize the claim of the complainants, and to enforce in their favor a lien on the Memphis bonds in the hands of Mrs. Brown; and for the errors in these particulars the decree must be reversed, and the case remanded to the trial court for further proceedings not inconsistent with this opinion."

What, then, is the duty of this court, under the mandate of the supreme court, construed in the light of the opinion on which such mandate is based? The entire case having gone to the supreme court, and having been there considered at length on its merits, what is established by its opinion and decision, and what is referred or left to this court for its action in the further progress of the case? That the contract (letter) in question gave to Walker & Co. an equitable lien on the bonds therein referred to is determined, and also that Walker & Co. have the right to the enforcement of such lien in the hands of Mrs. Brown, one of the defendants. See the closing portion of the opinion, above quoted. In arriving at such conclusions the supreme court considered on its merits the entire case presented by the pleadings and proofs, so far as the same related to the existence of a debt from Loyd & Co. to the plaintiffs, and the right of plaintiffs to an equitable lien therefor against the bonds in the hands of Mrs. Brown. Included in this is the amount of such debt, which (page 661, 165 U. S., and page 456, 17 Sup. Ct.) is declared to be "established by the proof" as \$13,916.39, and (page 674, 165 U. S., and page 460, 17 Sup. Ct.) to draw 6 per cent. per annum. As to a claim by plaintiffs, asserted in the bill, to recover from the estate of Brown for \$560.14, expenses incurred by plaintiffs, on agreement of Brown

to repay, in attempting to collect the Loyd & Co. debt, the supreme court (Id.) "do not determine whether the sum was really due, and whether, if due, it is enforceable in a court of equity"; the same not having been pressed on hearing of the appeal. Counsel for plaintiffs expressly state, on hearing of motion for decree on mandate, that this last-named claim is not pressed here, nor is the same presented for insertion in the decree. Looking, then, at the mandate and opinion, the case seems ripe for a decree. The amendment to the answer now sought to be filed by defendants in substance avers that in 1886—about three years prior to the execution by Brown of the letter to Walker & Co. by which the equitable lien was created—the decedent, Brown, by a formal written assignment, transferred the bonds in question to his wife, the defendant Anna L. Brown, "to have and to hold the same in her own right and separate estate"; that same were delivered to her at date of such assignment; that she never authorized her said husband to pledge said bonds, or either of them, to complainants or any one else, nor authorized or ratified any such pledge, nor had any personal knowledge of the transaction in connection with the letter above referred to, or of the writing of the letter, or of its contents, until after the institution of this suit, and that said bonds were not in possession of her said husband when he wrote said letter, nor had she ever authorized him to take possession or custody of same, nor did he have custody thereof, with her consent, after transfer thereof to her by said written assignment; and that the same are not now owned by her. To the interrogatories attached to the bill, defendants made answer (see same attached to answer filed herein February 1, 1892), stating "that these respondents are advised and believe that the said bonds are yet held and in the possession of Anna L. Brown, who holds them as her private property." The supreme court regard the same as "admittedly in the hands of Mrs. Brown as a gift from her husband." This court may not now permit to be modified by amendment a fact affirmatively passed upon and determined by that court, where the right thus to amend has not been reserved to defendants or granted by that court. The same general remark applies to other portions of the proposed amendment. The supreme court, at various points in its opinion, finds and regards the bonds, at the date of the letter from Brown to Walker & Co., as belonging to Brown, and loaned by him to Loyd & Co. Pages 656, 658, 665, 666, 674, 165 U. S., and pages 456, 457, 459-461, 17 Sup. Ct. The opinion, in its statement of the facts established by the proof, as well as its application thereto of the law of the case, regards and determines the bonds as rightfully in Brown's possession, and as outstanding in a valid pledge, as well as lawfully bound by this equitable lien created by his letter to Walker & Co. If defendants were now permitted to amend as proposed, this court would necessarily thereby "permit new defenses on the merits to be introduced by amendment of the answer" after the merits of the case had been once decided by the supreme court on appeal. This is expressly declared in *Re Potts*, supra, to be be-

yond the authority of this court. Because, as I construe the mandate, this court has no authority to allow the amendment proposed, and therefore has no discretion in the matter, the application to file the proposed amendment cannot be entertained, and is therefore denied, and the clerk will enter an order accordingly, to which defendants except.

On presentation of his motion for a decree on the mandate, counsel for plaintiffs stated in open court that plaintiffs do not press their claim stated in bill, for \$560.14, as due for expenses by plaintiffs incurred, under agreement by Brown of repayment, in attempted collection of their debt against Loyd & Co. In my judgment, it is desirable that this withdrawal be formally made of record. This leaves no disputed matters of fact for the determination of this court, and requires but the framing of a decree to carry out the mandate of the court, and to "enforce in [plaintiffs'] favor a lien on the Memphis bonds in the hands of Mrs. Brown"; the amount of the debt secured by such lien having been determined and stated in the opinion of the supreme court. Counsel for plaintiffs, after having formally withdrawn said claim for \$560.14, may prepare a decree accordingly, and submit same to counsel for defendants. To all of which defendants duly except. Should defendants desire to present an application to the supreme court for a writ of mandamus directing this court to entertain the application to file the proposed amendment, and exercise its discretion as to such filing, such order will be entered as to protect the interests of the parties during the pendency of such application before the supreme court.

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JONES et al. v. GREAT SOUTHERN FIREPROOF HOTEL CO.

SOSMAN et al. v. SAME.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1898.)

Nos. 535 and 536.

1. FEDERAL COURTS—BINDING EFFECT OF STATE DECISIONS.

The decision of the highest court of a state passing upon the validity of a state statute under the state constitution is not binding upon the federal courts when thereby the validity of a contract, executed before there was a judicial construction of the statute, between the citizen of the state and the citizen of another state, is affected.

2. CONSTITUTIONAL LAW—LEGALITY OF LIEN OF SUBCONTRACTOR.

Rev. St. Ohio, § 3184, as amended by Act April 13, 1894, giving subcontractors a lien on the building and land for the amount of their services or materials, without regard to the amount still unpaid the principal contractor by the owner, limited only by the original contract price to be paid by the owner, is not unconstitutional, under the Ohio bill of rights, as a restraint upon the freedom of contracts. 79 Fed. 477, reversed.

Appeals from the Circuit Court of the United States for the Eastern Division of the Southern District of Ohio.

This is a bill to enforce the statutory lien given to persons who do labor or furnish materials for the construction or repair of any house or other building by section 3184, Rev. St. Ohio, as amended by the act of April 13, 1894. By sec-

tion 3184 it is provided that "a person who performs labor, or furnishes machinery or material for constructing, altering or repairing" any house or other structure mentioned in the section, "by virtue of a contract with or at the instance of the owner thereof, or his agent, trustee, contractor or sub-contractor, shall have a lien to secure the payment of the same," upon the structure, "and upon the interest, leasehold or otherwise, of the owner in the lot or land on which the same may stand." Section 3185 provides that the lien shall be claimed and recorded within four months from the time of furnishing such labor or material, and that the lien shall operate from the date of the first item in the account. Section 3185a is as follows: "In all cases where the labor, material or machinery referred to in sections 3184 and 3185 shall be furnished by any person other than the original contractor with such owner or his agent or trustee, the lien shall not exceed the actual value of the labor, material or machinery so furnished, and the aggregate amount of liens for which the property may be held shall not, in the absence of fraud or collusion between the owner and original contractor, exceed the amount of the price agreed upon between the owner and original contractor for the performing of such labor and the furnishing of such material and machinery: provided, if it shall be made to appear that the owner and contractor, for the purpose of defrauding sub-contractors, material-men or laborers, fixed an unreasonably low price in the original contract for any work or material for which a lien is given under section 3184, the court shall ascertain the difference between such fraudulent contract price and a fair and reasonable price therefor, and sub-contractors, material-men and laborers shall have a lien to the amount of such fair and reasonable price so ascertained."

The complainants are members of a firm doing business at Pittsburg, Pa., and are citizens of Pennsylvania. The defendants are the Great Southern Fireproof Hotel Company, a corporation of the state of Ohio, against whom the lien is asserted, and William J. McClain, a citizen of Ohio and the contractor to whom materials were sold for use in the hotel building constructed by him at Columbus, Ohio, for the Great Southern Fireproof Hotel Company. The other defendants are corporations, firms, and individuals, claiming liens of various kinds upon the same property. They are all citizens of states other than Pennsylvania. The bill in substance avers that the defendant McClain entered into a contract with the Great Southern Fireproof Hotel Company to construct and complete at Columbus, Ohio, a six-story fireproof hotel and opera house, for the sum of \$345,000; that complainants contracted on the 13th of December, 1894, to furnish to said McClain, for use in said building, some 900 tons of structural steel; that, under said agreement, they delivered, between April 16, 1895, and January 24, 1896, such steel, to the value of \$43,296.74, which steel so furnished was all used in the construction of said house. They further aver that a balance of \$11,410.02 is due and unpaid, and that, within four months after said steel was delivered, they filed and recorded their lien as required by section 3185, Rev. St. Ohio. There is no averment that the hotel company is indebted to said McClain, or that it was indebted when the lien was filed. Neither is it averred that said hotel company had any notice of any such contract between complainants and McClain, nor promised to pay for same, nor that any contractual relations whatever existed between it and complainants. The hotel company demurred to the bill for want of equity. This demurrer was sustained, and the bill dismissed by Judge Sage, whose opinion is reported in 79 Fed. 477.

T. P. Linn, for appellants Jones and others.

George N. Nash, for appellants Sosman and Landis.

John J. Stoddart and J. E. Sater, for appellee.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The decision must turn here upon the constitutionality of the Ohio statute giving to subcontractors, laborers, and material men a lien upon the building and property of the owner, for labor or materials fur-



nished at the instance of the principal contractor." So much of the statute as gives a lien to complainants as subcontractors has been declared by the supreme court of Ohio to be null and void, as in conflict with the Ohio bill of rights, which, among other things, declares that the right of "acquiring, enjoying, and possessing property" is inalienable. That decision was made in a suit to which complainants were not parties, and after their rights under the law had accrued and their claim of lien recorded, as required by the statute. *Young v. Hardware Co.*, 55 Ohio St. 423, 45 N. E. 313. Does that decision furnish a rule of decision which is obligatory upon courts of the United States? When a citizen of one state enters into a contract with a citizen of another, he acquires the constitutional right to have that contract interpreted and enforced by a court of the United States. That right does not by any means involve the application of a different rule of decision, for the judiciary act requires that the laws of the several states shall be regarded as rules of decision, in trials at common law, where they apply. But even the decision of the highest courts of the state, by whose law the rights of the parties are to be ascertained and enforced, does not, under all circumstances, furnish a rule of decision obligatory upon courts of the United States. The question is, when do they apply? In the past this inquiry has involved no little friction between the courts of the Union and those of the states. But the final arbiter of all such constitutional questions is the supreme court of the United States. So far as the inquiry is pertinent to the decision which must be here made, that court has in an authoritative way decided:

1. That such decisions are not necessarily obligatory upon courts of the United States where they affect contracts which were valid under the constitution and laws of the state, as interpreted and enforced by its highest judicial tribunals at the time they were entered upon. *Rowan v. Runnels*, 5 How. 134; *Trust Co. v. Debolt*, 16 How. 432; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *Olcott v. Supervisors*, 16 Wall. 678; *Taylor v. Ypsilanti*, 105 U. S. 60; *Douglass v. Pike Co.*, 101 U. S. 677; *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 36-46, 22 C. C. A. 534, and 76 Fed. 296.

In *Rowan v. Runnels*, *supra*, Chief Justice Taney said:

"Undoubtedly, this court will always feel itself bound to respect the decisions of the state courts, and, from the time they were made, regard them as conclusive in all cases upon the construction of their own laws. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other states, which, in the judgment of this court, were lawfully made."

In *Douglass v. Pike Co.*, cited above, the court, after reviewing the preceding cases, decided by that court, said:

"The true rule is to give a change of judicial construction in respect to a statute the same effect in its operation on contracts and existing contract rights that would be given to a legislative amendment; that is to say, make it prospective, but not retroactive. After a statute has been settled by judicial construction, the construction becomes, so far as contract rights acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as an amendment of the law by means of a legislative enactment."

2. Neither are such decisions obligatory upon courts of the United States when thereby the validity of contracts between a citizen of the state and a citizen of another state is affected, which were executed before there was any judicial construction of the statute or constitution which seemed to authorize the contract in question. *Burgess v. Seligman*, 107 U. S. 20-33, 2 Sup. Ct. 10; *Pleasant Tp. v. Aetna Life Ins. Co.*, 138 U. S. 67-72, 11 Sup. Ct. 215; *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 36-47, 22 C. C. A. 534, and 76 Fed. 296.

In *Louisville Trust Co. v. City of Cincinnati*, supra, this court, after stating the general rule to be that a court of the United States would adopt and follow the construction of a state statute announced by the highest court of the state, said:

"A well-grounded exception exists where contracts and obligations have been entered upon before there has been any judicial construction of the statutes upon which the contract or obligation depends by the highest court of the state whose statute is involved. In such a case, if a court of the United States obtains jurisdiction of a question touching the validity, effect, or obligation of such a contract, it will, while 'leaning to an agreement with the state court,' exercise an independent judgment as to the validity and meaning of such contract, although the meaning and validity of state statutes may be an element in the case, and will not be bound to follow opinions of the state court construing such statute if such decisions were rendered after the rights involved in the controversy originated."

In *Burgess v. Seligman*, cited above, the court declined to follow the supreme court of Missouri in respect to the interpretation of a statute of that state, the decision having been made after the transaction in controversy had arisen. Justice Bradley, in that case, speaking for a unanimous court, said:

"We do not consider ourselves bound to follow the decision of the state court in this case. When the transaction in controversy occurred, and when the case was under the consideration of the circuit court, no construction of the statute had been given by the state tribunals contrary to that given by the circuit court. The federal courts have an independent jurisdiction in the administration of state laws, co-ordinate with, and not subordinate to, that of the state courts, and are bound to exercise their own judgment as to the meaning and effect of those laws. The existence of two co-ordinate jurisdictions in the same territory is peculiar, and the results would be anomalous and inconvenient but for the exercise of mutual respect and deference. Since the ordinary administration of the law is carried on by the state courts, it necessarily happens that, by the course of their decisions, certain rules are established which become rules of property and action in the state, and have all the effect of law, and which it would be wrong to disturb. This is especially true with regard to the law of real estate and the construction of state constitutions and statutes. Such established rules are always regarded by the federal courts, no less than by the state courts themselves, as authoritative declarations of what the law is. But, where the law has not been thus settled, it is the right and duty of the federal courts to exercise their own judgment, as they also always do in reference to the doctrines of commercial law and general jurisprudence. So, when contracts and transactions have been entered into, and rights have accrued thereon under a particular state of the decisions, or when there has been no decision, of the state tribunals, the federal courts properly claim the right to adopt their own interpretation of the law applicable to the case, although a different interpretation may be adopted by the state courts after such rights have accrued. But even in such cases, for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts if the question seems to them balanced with doubt. Acting on these principles, founded, as they are, on comity

and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well-considered decisions of the state courts. As, however, the very object of giving to the national courts jurisdiction to administer the laws of the states in controversies between citizens of different states was to institute independent tribunals, which it might be supposed would be unaffected by local prejudices and sectional views, it would be a dereliction of their duty not to exercise an independent judgment in cases not foreclosed by previous adjudication. As this matter has received our special consideration, we have endeavored thus briefly to state our views with distinctness, in order to obviate any misapprehensions that may arise from language and expressions used in previous decisions. The principal cases bearing upon the subject are referred to in the note, but it is not deemed necessary to discuss them in detail."

This case does not fall under the first class of exceptions stated above. The Ohio mechanic's lien statutes, prior to the amendment of April 13, 1894, only gave a lien to creditors of the principal contractor for labor or materials furnished at his instance, upon such balance as was due from the owner to the contractor when notice was given of the claim to a lien. Such statutes are in the nature of mere garnishee proceedings, whereby the creditors of the contractor are substituted to the lien of the contractor. *Copeland v. Manton*, 22 Ohio St. 398; *Dunn v. Rankin*, 27 Ohio St. 132; *Bullock v. Horn*, 44 Ohio St. 420, 7 N. E. 737; *Stark v. Simmons*, 54 Ohio St. 435, 43 N. E. 999. The last case cited was one in which the owner was permitted to set off his debt to the contractor by a claim he held against him when the contract was made, and thus defeated the effort of laborers to assert a lien against the owner.

The cases of *Railway Co. v. Cronin*, 38 Ohio St. 122, and *Railway Co. v. McCoy*, 42 Ohio St. 251, were suits under a statute giving liens to those contributing labor or materials to the construction of a railway. It does not appear that the principal contractor had been paid, and no constitutional objection to the law was urged or decided.

*Smith v. Parsons*, 1 Ohio, 236, and *Weil v. State*, 46 Ohio St. 450, 21 N. E. 643, presented no question as to any mechanic's or other lien statute, and the opinions are mere applications of the rule that contracts are made upon the basis of the existing law, and that a statute which operated only upon future contracts was therefore not legislation impairing the obligation of contracts. While these decisions have a bearing upon the general question of the legislative power to impress a lien upon the property of an owner in favor of those having no direct contractual relation with him, yet they do not constitute judicial decisions directly bearing upon the law with reference to which complainants may be said to have contracted. There has therefore been no such change of opinion by the supreme court of Ohio as to bring into operation the rule that the rights of the parties are to be determined according to the law as it had been judicially declared when the contract was made.

This brings us to the question as to whether the Ohio legislature exceeded its constitutional powers in providing that subcontractors and material men should have a lien, limited in extent by the original contract price to be paid the contractor, upon the building and land of the owner, to secure them for labor and materials furnished at the instance of the contractor. The facts of this case are such as to en-

title the complainants to demand from this court an independent judgment and expression of opinion as to the validity of the Ohio statute under which their transactions were had, and under which they claim a lien. With every disposition to come to an agreement with the views of the supreme court of Ohio, in the interest of harmony of decision, we are nevertheless compelled to express our inability to assent to the conclusions of that learned and impartial tribunal as to the validity of the legislation under which complainants' rights are claimed. The decision of that court was not placed upon any merely local or peculiar provision of the constitution of Ohio. The ground upon which they placed their objection to the law was that it was an unreasonable and oppressive restraint upon the owner's liberty of contract.

"The owner," said the Ohio court, "has the right to acquire his building upon the best terms possible, and if he can, by making a contract to pay in advance, or by exchange of securities or other property, acquire his building cheaper than by contracting to pay after four months from its completion, he has the inalienable right to so acquire it, and to be protected in its enjoyment; and it is not within the power of the general assembly to compel him to pay a higher price for his building, for the protection of laborers and furnishers with whom he has no contractual relations. To enable the contractor, by force of this statute, to enlarge the price to be paid by allowing liens to be taken on the property for labor and materials, would be as unjust as to authorize the owner, by statute, to enlarge the building, without a corresponding increase in payment." 55 Ohio St. 423-442, 45 N. E. 315.

In answer to the argument that the contract was made with the statute before him, and thereby made the law a part of the contract itself, and consented that those who furnished labor or materials to the contractor for his use would have a lien, the court said:

"This begs the question, and assumes the constitutionality of the statute. If the statute is valid, it must be read into the contract; but, if invalid, it binds neither party, and does not become a part of the contract."

This restraint upon an owner's liberty of contract, the learned court said, was prohibited by those declarations of the Ohio bill of rights which declare that among the inalienable rights of man is "the right of enjoying and defending his life and liberty, acquiring, possessing, and defending property, and seeking and obtaining happiness." Touching the fundamental rights thus enumerated and their application to the law under consideration, the court said:

"It is worthy of notice that the constitution is established to secure the blessings of freedom, and to promote the common welfare. As the constitution must be regarded as consistent with itself throughout, it must be presumed that the laws to be passed by the general assembly, under the powers conferred by that instrument, are to be such as shall secure the blessings of freedom, and promote our common welfare. To make this more emphatic, the first section of the bill of rights provides that 'all men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety.' And by the second section it is provided that 'all political power is inherent in the people. Government is instituted for their equal protection and benefit.' The usual and most frequent means of acquiring property is by contract, and one of the most valuable and sacred rights is the right to make and enforce contracts. The obligation of a contract when made and entered into, cannot be impaired by act of the general assembly. Article 2, § 28. The word 'liberty,' as used in the first section of the bill of rights, does

not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. *People v. Marx*, 99 N. Y. 377, 2 N. E. 29; *Bertholf v. O'Reilly*, 74 N. Y. 509; *In re Jacobs*, 98 N. Y. 98. Contracts and compacts have been entered into between men, tribes, and nations during all time, from the earliest dawn of history; and the right and liberty of contract is one of the inalienable rights of man, fully secured and protected by our constitution, and it may be restrained only in so far as it is necessary for the common welfare and the equal protection and benefit of the people. That such restraint of the right and liberty of contract is for the common public welfare, and equal protection and benefit of the people, must appear, not only to the general assembly, by force of popular clamor or the pressure of the lobby, but also to the courts; and it must be so clear that a court of justice, in the calm deliberation of its judgment, may be able to see that such restraint is for the common welfare and equal protection and benefit of the people. *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343. The statute in restraint of the liberty to contract as to interest on money is valid for the reason that all can see that it is for the common welfare. Many other like cases of restraint as to contracts are to be found in our statutes, but all of them, in so far as they are valid, depend for their validity upon the same principle. It was the infringement of the liberty of contract that induced this court, in *State v. Lake Erie Iron Co.*, unreported [no opinion filed], to hold the statute unconstitutional which required corporations to pay their employes at least twice in each month. Our exemption laws can be sustained only on the ground that, while they in a slight degree limit the liberty of contract, such limitation is for the general welfare of the whole people, and does not interfere with their equal protection and benefit. In such cases courts can see that the slight restraint of the liberty of contract is for the common welfare of the people, but no court can see that it is for the common public welfare that the liberty of contract should be taken away from the owner of a building, to enable the seller of materials to collect their value from a man who never purchased them, and has already fully paid the one with whom he contracted for all that he has received. There can be no public necessity for making the contractor the agent of the owner, to enable the seller of materials to collect his pay from one who does not owe him, and with whom he has no contract."

We have made these copious extracts from the opinion for the purpose of indicating that the case did not turn upon any constitutional principle peculiar to Ohio. The "rights" supposed to be violated are rights deemed fundamental under all forms of popular and constitutional government, and like declarations are to be found in all or most of our state constitutions. The question is therefore one of general law, having as much reference to the constitution of any other state as to that of Ohio.

In the case of *Whiting v. Railroad Co.*, 25 Wis. 188, it was held that, under the constitution of Wisconsin, a tax could not be constitutionally laid in aid of the building of a railroad. The supreme court of the United States refused to follow this as a decision obligatory upon it in a case involving the validity of an act of the Wisconsin legislature authorizing a tax in aid of a railroad.

Upon the question as to whether the decision was one of local or general law, the court, in *Olcott v. Supervisors*, 16 Wall. 678-690, said:

"This was a determination of no local question, or question of statutory or constitutional construction. It was not decided that the legislature had not general legislative power, or that it might not impose or authorize the imposition of taxes for any public use. Now, whether a use is public or private is not a question of constitutional construction. It is a question of general law. It has

as much reference to the constitution of any other state as it has to the state of Wisconsin. Its solution must be sought, not in the decisions of any single state tribunal, but in general principles common to all courts. The nature of taxation, what uses are public, and what are private, and the extent of unrestricted legislative power, are matters which, like questions of commercial law, no state can conclusively determine for us. This consideration alone satisfies our minds that *Whiting v. Railroad Co.* furnishes no rule which should control our judgment, though the case is undoubtedly entitled to great respect."

In support of the conclusion reached by the Ohio court, there have been cited but two cases,—*Spry Lumber Co. v. Sault Sav. Bank Loan & Trust Co.*, 77 Mich. 199, 43 N. W. 778, and *Waters v. Wolf*, 162 Pa. St. 153, 29 Atl. 646. The Michigan case cited involved the validity of the Michigan Act No. 270 (Laws 1887). The act was held void. The second section of that act provided that the lien given to sub-contractors or material men should "not be defeated by any contract, agreement, or understanding between the owner, part owner, or lessee of the real estate upon which such improvements are made, or for which such materials are furnished, and the original or any sub-contractor, by any payment made by such owner, part owner or lessee to such contractor or sub-contractor for the contract price of such labor or material, or any part thereof." The court said such a law "strikes at the foundations of all property in land. There is no constitutional way for divesting a man's title except by his own act or default. Here his own act is not required, and his freedom from default is no defense. He may pay in full, in advance, or otherwise, for all he has contracted for. He may contract for a house built in a certain way, and of certain materials, and may have to pay for what he never bargained for, and what his building contractor had no right to put off upon him. The original contract plays no part in the matter, except as a fact which binds no one, and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer." The case cites no authorities, and states no particular provision of the constitution of Michigan which was violated.

The state of the decisions in Pennsylvania is quite peculiar. Under the mechanic's lien act of 1803 and 1806 it was held that the owner of any interest in the land upon which the improvement was placed could, by his contract, bind the land in its entirety. *Savoy v. Jones*, 2 Rawle, 343. In the case cited, *Gibson, C. J.*, thus stated the ground upon which such a result was to be justified:

"The object of the legislature was to enable the mechanic or material man to follow his labor or material into the building, which is pledged for the price, without regard to the estate of the owner. Did the lien proceed from a contract with the owner, the argument drawn from the apparent injustice of permitting a tenant for life to affect the estate of the remainder-man, who was not a party, would not be destitute of plausibility. But there is no real injustice in the matter, the owners of the several parts of the fee being proportionately benefited; and it is consequently just that the whole should bear the burden."

By the later acts of 1836 and 1845 it was provided that a lien should exist in favor of all debts contracted by the owner or contractor for labor or materials. This legislation was upheld upon the theory that the contractor was, by implication, made the agent of the owner

to fasten a lien upon the building and the owner's land for debts contracted for labor and materials. *Harlan v. Rand*, 27 Pa. St. 511; *Singerly v. Doerr*, 62 Pa. St. 9; *Duff v. Hoffman*, 63 Pa. St. 191.

Adhering to this idea of an implied agency of the contractor for the owner, it was held in *Schroeder v. Galland*, 134 Pa. St. 277, 19 Atl. 632, that a subcontractor or material man could have no right against the owner not founded on the contract between the owner and his contractor; that the agency of the owner was special and limited by his contract, of which all who give him credit must take notice; and that, if he contracted that neither himself nor any other should have a lien, none could be claimed by subcontractors or others.

In *Taylor v. Murphey*, 148 Pa. St. 337, 23 Atl. 1134, it was held that a stipulation by the contractor that he "will release and discharge the said houses from the operation of all liens," etc., was not a waiver of the right to enter a lien, or a covenant that none should be entered, but only a personal undertaking on the part of the contractor to settle any liens that might be filed before demanding payment of the balance due upon his contract, and that, therefore, subcontractors had acquired valid liens. To meet the ruling in *Schroeder v. Galland* and cases following it, the act of 1891 was passed. That act provided that the owner should make no contract with the contractor which should operate to defeat the rights of subcontractors and material men to file liens, and that all subcontractors should have a lien notwithstanding any stipulation to the contrary in the contract between the contractor and owner unless consented to in writing by such subcontractors.

In *Waters v. Wolf*, 162 Pa. St. 153, 29 Atl. 646, a lien was asserted by a subcontractor who had not consented to a stipulation by which the contractor was to neither have nor create any lien in favor of others. The court, in an elaborate opinion, held the act of 1891 invalid, as an unauthorized restraint upon the right of "acquiring, possessing, and protecting property," and not within the delegated powers of the legislature.

The Ohio act involved here contains no provision expressly prohibiting an agreement limiting the supposed agency of the contractor for the owner, or restraining him from creating any lien, such as was contained in both the Michigan and Pennsylvania statutes. If such acts are properly to be regarded as constituting the contractor a special agent for the owner, to which he consents by making a contract with the law before him, it would seem that the Ohio act would be valid, there being no inhibition of an agreement withholding such power, and no intimation that the hotel company, in this instance, limited the implied agency of the contractor. Certainly, the Pennsylvania decisions give no support to the decision of the Ohio court that the Ohio act is void. Under the settled line of decisions in Pennsylvania, the Ohio act is valid. In the last Pennsylvania case, that of *Waters v. Wolf*, cited above, the court announces its adherence to the long line of decisions upholding just such a statute as the Ohio act involved here, saying:

"In the absence of an express contract against liens, with a statute before him giving a lien to those with whom he contracted, the consent of the owner

that a remedy given by law should be enforced under the contract was certainly to be implied."

In all or nearly all of the states there are statutes intended to give liens to those who contribute labor or materials to the enhancement or improvement of the land or buildings of an owner. These statutes vary in their character and purpose. Originally, they were chiefly acts giving a lien to persons having direct contractual relations with the owner. Such statutes did not protect those who contributed to the improvement through dealings with the contractor, and were soon followed by statutes extending the lien to persons not contractually connected with the owner, but who furnished labor or materials for the building through contracts with the principal contractor. This was accomplished in two ways: (1) By giving to creditors of the contractor a derivative lien, whereby they were substituted to the rights of the contractor as they existed when notice was given of the claim. Such statutes were in the nature of mere garnishee or attachment proceedings, and were subject to no criticism as doing injustice to the owner. Payment in advance was a defense under all such statutes, for the contractor's creditors could stand in no better situation than he did. So, if he had no lien, his creditors had none, as their utmost right was to be substituted to the contractor's place. (2) Or by statutes which gave to those who furnished such labor or materials to the contractor a direct or independent lien upon the building and land of the owner. Under these, payments to the contractor prior to expiration of the time within which notice might be given were ineffectual, the lien not being a derivative one, but independent of that given the contractor. Some of these statutes sought to diminish the severity of this legislation by limiting the aggregate of such liens to the original contract price, or by providing for a contractor's bond for the benefit of the owner with summary remedy thereon, or by both. The verbiage of statutes of the latter class varies. In some the contractor is declared to be the agent of the owner, and, as such, authorized to obtain labor and materials upon the credit of the owner or his building and land, or both.

In a large number of cases the question of the constitutionality of acts extending the lien to subcontractors and others having no direct contractual relation with the owner has been brought in question, and the validity of the legislation upheld. In still other instances such acts have been enforced without question as to their constitutionality. We cite a number of cases, though by no means all, in which acts involving questions identical with those raised by the Ohio statute have been enforced, either after their validity had been challenged or sub silentio.

In New York the constitutionality of an act like the Ohio act was twice raised, and twice decided favorably to the lien. *Blauvelt v. Woodworth*, 31 N. Y. 285; *Glacius v. Black*, 67 N. Y. 563.

In *Blauvelt v. Woodworth*, *supra*, payments made to the contractor in advance of the time within which liens might be filed were held to have been made at the peril of the owner, and a sale of the premises by the owner, after the completion of the building, but before notice, and within the time within which notice might be given, were held in-



effectual to defeat the lien of the material men. Touching the constitutionality of a law which brought about such consequences, the court said:

"There is no provision of the constitution which precludes the legislature from declaring a statutory lien, in respect to future contracts, in favor of either the contractor, the subcontractor, or the laborer, upon the land of the owner, at whose instance and for whose benefit the services are performed. The act of 1852 was in force when the contract in question was made; and every contract is presumed to be executed with reference to existing laws, and subject to such modification, in respect to the remedies of the parties, as may result from subsequent legislation, if free from constitutional objection."

And in *Glacius v. Black*, *supra*, the constitutional objection was again urged. The court said:

"The constitutionality of the legislation known as 'Mechanic's Lien Laws' was affirmed in *Blauvelt v. Woodworth*, and the court held that there was no constitutional objection to the creation, by the legislature, of statutory liens, in favor of mechanics and others, for the purposes and under the circumstances and limitations specified in these statutes. Laws of similar character have been in force in this state for more than forty years (Laws 1844, c. 220); and similar legislation is found on the statute books of many of the states. These statutes have been frequently under consideration by the courts, and, so far as we know, their constitutional validity has never been judicially questioned."

In Minnesota similar statutory liens have been enforced. *O'Neil v. St. Olaf's School*, 26 Minn. 329, 4 N. W. 47; *Bohn v. McCarthy*, 29 Minn. 23, 11 N. W. 127; *Laird v. Moonan*, 32 Minn. 358, 20 N. W. 354. In the case last cited, the constitutionality of the law was elaborately considered by the court. Among other things, the court said:

"As such liens are incumbrances upon the owner's title, they can only be created by his consent or authority; and it is upon this ground that such legislation is supported. The statute annexes the lien as an incident to the contract of the owner with the contractor or builder, and such contract is the evidence of the authority of the latter to charge the building and land with liabilities incurred by him in performing his contract." "The owner consents to this power conclusively and irrevocably, so far as others than the builder are concerned, by making a contract while such is the law."

That liens for an amount in excess of the contract price of the improvements or building might be asserted, was held to be no objection. On this subject the court said:

"As respects the amount which may thus be secured, their rights are not dependent upon or limited by the amount due the contractor from the owner under the original contract, nor by the state of the accounts between them. It is sufficient that the liens are created through the owner's contract, from which his consent is implied. To avoid the incumbrance of such liens, the owner takes the burden of securing the bond which he is authorized by the act to take. Whether the burden of taking such proceedings for his own protection should thus be cast on him, or whether subcontractors and laborers should be left to proceed against the amount due, as under the former practice, was entirely a question of legislative policy. And this is sufficient to dispose of the objection that the law unreasonably limits the exercise of the owner's discretion as to the persons whom he shall contract with; that is to say, to such as can give bonds or are financially responsible for the contracts they may make in the prosecution of the work. It is strictly in conformity with the policy which allows a lien in any case. It does not take away or affect the rights of the owner any further than it may be necessary for the security of those who are presumed to have added something to the owner's property equal to the expenses incurred. *Spofford v. True*, 33 Me. 283; *Taggard v. Buckmore*, 42 Me. 77. It is ordinarily understood from the nature of the case that under building contracts the work is not to be

done wholly by the contractor; and it is a sound and just principle that all those who have, by consent of the owner, or in pursuance of contracts with him for that purpose, contributed to increase the value of his property, should have an interest in it until their respective claims for such services have been discharged."

In Wisconsin such an act was sustained over an earnest dissent by Judge Cassady. *Mallory v. Abattoir Co.*, 80 Wis. 170, 49 N. W. 1071.

In Missouri the case of *Henry v. Rice*, 18 Mo. App. Rep'r 497, was overruled, and the validity of the act sustained, in an able opinion by Judge Barclay. *Henry v. Evans*, 97 Mo. 47, 10 S. W. 868.

In Massachusetts an act which did not expressly extend the lien to subcontractors or workmen was held to give a lien upon an implied agency of the contractor. In *Parker v. Bell*, 7 Gray, 429, the court construed an act which provided that "any person who shall actually perform labor in erecting, altering or repairing any building or structure upon real estate, or shall furnish materials actually used for the same, by virtue of any agreement with or consent of the owner thereof, or other person having authority or acting for such owner to procure labor or furnish materials in his behalf, shall have a lien upon such building or structure, and upon the interest of the owner of the building or structure in the lot of land upon which the same is situated, to secure the payment of the amount due him for such labor and materials," and gave to a plasterer employed by a subcontractor an independent lien, the court saying:

"That the employment of a principal contractor to build a dwelling house for a definite and fixed compensation operated to authorize the latter to do all acts necessary and proper to enable him to fulfill his contract, and to complete the tenement to be erected. It was, of course, understood between the parties that this work was not to be wholly and in every part done by the contractors with their own hands. They were fully empowered to employ, in the execution of the contract, the necessary workmen, and to cause their labor to be faithfully applied in fulfillment of its provisions. The consent of the respondents to such employment of laborers, and such application of their labor, is a necessary and inevitable implication from the contract under which the house was to be erected. The labor, therefore, which was actually performed by the petitioners, in doing the plaster and stucco work of the house, and which was a necessary part of the construction, having been rendered by virtue of an agreement with *Whittemore & Currier*, must be considered to have been performed with the consent of the respondents. It was done for their benefit, and under stipulations into which they had entered, by force of which they were entitled to insist that the contract should be fully performed."

In *Donahy v. Clapp*, 12 Cush. 440, *Shaw, C. J.*, for the court, said, concerning the theory upon which the subcontractor might acquire a lien upon the land of the owner:

"Such liens in favor of subcontractors would equally bind the estate by consent of the owner; because such a contract, by force of the existing law, when it was made, of which the owner is presumed to be consant, gives his irrevocable power to his contractor, to charge and bind his estate; and, when such power is executed by the actual making of such subcontract for labor, it is in law the act of the owner, hypothecating his own estate to the extent of the price of such labor."

In *Bowen v. Pinney*, 162 Mass. 593, 39 N. E. 283, *Holmes, J.*, said:

"Our statute gives an immediate lien to one who has performed labor in the repair of a building by the consent of the owner. Even if he is employed by a contractor, the laborer's lien is not by way of subrogation, and does not depend

upon the terms of the contract or the state of the account between his employer and the owner of the land."

In Tennessee just such an act was upheld, though most vigorously assailed as beyond the legislative power. In answer to some of the objections urged, Justice Caldwell, in *Manufacturing Co. v. Falls*, 90 Tenn. 466, 16 S. W. 1045, said:

"It is true that a lien is provided for persons with whom the owner is supposed to have no direct contractual relations, but that fact alone does not invalidate the act; for the owner must be held to a knowledge of the existing law on the subject, and to the presumption that he employed the original contractor, and gave out his work with reference to that law. The right of lien to subcontractors and material men is, by operation of law, incorporated into and made a part of the owner's contract, as much as if expressly included and written therein. He contracts about a subject in which the law declares certain advantages to all persons concerned, whether by direct contract with him or by the employment of his contractor. The law declares that a lien shall exist in favor of the subcontractor and material man in certain contingencies; hence the owner who makes the contemplated contract cannot justly complain of the legal result, especially when he derives the benefit of the labor and material of those for whom the lien is provided, and who often have no other means of compensation. The enforcement of this law does not necessarily result in loss to the owner, nor take from him something for nothing."

In *Colter v. Frese*, 45 Ind. 96, the validity of such an act was most learnedly vindicated by Judge Warren, who delivered the unanimous opinion of the court.

*Stewart v. Wright*, 52 Iowa, 335, has been referred to as questioning the validity of such legislation. The case does not so decide. It turned upon the construction of the act which the court interpreted as giving a lien only upon the balance due from the owner when notice of the subcontractor's lien was filed. The judge, writing the opinion, does intimate a doubt as to the power of the legislature to subject the owner to debts of a contractor who had been paid in full before notice. But no such question was involved or decided.

The California act of March 30, 1868, gave to material men and laborers a lien upon a building to secure the amounts due them, "whether done or furnished at the instance of the owner of the building, or other improvement, or his agent; and every contractor, subcontractor, architect, builder, or other person having charge of any mining, or of the construction, alteration, or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purposes of this act."

In *Hicks v. Murray*, 43 Cal. 515, the constitutionality of this act was assailed, but the court, in an opinion of a few lines, said they thought the act was constitutional.

In the subsequent case of *Renton v. Conley*, 49 Cal. 185, the court construed the act as limiting the lien to the amount due from the owner to the contractor under the contract at the time notice of the filing of the lien was given the owner, but no constitutional question was raised or decided.

In Maine, like statutes, giving liens to subcontractors and material men who gave notice within the time fixed by the statute, have been enforced, and their constitutionality maintained, upon the ground that they applied only to future contracts, and that all building contracts

were made subject to the provisions of the statute. *Spofford v. True*, 33 Me. 283; *Atwood v. Williams*, 40 Me. 409; *Taggard v. Buckmore*, 42 Me. 77. In *Atwood v. Williams*, *supra*, the lien of the material man was enforced, although the owner had made full payment to the contractor after the completion of the building, and before notice of the claim to a lien was filed.

In *Gurney v. Walsham*, 16 R. I. 699, 19 Atl. 323, the constitutionality of such an act was affirmed, upon the ground that the contract was made and entered into subject to its provisions. The defense that the owner had paid all that he owed the contractor before notice of claim of lien by material men was not sustained.

In Virginia similar acts have been held valid (*Improvement Co. v. Karn*, 80 Va. 589; *Railroad Co. v. Howison*, 81 Va. 125); so, in Washington (*Lumber Co. v. McChesnay*, 1 Wash. 609, 21 Pac. 198); and in Connecticut (*Paine v. Tillinghort*, 52 Conn. 532); and in Maryland (*Treusch v. Shryock*, 51 Md. 162).

The direct question as to the constitutionality of acts extending a lien to subcontractors and material men furnishing materials at the instance of contractors has not arisen in the supreme court of the United States, nor in any of the United States courts of appeals, so far as we have been able to discover. An act of congress of March 2, 1833 (4 Stat. 659), gave a lien in the District of Columbia upon buildings to all who do work or furnish materials on order of the contractor, who should give notice to the owner within 30 days after being employed to do the work or furnish materials that they claimed such lien. In *Winder v. Caldwell*, 14 How. 434, this act was construed as not giving a lien to the principal contractor. The court said:

"The contractor, though mentioned in the act, is not enumerated among those entitled to its benefit. The aim and policy of this statute is also obvious. Experience has shown that mechanics and tradesmen, who furnish labor and materials for the construction of buildings, are often defrauded by insolvent owners and dishonest contractors. Many build houses on speculation, and, after the labor of the mechanic and the materials are incorporated into them, the owner becomes insolvent, and sells the buildings, or incumbers them with liens; and thus one portion of his creditors are paid at the expense of the labor and property of others. Or, the insolvent owner, who builds by the agency of a contractor or middleman, pays his price and receives his building, without troubling himself to inquire what has been the fate of those whose labor or means have constructed it. These evils required a remedy, and such a one as is given by this act. Its object is not to secure contractors, who can take care of themselves, but those who may suffer loss by confiding in them. It is not the merit of the contractor that gave rise to the system, but the protection of those who might be wronged by him, if the owner were not compelled thus to take care of their interests before he pays away the price stipulated. But the contractor is neither within the letter nor the spirit of the act."

In *Grant v. Strong*, 18 Wall. 623, and *McMurray v. Brown*, 91 U. S. 258, and *Van Stone v. Manufacturing Co.*, 142 U. S. 128, 12 Sup. Ct. 181, the question of waiver of the lien given under various state statutes was considered. In considering the character and nature of the lien, the court, in *McMurray v. Brown*, 91 U. S. 258-266, said:

"Liens of the kind, except where the statute otherwise provides, arise by operation of law, independent of the express terms of the contract, in case the stipulated labor is performed or the promised materials are furnished; the principle being that the parties are supposed to contract on the basis that, if the

stipulated labor is performed, or the promised materials are furnished, the laborer or material man is entitled to the lien which the law affords, provided he gives the required notice within the specified time."

In *Van Stone v. Manufacturing Co.*, 142 U. S. 128-136, 12 Sup. Ct. 181, it was said:

"It is not the contract for erecting or repairing the building which creates the lien, but it is the use of the materials furnished and the work and labor expended by the contractor, whereby the building becomes a part of the freehold, that gives the material man and laborer his lien under the statute. The lien is brought into operation by virtue of the statute, and the contract for building is entered into presumably in view of, or with reference to, the statute."

In *Trust Co. v. Condon*, 31 U. S. App. 387-422, 14 C. C. A. 314, and 67 Fed. 84, a lien in favor of subcontractors was enforced against mortgagees by this court. Judge Taft, in delivering the opinion of the court touching the character of the lien, said:

"A subcontractor's lien under the statute is not dependent on the principal contractor's having perfected his lien. *Green v. Williams*, 92 Tenn. 220, 21 S. W. 520. It is independent of and superior to his lien, and is only limited by the amount due to the principal contractor at the time of the service of notice by the subcontractor on the railroad company. Therefore the assignee of a principal contractor's lien is junior to the subcontractor who has perfected his statutory lien."

In *Central Trust Co. of New York v. Richmond, N. I. & B. R. Co.*, 31 U. S. App. 675-688, 15 C. C. A. 273, and 68 Fed. 90, we enforced a lien in favor of such subcontractors arising under a Kentucky statute. Touching the origin and nature of the lien, we said:

"It is not a lien originating in a contract for a lien, but arises out of the statute independent of any agreement for a lien, and is based upon the equity of paying for work done or materials delivered. \* \* \* The clear purpose of the Kentucky statute was to make the liens of the contractor and subcontractor independent, direct liens, the latter limited only by the amount of the original contract price. The lien of the subcontractor does not spring out of the lien of the contractor, and is not derived therefrom or subordinate thereto. The aggregate of all the liens is not to exceed the contract price agreed to be paid by the owner, but this limitation concerns not the fact of a lien, but the extent thereof. Being a direct lien, its existence does not depend upon the existence or nonexistence of a contractor's lien, and the waiver of a lien by a contractor will not affect the subcontractor's lien."

In neither of these cases, though the amounts involved were great, was any constitutional objection to the statutes giving the lien suggested, though very eminent counsel appeared in each case. The constitutional validity of statutes giving an independent lien has the support of most of the text writers. 2 Jones, Liens, 286; Phil. Mech. Liens, § 30; Boisot, Mech. Liens, §§ 22, 23. Overton on Liens (section 553) has been cited as advancing a contrary view. If we had doubt as to whether such statute was "due process of law," or violated the fundamental right of owning and enjoying property, or unreasonably restrained liberty of contract, we should be disposed to yield to the current and weight of authority upholding such acts as valid and constitutional. No court is justified in striking down an act of legislation, unless it is clearly satisfied that the act is in conflict with the organic law limiting the power of the legislative branch of government. Such statutes have met with the approval of the legislative bodies of nearly every state in the Union, as well as of congress, as

indicated by the act of 1833, construed in *Winder v. Caldwell*, 14 How. 434. They have survived assault whenever the question has arisen, save in Ohio and Michigan, and to a limited degree in Pennsylvania, and in a still larger number of instances have been enforced without question as to their validity.

But the validity of such statutes need not be rested upon mere authority. They find sanction in the dictates of natural justice, and most often administer an equity which has recognition under every system of law. That principle is that every one who, by his labor or materials, has contributed to the preservation or enhancement of the property of another, thereby acquires a right to compensation. This strong natural justice has given rise to a variety of liens recognized by the common law. Thus, without any agreement the common law gave to one who, by his labor or expense, has made, preserved, enlarged, or repaired a chattel, a lien thereon for his security, which he may, however, lose if he surrender possession. So, we find another illustration in the lien given one who, in the exercise of a quasi public employment, is required to receive or perform some service in respect to the thing upon which the lien is given. That the owner who sells his chattel shall not be required to part with it until the price is paid rests upon the justice of the matter, and not upon any agreement. But the remedies prescribed by the common law by no means embrace the numberless instances in which the inherent right of the matter requires that a charge or lien should be recognized as arising out of the nature of the transaction, independently of any agreement. That wide class of trusts arising out of the conduct of the parties, either with or without intention, but without express words of creation, which we call constructive or implied trusts, rest upon the natural justice which will not permit one to retain that which in justice does not belong to him, and therefore fastens upon the thing, or that into which it is traced, a charge or lien in favor of the equitable owner. So, the vendor of realty may ordinarily, without any express agreement, apply the property sold to the payment of the price. There are a large variety of cases where a lien has been recognized as arising out of the nature of the transaction, although there was no direct contractual relation between the parties affected. Thus, in the maritime law the last lien created by the master of a ship for supplies or repairs is entitled to preference over prior liens; the principle being that the common pledge has thereby been preserved for the common benefit. So, he who rescues goods from capture or the perils of the sea has a lien thereon for his compensation. The meritorious character of a claim often displaces prior burdens, as in the case of supplies and labor furnished a mortgaged railway company to keep it in operation, and preserve the property for the benefit of all interested.

Whoever takes and holds possession of land to which another has the better title is liable to the true owner for the rents and profits, and no distinction is recognized between a bona fide and mala fide possession. *Green v. Biddle*, 8 Wheat. 1, 74. But this was a harsh rule when applied to a case where the rents and profits had been offset by lasting improvements, which had actually increased the value of the land. Courts of equity, therefore, soon applied the principle that,

where the owner resorted to a court of equity for an account of rents and profits, the permanent improvements should offset the liability of the possessor if his possession and improvement were in good faith. 2 Story, Eq. Jur. §§ 799a, 799b, 1237, 1239.

In *Bright v. Boyd*, 1 Story, 478, Fed. Cas. No. 1,875, and same case in 2 Story, 605, Fed. Cas. No. 1,876, Justice Story laid down the broad doctrine that a bona fide purchaser, without notice of defect in his title, who makes improvements upon the estate, has a lien upon the estate for the increased value, after deducting rents and profits; and a court of equity will enforce this lien against the true owner who recovers the estate at law against such a purchaser. This case has been adopted and approved in *Vallés' Heirs v. Fleming's Heirs*, 29 Mo. 152, *Association v. Morrison*, 39 Md. 281, and *Hatcher v. Briggs*, 6 Or. 31, though it cannot be said to have received any very general support, though often cited. The reason is doubtless found in the fact that the equities of bona fide purchasers of defective titles were so generally recognized as to result in statutes in most of the states, called "betterment" or "occupant" statutes, which provide that a bona fide occupant making lasting improvements in good faith shall have a lien upon the estate recovered by the true owner to the extent that his improvements have increased the value of the land. Though the operation of these statutes is to make the true owner pay for improvements made against his will, and which he might not desire, the courts have sustained their constitutionality, as giving remedy where before there had been none, though a strong equity existed. *Cooley*, Const. Lim. 486 et seq.; *Brown v. Storm*, 4 Vt. 37; *Ross v. Irving*, 14 Ill. 171; *Griswold v. Bragg*, 48 Fed. 519; *Hunt's Lessee v. McMahan*, 5 Ohio, 132; *Scott v. Mather*, 14 Tex. 235; *Davis v. Powell*, 13 Ohio, 308; *McCoy v. Grandy*, 3 Ohio St. 463; *Bacon v. Callender*, 6 Mass. 303; *Welch v. Wodsworth*, 30 Conn. 149; *Whitney v. Richardson*, 31 Vt. 300. The constitutionality of a similar Tennessee act was denied in *Nelson v. Allen*, 1 Yerg. 376, but Chief Justice Catron, in a note, says the question did not arise.

Not only was the equity so broadly declared and enforced by Justice Story in *Bright v. Boyd*, supra, recognized and enforced by the civil law, but in that system of law very high consideration was given to all who had, by their contributions, benefited, preserved, or enlarged the estate or property of another; and, among creditors secured by a common pledge or mortgage, those whose contributions were given and used for the benefit of the thing hypothecated were privileged, and, among this class, those whose contributions were last given and used had the preference. *Mackeldy*, Rom. Law, 280, 281.

Domat says:

"Among creditors who are privileged, it does not matter which of them is first or last in order of time, for they are distinguished only by the nature of their privileges." Domat, Civ. Law (by Strahon) 681.

Thus, he who had sold an immovable thing was privileged for the price, before the creditors of the purchaser and all others, as to the thing sold. So, he who loaned money to a purchaser to pay the purchase price had the same privilege as the seller would have

had till he had been paid. He who loaned money to preserve the thing, or to make an improvement of an estate, had a like privilege. *Id.* 682, 683. This equity was, by the civil law, extended to all who had contributed to the preservation, repair, enlargement, or creation of an improvement on land. This privilege is thus stated by Domat (page 683, § 1744):

"Architects and other undertakers, workmen and artificers, who bestow their labor on buildings or other works, and who furnish materials, and in general all those who employ their time, their labor, their care, or furnish any materials, whether it be to make a thing, or to repair it, or to preserve it, have the same privilege for their salaries, and for what they furnish, as those who have advanced money for these kinds of works, and which the seller has for the price of the thing sold."

None of these instances, from either the civil or common law, of a charge or preference, are dependent upon an express agreement for such privilege over other creditors. They have their basis in the nature of the transaction. Statutes which give to a contractor or material man, dealing directly with the owner, a lien on the building or land, do so independently of any agreement for a lien, but their validity has never been doubted. Yet the basis for the interposition of a lien is the mere equity in favor of him who, by his labor or materials, has benefited the owner, and has acquired, therefore, an interest in the property benefited, to secure his just compensation. In most instances it is well understood that the contractor will employ others to aid in or do the work and to furnish the materials necessary. The earlier statutes did not extend any protection to those who should be thus employed by the contractor. To remedy this, some statutes gave to such subcontractors, workmen, or furnishers of materials a mere derivative lien, by which they might be substituted to the lien and claim of the contractor. In others, an independent lien was given to all who should, at the instance of the owner or his contractor, contribute towards the completion of the work either labor or materials. Of this character is the Ohio statute under consideration. Such statutes rest upon the principle of natural justice which lies at the foundation of the many liens or preferences among creditors which we have cited from both the common and civil law. It is true that a lien is created in favor of one with whom the owner has no direct contractual relations. But, if the owner makes the contract with the law before him, the law enters into and becomes a part of the contract. The legal effect of the contract is to give a lien to all who, at the instance of his contractor, shall be employed to furnish labor or materials for the work which he has let out. So far as such a statute is limited to future contracts, it cannot be said to impair the obligation of a contract. If the law be subject to no other objections, it impairs no contract, for all thereafter made are entered into upon the basis of the law. "The inhibition of the constitution is wholly prospective. The states may legislate as to contracts thereafter made as they see fit. It is only those in existence when the hostile law is passed that are protected from its effect." *Edwards v. Kearney*, 96 U. S. 595; *Greenwood v. Freight*



Co., 105 U. S. 13; *Denny v. Bennett*, 128 U. S. 489, 9 Sup. Ct. 134; *Smith v. Parsons*, 1 Ohio, 236; *Weil v. State*, 46 Ohio St. 450, 21 N. E. 643. Neither can the owner be said to be thereby deprived of his property without due process of law. He has voluntarily made a contract with the law before him. He has thereby subjected his property to liability for certain debts of the contractor. His own voluntary consent is an element in the transaction. He knows what the law is, and makes a contract under that law. It is idle to say that under such circumstances he is deprived of his property without due process of law. *Provident Inst. for Savings v. Jersey City*, 113 U. S. 506-514, 5 Sup. Ct. 612.

If, then, this statute does not unduly restrain the owner's liberty of contract, considered as an incident to the right of owning, possessing, and enjoying property, the law must be constitutionally unobjectionable. If, however, this legislation is the mere arbitrary exercise of the powers of government, unauthorized by the established principles of private right, and not having the sanction of natural justice, it is not the law of the land. But we have already seen that the underlying purpose of the act is not to arbitrarily and unnecessarily oppress the owner in any incident of his right as owner, but to secure those who, by their labor or materials, have contributed to the improvement of the owner's property. That the liens under consideration are given to secure debts which are primarily the debts of another would be fatal to the legislation, as taking the property of one to pay the debts of another, but for the equity arising from the use of the labor and materials by the owner. It is in this connection of the owner with such debts that the justice of the statute is found. In paying off such claims, the owner may, if he exercise proper precaution, pay only his own debt to the contractor. If he be required to pay such subcontractors when nothing is due the principal contractor, it is his own fault. That the liability of the owner in respect to building contracts is restrained in some degree by this statute must be admitted. If he pay in advance, or contract to pay in property, or by an exchange of paper, and his contractor be dishonest or insolvent, he may find himself involved by the contractor's debts for labor or supplies. This contingency he may not always be able to guard against. But as much may be said of those who furnish labor or materials at the instance of the contractor. Without the lien they must look alone to the contractor, and may not always be able to protect themselves. Inasmuch as the owner actually gets the benefit of their contributions to his property, their equity is a strong one, and the legislature has, in its discretion, determined to cast upon the owner the responsibility of guarding against the defaults of a contractor selected by himself. To protect the class having this equity, the making of building contracts has been regulated. The restraints upon the owner are neither arbitrary nor oppressive; nor are they, under this Ohio statute, any more onerous than required by the necessity of protecting those who actually do the work or furnish the materials by which the owner is benefited. To permit such persons to follow and recover their contributions in kind would

be futile to them, and disastrous to the owner. A law which has for its basis equitable principles, which in all times and in all ages have had recognition, cannot be arbitrary and oppressive to the extent of exceeding the boundary of legislative discretion. Restraints upon liberty of contract are constantly met with in the legislation of every state. Statutes requiring certain contracts to be in writing or to be witnessed or acknowledged or registered, statutes regulating interest or the time within which rights may be enforced, and statutes exempting property from liability to execution, are notable examples of statutes regulating and limiting contracts. No more striking example of interference with liberty of contract is afforded than the statute upheld by the Ohio court in *Weil v. State*, 46 Ohio St. 450, 21 N. E. 643. The statute there declared valid was one which regulated conditional sales of personal property, or sales upon the installment plan, and made the violation of one of its sections a misdemeanor.

The equity in favor of those to whom the benefit of the Ohio lien law is extended is in its nature comparable to many equities recognized by courts of chancery and in other systems of law. But it was an equity upon which there was no remedy. The statute gives one in respect to future contracts. We cannot say that the remedy is so arbitrary or oppressive, or so unreasonable, as to be an act in excess of legislative power. The right of him who, by his labor and materials, had contributed to the betterment of another's estate, was an imperfect right, because it had not been done at the instance of the owner, though presumably with his knowledge and at the instance of his contractor. At the common law neither the owner nor his building was chargeable, there being no contractual relation. The statute recognizes the equity of such contributors, and has turned the imperfect into a perfect right, by prescribing the consequences of a building contract, and giving a remedy to all who, at the instance of the contractor, shall contribute to the performance of his contract with the owner. That legislation which is sanctioned by the dictates of natural justice can only be avoided by pointing out some specific provision in the organic law which has been violated by its enactment. Neither upon reason nor authority are we able to come to an agreement with the Ohio court. In the exercise of our independent constitutional jurisdiction, we must declare our conscientious judgment to be that the Ohio statute was not void, and that complainants are entitled to relief thereunder. The decree of the circuit court must be reversed. The demurrer will be overruled, and the cause remanded for answer and further proceedings not inconsistent with this opinion.

## AMERICAN LOAN &amp; TRUST CO. v. CENTRAL VERMONT R. CO.

(Circuit Court, D. Vermont. March 8, 1898.)

## 1. EQUITY PLEADING—BILL TO FORECLOSE MORTGAGE—PROPERTY IN HANDS OF RECEIVER.

Where property is in the hands of a receiver appointed by a court, an independent suit to foreclose a mortgage cannot be maintained, even in the same court.

## 2. SAME.

One who claims the disposition or possession of property in the hands of receivers of a court must come to that court in that case, and obtain leave to file a bill in the original cause.

This was a bill in equity by the American Loan & Trust Company against the Central Vermont Railroad Company to foreclose a mortgage.

Elmer P. Howe and Henry Crawford, for plaintiff.  
Benjamin F. Fifield, for defendant.

WHEELER, District Judge. This bill is brought and filed, as an independent proceeding, upon a mortgage which is first upon a part of the defendant's railroads and property, and second as to part, and which provides, as is alleged, that:

"If default be made in the payment of any installment of interest upon, or the principal of, any of the bonds secured by this mortgage, when the same is payable, and such default shall continue for six months after due demand, the trustee is authorized, in its discretion, to enter upon and sell at public auction in the town of St. Albans, Vermont, after notice in writing to the party of the first part at least six weeks before the sale, and publication of the notice of the proposed sale at least once a week for six weeks next preceding such sale in a daily newspaper published in the city of Boston and the city of New York each, and a newspaper published in the town of St. Albans and in the city of Burlington, Vermont, the whole of the lands, property, premises, railroads, stocks, bonds, and franchises herein conveyed, or as much thereof as shall be necessary to satisfy such overdue obligations of the party of the first part."

The bill further sets up:

"That on or about the 14th day of March, 1896, the Grand Trunk Railway Company of Canada filed its bill of complaint in this honorable court against the said defendant, the Central Vermont Railroad Company, in behalf of itself and all other creditors, both secured and unsecured, of said Central Vermont Railroad Company, in which said bill the orator set forth the leases by the Central Vermont Railroad Company of the various railroads hereinbefore stated, and the issue of \$7,000,000 of bonds by the Consolidated Railroad Company of Vermont, secured by a mortgage on said Consolidated road and the Vermont & Canada road, and the execution and delivery of said mortgage of the Central Vermont Railroad Company sought to be foreclosed in this action, and the issue and delivery of about \$3,000,000 of the bonds secured by said last-named mortgage, and the failure of the Central Vermont Railroad Company to pay any of the interest coupons upon said bonds; the existence of a large floating debt of the Central Vermont Railroad Company, amounting to about \$2,500,000; the inability of the Central Vermont Railroad Company to meet its obligations; the ownership by said Grand Trunk Company of \$700,000 of said mortgage bonds of said Consolidated Railroad Company of Vermont, and of \$1,000,000 of said mortgage bonds of the Central Vermont Railroad Company, and that, unless receivers were appointed, the whole Central Vermont system would become disintegrated and broken up by attachments and sequestrations in dif-

ferent jurisdictions; and praying that the rights of the said Grand Trunk Company and other creditors of the Central Vermont Railroad Company, including all holders of the bonds of the Consolidated Railroad Company of Vermont, and of the bonds of the Central Vermont Railroad Company, in or to the property, real or personal, of said Central Vermont Railroad Company, might be ascertained and protected; and that the court would administer the fund constituting the entire railroad and assets of said corporation, and for such purposes would marshal its assets, ascertain the several separate liens and priorities existing upon each and every part of said system, and the amounts due upon each and every of said mortgages and other liens, and would enforce and decree the rights and equities of each and all the creditors of said Central Vermont Railroad Company as the same may be fully ascertained and decreed, upon the respective intervention or application of each and every such creditor or lienor in and to not only the said lines of said railroads, their appurtenances and equipments, but also to and upon each and every portion of the assets and property of said defendant company, and for the appointment of receivers of said defendant company and of its property of every description, and for an injunction against said defendant company restraining it from interfering with the possession and management of said property under said receivers."

That the defendant therein, the Central Vermont Railroad Company, "filed its answer to said Grand Trunk bill, in which it admitted substantially that all the allegations of said bill were true"; that:

"And thereafterwards, upon the 20th day of March, 1896, this honorable court appointed Charles M. Hays and Edward C. Smith receivers of said Central Vermont Railroad Company, and all its leased lines, property, and assets, and immediately thereafter said receivers took possession of the same, and thence hitherto have been, and still are, in possession of said property, with the exception of the Rutland and Ogdensburg & Lake Champlain Railroads."

And alleges that:

"Your orator further shows that all the rights, franchises, choses in action, and all real and personal property, embraced in said mortgage to your orator as trustee, within the jurisdiction of this court, are, by virtue of the appointment of said receivers above set forth, in the possession, custody, and control of this court, by the reason whereof your orator is unable, save as herein sought, to take possession of the same, and through possession thereof administer its trust as in said mortgage or indenture of trust it was provided it should do."

And prays for a foreclosure and sale, and:

"Second. That a receiver or receivers may be at once appointed, according to the usual course and practice of this court, of all the property, lands, railroads, assets, and franchises embraced in and covered by said mortgage or indenture of trust dated October 26, 1892, to your orator, and thereby conveyed or intended to be conveyed as aforesaid, and of the income, rents, tolls, issues, and profits thereof, and that said receiver or receivers may be empowered and directed to take, hold, and possess the same, and have exclusive charge and control thereof, with the usual powers of receivers in like cases, subject only to the order of this court; that such receiver or receivers may be directed to operate and manage said railroads, to pay out of the earnings therefrom the necessary operating expenses thereof, to keep the same and rolling stock and appurtenances in repair, to apply such earnings as directed by the court, and to otherwise discharge all duties ordinarily imposed upon the receivers of railway property."

The bill is demurred to, and that it is so brought and filed as an independent suit is principally set down as a special ground for the demurrer, which has now been argued. Some statements of fact outside the bill have been made in assigning the causes of demurrer, which have been objected to, and of course cannot be considered. They should be, if relied upon as material, brought forward by plea or

answer. The receivership, as alleged in the bill, is what must be and is considered with reference to the right to maintain an independent suit. The principal difference between this question here now, and that lately here, decided in *American Loan & Trust Co. v. Central Vermont R. Co.*, 84 Fed. 917, on demurrer to a bill for foreclosure of the first mortgage, is that arising from the presence of the receivers as parties defendant there, and not here. If this was a strict foreclosure of a mortgage in the usual form, such as is had under the laws of the state, to merely cut off the right to redeem without touching the possession of the property, it might, perhaps, be maintained as a separate suit. *Brooks v. Railroad Co.*, 14 Blatchf. 463, Fed. Cas. No. 1,964; *Mercantile Trust Co. v. Lamaille Val. R. Co.*, 16 Blatchf. 324, Fed. Cas. No. 9,432. But the extracts quoted from the mortgage and bill show clearly that immediate possession of the property by receivers now, and vendee subsequently, is sought. This cannot be had without displacing that of the present receivers, or making their possession a new one, by appointing them receivers in this cause. That their possession will not be disturbed or changed but by, or by leave of, the court appointing them is, as said in the other case, universal and elementary. No case is cited or known to the contrary. Much stress has been laid in argument upon *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 82 Fed. 642. There the receivers in a creditors' suit had, by leave of court, been made defendants in a foreclosure suit which set out the receivership, the suits had been consolidated by the title of the foreclosure suit, and the receivers had been continued in that suit. On a motion to dismiss the bill of foreclosure, Judge Taft appears to have said: "It cannot be of importance that the bill was apparently filed as an independent bill. If in fact the only way of maintaining jurisdiction of it is as a dependent bill, ancillary to the creditors' action, it is the duty of the court so to treat it, provided it appear, as it does, that it can be maintained as such." This must be considered as said with reference to the suits as they then stood together, and falls far short of saying that the foreclosure suit could properly be maintained during the receivership in the other, as a wholly independent suit. Neither do his remarks, nor those of Judge Bunn in *Louisville Trust Co. v. Louisville, N. A. & C. R. Co.*, in the circuit court of appeals, Seventh circuit (28 C. C. A. 202, 84 Fed. 539), to the effect that filing the bill of foreclosure as a dependent or ancillary proceeding to, or in any way consolidating it with, a creditors' suit does not enlarge or vary the rights of parties to that suit in respect to contesting the foreclosure suit, show that the foreclosure suit, setting up the creditors' suit and receivership, can exist, against a demurrer for that cause, as a suit wholly by itself for seizure and sale of the property. The substance of the whole is that those who claim the disposition or possession of property in the hands of receivers of a court must come to that court, in that case, to reach it, and an independent suit for that purpose cannot be maintained even in the same court. Leave of court to file a bill separately must be had in the original cause, and this annexes the new bill to that cause, and amounts to the same as filing it in that cause would. Here no leave whatever has been had, and the bill is bad on demurrer for that cause. Leave to so file this bill may,

however, be granted now, and so filing it will avoid such demurrer; and leave to file this bill in that cause within 10 days is so granted.

Demurrer sustained, with leave to file this bill in original cause within 10 days; and, if so filed, the demurrer for the cause of want of such leave is then to be overruled, with leave to defendant to answer over under the rules.

FARRAND et al. v. LAND & RIVER IMP. CO. et al.  
(Circuit Court of Appeals, Seventh Circuit. April 18, 1898.)

No. 467.

**1. NEGLIGENCE OF ATTORNEY—TITLE ADVERSE TO CLIENT—ESTOPPEL.**

An attorney who negligently fails to see that a judgment, recovered by him for another in the county court, is properly docketed in the office of the clerk of the circuit court to make it a lien on real estate, as required by Laws Wis. 1856, c. 120, § 192, is not precluded from afterwards acquiring title to, and holding for his own benefit, land upon which such judgment would have become a lien had it been so docketed.

**2. EXECUTION AFTER DEATH OF PLAINTIFF—BID AND CERTIFICATE IN NAME OF DECEASED.**

Notwithstanding the statute authorizes the issue of execution after the death of the judgment plaintiff, "in the same manner and with like effect as though the person in whose favor the same was rendered was still living," the sale is a nullity where the bid is made and the certificate taken in the name of the deceased plaintiff.

**3. MONEY HELD BY ATTORNEY—DEATH OF CLIENT—PROTECTING CLIENT'S INTERESTS.**

After the death of his client, an attorney has no right to use money collected for the client to redeem land from a tax sale, in order to protect such client's interest therein.

**4. ATTORNEY'S NEGLIGENCE—LOSS OF LIEN—ESTOPPEL.**

Where it was an attorney's duty to redeem land from a tax sale in order to protect his client's judgment lien thereon, his failure to do so affords no ground for asserting against him an estoppel to deny the existence of such lien years after it has been extinguished by such sale.

**5. TRUST EX MALEFICIO IN LAND—ENFORCEMENT—LACHES.**

Land was sold on execution in 1859, a year after the death of the judgment plaintiff, and bid off for him, and certificate taken in his name, by his attorney, in ignorance of his death. No deed was taken on the certificate. The land was afterwards sold for taxes, and title thereby acquired by another. At a subsequent tax sale it was purchased by said attorney, who, in 1870, received a tax deed therefor. In 1883 he sold the land to defendants, and in 1895 plaintiffs, the administrator and widow of the judgment plaintiff, commenced suit to enforce a trust ex maleficio in the land. *Held*, that the long delay constituted such laches as to bar relief.

Appeal from the Circuit Court of the United States for the Western District of Wisconsin.

This suit was brought on September 28, 1895, by the administrator of the estate and the widow of George A. Porter against the Land & River Improvement Company and Hiram Hayes for the purpose of enforcing an alleged trust ex maleficio in land conveyed by Hayes to that company. The essential facts are not in dispute. By a letter dated "Superior, June 16, 1857," George A. Porter sent to M. S. Bright a promissory note made by Ray & Markel, a firm composed of James D. Ray and Clinton A. Markel, with directions to protest, and, if necessary, to sue in time for the next term of court, and for "further instructions at any time" to address him at Detroit, Mich. M. S. Bright and Hiram Hayes were at that time partners as attorneys at law at Superior,

Douglas county, Wis., where Ray & Markel were engaged in business, and on September 3, 1857, they obtained judgment on the note against the makers, in the county court of Douglas county, for the sum of \$1,135.54. It is claimed that this judgment became from the date of entry a lien upon a quarter section of land in the county, of which Ray held the legal title. Before the entry of the judgment, on August 1, 1856, Ray had bound himself in writing to convey the land to Augustine Chester and Benjamin Chester for \$2,090, for the unpaid balance of which sum the Chesters executed to him their promissory notes for \$530 and \$560, payable, respectively, August 1, 1857, and August 1, 1858. There is a stipulation in the record made by counsel that these notes were paid. Counsel for the appellants afterwards gave notice that the stipulation was withdrawn because made without the authority of his clients, but no order of the court authorizing the withdrawal was obtained. On October 12, 1857, Augustine Chester assigned the contract to Benjamin Chester, who, on November 25, 1857, assigned it to Mary Etta Chester, who, on February 1, 1889, assigned it to Margaret C. Harney. This contract was recorded March 31, 1858. George A. Porter died on October 31, 1858, but in ignorance of his death Bright & Hayes, on the ensuing 31st of December, caused the issue of an execution on the judgment, which was returned unsatisfied, and in October, 1859, they procured of the county judge an order for execution upon the judgment, notwithstanding the lapse of two years since its rendition. The execution was issued on November 3, 1859, directed to the coroner of the county, Ray being the sheriff, and levy was made upon the land in question, on the supposition that Ray had an interest therein. Sale by virtue of the execution was made on December 24, 1859, and, the land having been bid off by Bright & Hayes for Porter, whom they supposed alive, the coroner made duplicate certificates of the sale, one of which was filed in the office of the register of deeds of Douglas county on December 30, 1859, the sale being also entered in the sheriff's sale book on the same day; and the other was delivered to Bright & Hayes for Porter. A conveyance of the land in pursuance of the sale was never made. On March 15, 1858, Bright & Hayes informed Porter by a letter addressed to him at Detroit of certain collaterals which they had received of Ray & Markel for the payment of the judgment, of the rendition of which they had before written him, and of the payment to them by Ray of \$140 in provisions, which they had turned on the judgment. One item of the collaterals was the second Chester note for \$560. That letter Porter answered from Detroit on April 19, 1858, returning the collateral sent him—a draft on parties in New York—protested for nonpayment, and saying that the letter of March 15th was the first notice he had received of judgment having been obtained in his favor. On May 10, 1858, Bright & Hayes replied, and it does not appear that another letter passed between the parties until January 6, 1860, when Bright & Hayes mailed a letter to Porter at Detroit, stating that they had bid off the land described at execution sale in his name for the sum of \$650, that the property would have been sold sooner had there not appeared to be an equitable lien upon it in favor of parties in Chicago, created by an obligation of Ray to convey the land. This letter was not acknowledged by Porter's widow, or by his brother or uncle, who resided and were, well known in Detroit, and they each testified that they had no knowledge of it. It was not returned to Bright & Hayes. In September, 1858, the land was sold for taxes, and the tax deed made on May 6, 1863, to Thomas A. Kiley, was duly recorded, but, the deed being defective for want of the words "as the fact is" in the redemption clause, a corrected deed supplying the defect was made to Kiley on December 24, 1864. That deed was not recorded. In 1862 the land was sold for taxes to Douglas county, but was redeemed by Kiley in November, 1862; was again sold in 1863 for taxes, and again redeemed by Kiley in June, 1864; the sums paid being \$69 and \$9.78, respectively. Bright & Hayes dissolved partnership in 1860, Bright remaining in Superior until some time in 1861, when he removed to New York, where he died in 1863. After the dissolution Hayes went to Washington, D. C., where he did clerical work until October, 1862, when he was appointed a quartermaster, and served in that capacity until mustered out in October, 1865, being at that time a lieutenant colonel. He returned to Superior in 1866, where he engaged in teaching school, gardening, and doing what little law business came to him to do. From 1867 to 1870 the population of Superior was greatly re-

duced, and lands in the vicinity ceased to be saleable, except for taxes. On September 3, 1867, Hayes purchased at tax sale 17 pieces of land, including that in controversy, paying therefor the total sum of \$40.80, of which \$14.23 was for the land in question, and expecting to profit only by the premium and interest required to be paid in order to redeem from the sale. He received a tax deed in 1870. The land was about four miles from the inhabited part of Superior. Hayes had never seen it, did not know that it was the land which had been sold on the Porter execution, and did not learn that fact until 1891, when, on hearing that the appellants were investigating, he looked up the papers of Bright & Hayes touching the subject. He paid the taxes on the land from 1867 until June 2, 1883, when, for the consideration of \$6,400, as expressed in the deed, he conveyed the land to Edward Buchanan, who purchased for and afterwards conveyed to the Land & River Improvement Company for the expressed consideration of \$16,000. The court below dismissed the bill on the grounds that if the appellants had an interest in the land it was of an inchoate and uncertain character, and that in waiting 35 years to sue they had been guilty of such gross laches as to forbid relief, and that in fact they never had title or interest in the land.

In support of the proposition that Porter or the appellants never acquired an interest in the land, it is contended by the appellees: First, that the judgment debtor, Ray, by the contract with the Chesters, had divested himself of all interest in the land before the judgment was rendered; second, that Ray's interest, if he had any, was divested by the corrected tax deed of December 24, 1864, to Kiley; third, that, not having been docketed in the office of the clerk of the circuit court, as required by section 192, c. 120, Laws Wis. 1856, the judgment taken in favor of Porter in the county court did not become a lien on the land; fourth, that, the judgment plaintiff being dead, execution could not be issued by his attorneys after two years from the date of rendition; fifth, that the coroner's sale was a nullity, the bid being made and the certificate taken in the name of the deceased plaintiff; and, sixth, that the attorneys were under no obligation to take a deed in consummation of the sale. These propositions are disputed by counsel for the appellants, who insists (1) that, if a docketing of the judgment in the circuit court was necessary, Bright & Hayes were guilty of such negligence in not having it so docketed as precludes each of them from acquiring an interest in or title to the land, which, if the judgment had been so docketed as to be a lien, equity would have forbidden them to acquire; (2) that Bright & Hayes, having knowledge during the life of Porter that Ray had an interest in the land, which it was their duty to subject to the payment of the judgment, Hayes was precluded in equity from acquiring a title or interest in the land which would impair the interest therein to which the duty related; (3) that the acts of Bright & Hayes relating to issuing the execution and to the sale of the land were capable of being ratified, and were properly ratified by the appellants; (4) that it was the duty of Bright & Hayes to demand a deed for the land after the time for redemption from the sale had expired; (5) that out of the money in their hands collected for Porter on the judgment, Bright & Hayes should have redeemed the land from the tax sale, and prevented the issue of the tax deed of Kiley; (6) that by releasing from the lien of the judgment certain lots in Dubean's addition to the village of Superior, Bright & Hayes must be regarded as having in their hands for the use of Porter the value of the lots; (7) that by reason of the negligence of Bright & Hayes and his own negligence Hayes is estopped from alleging that the tax deed to Kiley impaired the interest of the appellants in the land; (8) that in purchasing the land at tax sale in September, 1870, Hayes committed a fraud against the appellants, which rendered him their constructive trustee for the entire title to the land; and (9) that the Land & River Improvement Company could and did acquire of him no right or title freed from the trust. These propositions are deduced from the assignment of errors. In support of them the following proposition of law is advanced: "Whenever one person is placed in such relation to another by the act or consent of that other or the act of a third person or of the law, or becomes interested for him, or interested with him, in any subject of property or business, he is prohibited from acquiring rights in that subject antagonistic to the person with whose interest he has become associated;" or, as otherwise stated: "No party can be permitted to purchase an



interest in property, and hold it for his own benefit, where he has a duty to perform in relation to said property which is inconsistent with the character of the purchase on his own account." The following is quoted from the opinion of the court in *Henry v. Raiman*, 25 Pa. St. 354: "If a trust reposed [in an attorney] for the purpose of establishing it [the title] might be made available as the means of defeating it the moment it passed into other hands, it would be more injurious than beneficial. No prudent man would repose confidence on such terms, and all men would be deterred from purchasing titles which had ever been in the hands of attorneys or counselors at law. If, after the cause is ended, or the relation of counsel and client is terminated by a sale, or by the death of the client, the counsel employed to defend the title should be permitted to make war upon it by means of the purchase of the hostile claim which he was employed to oppose, no one would be safe in the employment of professional aid." And from the case of *Downard v. Hadley*, 116 Ind. 131, 18 N. E. 453, the following: "The rule is inflexible \* \* \* that an attorney who is employed to perfect or defend a particular title to land can neither during the continuance of that employment nor after its termination, without disclosing the fact to, and obtaining the consent of, his client, avail himself of information acquired, or which it was his duty to acquire, while in that relation, and purchase an outstanding title for himself, and set it up in hostility to that which he was employed to perfect or defend."

G. W. Hazelton, for appellants.

R. M. La Follett and A. L. Sanborn, for appellees.

Before WOODS, JENKINS, and SHÖWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

Without further mention of the name of Bright, the case will be considered as if Hayes had been the sole attorney for Porter, and alone responsible for what was done. It is entirely clear that if he was guilty of wrong towards Porter or the complainants it was a purely constructive and unintended wrong. He was employed to collect a note, not to "perfect or defend a particular title to land;" and down to the entry of the judgment no dereliction of duty is alleged. Whether it was his duty to see that the judgment was properly docketed may be doubtful under the decision in *Hesse v. Mann*, 40 Wis. 560, but, if he was at fault in that respect, the extent of his liability for the negligence was the injury done, which would be the value of the lien which was lost, if there was no other property subject to levy; and in no event could the liability exceed the amount of the judgment. Such negligence is cause for an action at law, and affords no basis whatever, in principle or by authority, for the assertion that Hayes was precluded from acquiring an interest in or title to the land on which the judgment, by proper docketing, would have been made a lien. There is manifestly the same objection to the kindred proposition that Hayes was precluded from acquiring title to land in which, while Porter was living, he knew Ray had an interest which he ought to have subjected to the payment of the judgment. For that negligence, too, if he was guilty of it, he was liable at law to the extent of the injury done, not exceeding the amount of the judgment; and his right thereafter to deal with land, on which a lien might have been, but was not, established, was in no sense affected. And, indeed, if the judgment had been from the begin-

ning, or had been made, a lien upon the land, the only restriction upon his right to acquire the title or an interest would have been that he must take subject to the lien. His duty, on that supposition, would have forbidden any act which would impair his client's right, but it did not make him "a trustee for the entire title," of whatever value it should become, beyond the amount of the lien. In order to fasten the alleged trust upon the entire title and interest in the land, it was necessary to show that the title was in fact in Porter. Anything short of that, as that there was no lien when there ought to have been one, or that there was a lien which ought to have been made a title, is not enough, for the reason, already stated, that the injury, if attributable to the negligence of Hayes, was remediable at law, or at most could have had the effect only to make the title acquired by Hayes subject to the lien, if lien there was. That the title to the land was never in Porter is clear, even if the lien of the judgment and execution upon the land, the title of Ray, and the validity of the execution be conceded. The doctrine is elementary that there must be a grantee before a grant can take effect, and that a patent to one who is dead passes no title. *Galloway v. Finley*, 12 Pet. 264. "A patent to a fictitious person is, in legal effect, no more than a declaration that the government thereby conveys the property to no one." *Moffat v. U. S.*, 112 U. S. 24, 5 Sup. Ct. 10. There is nothing to change the rule in the Wisconsin statute, which, when a judgment plaintiff shall have died, authorizes the issue of execution "in the same manner and with like effect as though the person in whose favor the same was rendered was still living." Porter had no title. He had no lien, because a judgment in the county court did not become a lien unless docketed in the circuit court. This we think clear upon the statutory provisions which bear upon the question; but if it were conceded that such docketing was not necessary, and that the judgment became a lien from the date of rendition and entry in the county court, the lien was divested by the tax deed to Kiley. In the absence of proof of irregularities in the tax sale, the corrected deed, though not recorded, was effective to convey title. *State v. Winn*, 19 Wis. 323; *Hewitt v. Week*, 59 Wis. 444, 18 N. W. 417. It is urged that Hayes had in his possession money with which he should have redeemed from the sale, and prevented the issue of the deed to Kiley; but that is a clear mistake. Porter's death terminated all agency, and whatever money Hayes was chargeable with, actually or constructively, he held for the use of the executor or administrator of Porter's estate, and had no right to use it in the manner suggested. But, even if it had been within his authority and duty to redeem from the sale, his failure to do it was at most the subject of an action at law for damages, the measure of which could not have exceeded the amount of the judgment, and affords no ground for asserting an estoppel against Hayes to deny the existence of a lien which in fact had been extinguished years before. Aside, therefore, from the doctrine of laches, which we agree was such as ought to bar the suit, there is not, and never has been, ground for the relief sought. The pend-

ing of litigation between other parties over the land afforded these complainants no excuse for delaying to bring their suit. The decree below is affirmed.

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WELDEN NAT. BANK OF ST. ALBANS v. SMITH et al. FARMERS'  
NAT. BANK OF MALONE v. SAME. OGDENS-  
BURG BANK v. SAME.

(Circuit Court of Appeals, Second Circuit. March 2, 1898.)

Nos. 59, 60, and 61.

1. RAILROAD LEASES—ASSUMPTION OF DEBTS.

A lessee under a railroad lease covenanted to pay all obligations of the lessor incurred "as common carriers, warehousemen, or otherwise," and thereafter to pay the interest on certain mortgage bonds of the lessor. *Held*, that "or otherwise" referred only to obligations of the same class as those enumerated, and that earnings accruing in the hands of receivers of the lessee were applicable to interest on the bonds, rather than to judgments on claims not falling within the class.

2. SAME—ASSUMPTION OF INTEREST PAYMENTS—LIABILITY TO BONDHOLDERS.

A lessee railroad company, which covenants to pay to the trustees of the lessor's mortgage bonds interest thereon as it accrues, is directly liable to the mortgagees therefor, though they are not parties to the lease, since such an agreement shows that the contracting parties intended this stipulation for the benefit of the mortgagees.

3. SAME—LIABILITIES OF LESSOR.

A railroad company which has leased its road, rolling stock, and franchises to another company remains responsible to the public for the acts and defaults of the lessee in operating its road.

Appeal from the Circuit Court of the United States for the District of Vermont.

Chas. M. Wilds, for receivers.

Wager Swayne and Wm. B. Hornblower, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. These are appeals from final orders in a suit brought in the United States circuit court for the district of Vermont by the Grand Trunk Railway Company of Canada against the Central Vermont Railroad Company, and they present the question of the proper distribution to be made of the earnings from a leased railroad in the hands of the receivers of the Central Vermont Railroad Company. The receivers were appointed March 20, 1896, in the suit mentioned, and in an ancillary suit in the United States circuit court for the Northern district of New York. The receivership extends over all property of the Central Vermont Railroad Company and its leased lines, including the Ogdensburg & Lake Champlain Railroad. The fund in controversy consists of net earnings of the latter railroad to the amount of \$105,000, of which \$11,132.36 accrued prior to the receivership, and the balance while the receivers were operating the road.

Since June, 1886, until the receivers were appointed, the Central Vermont Railroad Company operated the railroad of the Ogdensburg & Lake Champlain Railroad Company under an agreement which was

practically, although not technically, a lease. The agreement was executed June 1, 1886, between the Ogdensburg & Lake Champlain Railroad Company, as party of the first part, and the Consolidated Railroad Company of Vermont, as party of the second part, and immediately thereafter was assigned to the Central Vermont Railroad Company; and that company, by the articles of transfer, assumed all the obligations of the Consolidated Railroad Company of Vermont. For convenience it will be termed a "lease," and the parties to it termed "lessee" and "lessor." By the terms of the lease the lessee was to have immediate possession of and operate the franchise and all the property of the lessor for and during the term of the corporate existence of the lessor, and was authorized to collect and receive all the income, rents, and profits of the railroad and property of the lessor. It contained a covenant upon the part of the lessee as follows:

"That all the gross earnings, income, and receipts of and from the business traffic and rentals of said railroad and other property, and referred to in article second of this agreement, shall in each year and annually during the continuance of this agreement be applied and disposed of by the party of the second part as follows."

So far as is material for present purposes, the agreement provided that the gross earnings should be appropriated first to the expenses of operation and maintenance of the railroad, including taxes and repairs, to the payment of certain specified outstanding obligations of the Ogdensburg & Lake Champlain Railroad Company, and to satisfy the covenants of article 3 of the agreement; thereafter to the payment of the interest upon the first consolidated mortgage bonds of the Ogdensburg & Lake Champlain Railroad Company, a lien upon the railroad prior to the lease; thereafter to the payment or adjustment of the liabilities of the Ogdensburg & Lake Champlain Railroad Company upon bonds of the Lamoille Valley Extension Railroad Company; and finally that the residue should be divided between the lessor and lessee in specified proportions.

The appellants are judgment creditors of the Ogdensburg & Lake Champlain Railroad Company, and they assign error of the decision of the court below in adjudging that their demands were not entitled to priority of payment out of the earnings of the leased railroad before the payment of the semiannual installment of interest upon the first consolidated mortgage bonds, which accrued April 1, 1896.

It is conceded by all parties that the fund should be distributed according to the terms of the lease. The lease is the origin of the fund in the hands of the receivers, and they acquire the fund cum onere.

It is insisted by the appellants that their several debts are obligations assumed by the terms of article 3 of the lease, and consequently are payable before the interest upon the mortgage bonds. The covenants of that article, so far as they are material to the present controversy, are as follows:

"The party of the second part covenants and agrees \* \* \* to assume, conduct, and pay the expenses of any and all litigations now pending wherein the said party of the first part is a party or interested, and to pay any and all judgments that may have been or may ultimately be recovered against the said party of the first part herein, except the judgment or judgments that may be recovered in the suit now pending in the supreme court of the state of New York, wherein

Robert L. Day and another are plaintiffs and party of the first part, and the Lamolille Valley Extension Railroad Company and others are defendants, as to which provision is hereafter made, if the highest court to which said litigation may be appealed shall determine against the party of the first part, or said party of the second part shall be advised by competent counsel that appeal therein will be useless." "To fulfill all outstanding contracts or obligations of said party of the first part which are enumerated and mentioned in the schedule hereto annexed, marked 'Schedule A,' as fully, to all intents and purposes, as they ought to be fulfilled by the party of the first part, and all obligations that it has incurred, either by statute or common law, as common carriers, warehousemen, or otherwise, in the operation and maintenance of its railroad property." "To assume all obligations of the party of the first part that may hereafter be incurred, either by statute or at common law, as common carriers, warehousemen, or otherwise, and indemnify and save harmless the party of the first part from all costs, damages, or loss by reason of any failure to fulfill said obligations, and by reason of any claim that may be made for neglect, accident, or default happening upon or in connection with said road or the property of the party of the first part, and from any claims, damages, actions, or judgments arising from the maintenance and operation of said railroad and other property during the continuance of this agreement." "To keep, comply with, and obey the laws of the state of New York in maintaining and operating the said railroad and other property."

The covenant upon the part of the lessee for the payment of the interest upon the mortgage bonds provided that the gross earnings, income, receipts, etc., should be applied—

"To the payment punctually when due, and in full, of the interest on the bonds \* \* \* known and described in the mortgage executed by said party of the first part to William J. Averell and Stuyvesant Fish, as trustees, as the 'First Consolidated Mortgage Bonds' of said party of the first part, dated April 1, 1880, and the total issue wherefor is limited to \$3,500,000, and which interest is at the rate of six per centum, per annum, and payable semiannually on the first days of April and October in each year."

The judgment of the appellant the Welden Bank is founded upon a promissory note for \$10,000 made by the Ogdensburg & Lake Champlain Railroad Company December 2, 1895. The note was a renewal of a series of notes, the first of which was made March 13, 1886, and the consideration of which was money lent to the Ogdensburg & Lake Champlain Railroad Company, and used by it in payment of "sundry bills and pay-roll vouchers." The judgment of the appellant the Ogdensburg Bank is founded upon a promissory note for \$15,000 made by the Ogdensburg & Lake Champlain Railroad Company November 26, 1895. The note was a renewal of a series of notes, the first of which was made in 1888, and the consideration of which was money lent to the Ogdensburg & Lake Champlain Railroad Company, and used by it "in the settlement or compromise of a certain claim for \$350,000 made by the holders of the bonds of the Lamolille Valley Extension Railroad Company." The judgment of the Farmers' National Bank of Malone is founded upon a note made December 2, 1895, by the Ogdensburg & Lake Champlain Railroad Company for \$10,000. This note was a renewal of a series of notes, the first of which was made in 1888, the consideration of which was money loaned to the Ogdensburg & Lake Champlain Railroad Company, and used for the same purpose as the loan from the Ogdensburg Bank. It will be observed that the original note to the Welden Bank was outstanding prior to the execution of the lease, and was not one of the obligations

enumerated in Schedule A, and that the moneys loaned by the other appellants were used to discharge demands which by the express terms of the lease were not to be satisfied from the earnings until the interest on the mortgage bonds had first been paid.

The argument for the appellants is that the words "or otherwise," following the words "common carriers, warehousemen," include claims of the description of theirs. If these words have that scope and meaning, they would bind the lessee to pay, not only the outstanding obligations of every kind which had already been incurred by the lessor in operating or maintaining the railroad, but all and every kind which the lessor might thereafter see fit to assume. If that were a correct construction, the elaborate detailed enumeration of the obligations, outstanding and future, which were to be assumed by the lessee, was unnecessary and meaningless. The parties could not have contemplated giving unlimited power to the lessor to create obligations which would absorb the earnings of the railroad, and thus prevent their application to the other purposes provided for in the lease. The covenants were intended, we think, to protect the lessor against all claims or liabilities which had been incurred or might thereafter arise by operation of law from its acts or defaults in exercising its capacity of common carrier, warehouseman, or other similar duties as a public agent. The Ogdensburg & Lake Champlain Railroad Company had no power by its organic law to lease its railroad and franchise (Laws N. Y. 1839, c. 218), and, notwithstanding the agreement, remained responsible to the public for the acts and defaults of the lessee in operating its railroad. *Abbott v. Railroad Co.*, 80 N. Y. 27; *Troy & B. R. Co. v. Boston, H. T. & W. Ry. Co.*, 86 N. Y. 107. It remained liable, not only as carrier and warehouseman, but otherwise, for injuries caused by the negligence of those operating its road. The words "or otherwise" should be read ejusdem generis. *Lewis v. Smith*, 9 N. Y. 502-520; *Monck v. Hilton*, 46 Law J. M. Cas. 167; *Haren v. Archdale*, 12 L. R. Ir. 318; *Corporation of Portsmouth v. Smith*, 13 Q. B. Div. 184; *Morgan v. Omnibus Co.*, 53 Law J. Q. B. 352.

The court below would not have been justified in finding that the moneys loaned by the Ogdensburg Bank and the Farmers' National Bank of Malone were used for the purposes stated in the affidavit of Louis Hasbrook. The statement of that affidavit is founded upon hearsay, and contradicts the explicit statements in the petitions of the two banks. It is not admitted by the answer to the petition. If, however, it should be assumed, as stated in the affidavit, that the moneys borrowed of the Ogdensburg Bank and the Farmers' National Bank of Malone were used by the Ogdensburg & Lake Champlain Railroad Company in paying expenses of litigation which by article 3 the lessee covenanted to pay, we think the demands of the appellant are not entitled to priority over those of the bondholders. The covenant to pay interest upon the bonds was one which could have been enforced by the trustees of the bondholders in an action against the lessee. The covenants of article 3 were solely for the benefit of the lessor. The former gave to the bondholders an equitable lien upon the earnings, because the trustee could have compelled the lessee to apply the earn-

ings to the payment of the interest. The latter gave simply a remedy to the lessor, which it might or might not assert, at its own option.

There are many cases in which a promise made upon a valid consideration by one person to another, for the benefit of a third, can be enforced by the third person in his own name, although he was not privy to the consideration. As was said in *Austin v. Seligman*, 18 Fed. 522, where the general question was discussed:

"The result of the better-considered decisions is that a third person may enforce a contract made by another for his benefit whenever it is manifest from the language or terms of the agreement that the parties intended to treat him as the party primarily interested."

In the language of Folger, J., in *Simson v. Brown*, 68 N. Y. 355:

"The contract must be made for his benefit as its object, and he must be the party intended to be benefited."

The authorities cited in *Austin v. Seligman* and in the note to that case by Mr. Wharton are sufficient references in support of the proposition, and we shall not attempt to collate or review them.

It was as much for the benefit of the lessee as the lessor that the interest upon the bonds, which were a lien upon the property coming into the possession of the lessee, should be paid at maturity; and the terms of the covenant indicate that it was to be paid by the lessee as it matured, and directly to the trustees named in the mortgage. On the other hand, it is obvious that the covenant of article 3 to pay the expenses of pending litigation was intended to be satisfied by making the payment directly to the lessor. No other person was named, or apparently known, as the one to whom payment should or could be made.

In any view of the case, therefore, the decision of the court below was correct.

The orders are affirmed, with costs.

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#### MALOY v. DUDEN.

(Circuit Court of Appeals, Second Circuit. March 2, 1898.)

No. 67.

#### RES JUDICATA—PARTIES AND QUESTIONS CONCLUDED.

A member of a partnership in Brussels formed a partnership with a New Yorker, and the Brussels firm supplied to the New York firm its stock in trade. On the dissolution of the New York firm the Brussels firm sued the New York partner for an accounting of the partnership affairs, and to recover a balance alleged to be due. Before judgment the other partner in the Brussels firm died. On the accounting it was found that the New York firm was indebted to the Brussels firm in a specified amount, and judgment was given for plaintiff accordingly. *Held* that, as at the date of judgment the complainant was sole surviving partner of the Brussels firm, he was the real party in interest, so that the finding as to the amount due from the New York to the Brussels firm was conclusive, and could not be questioned in a subsequent suit by the New York member against the Brussels member as surviving partner of the Brussels firm.

Appeal from the Circuit Court of the United States for the Southern District of New York.

W. Wickham Smith, for appellant.

Ronald K. Brown, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This appeal presents the question whether the court below erred in deciding that upon the facts the plea of *res adjudicata* was a good defense to the suit. 77 Fed. 935.

The complainant, Maloy, was from 1878 to 1886 a partner with the defendant, Duden, in the mercantile firm doing business at New York City by the style of Duden & Co. By the partnership articles, Maloy was to have 25 per cent. of the proceeds, and Duden was to have 75 per cent. Neither partner contributed any capital, but Duden was a member of the firm of Duden & Co., of Brussels, and during the existence of the New York firm the Brussels firm supplied it with its entire stock in trade; sending to it goods direct from Brussels, or purchasing them elsewhere.

Upon the dissolution of the New York firm, Duden brought an action against Maloy for an accounting of the partnership affairs, and to recover a balance alleged to be due him. That action was originally brought in a state court, and was then removed to the United States circuit court. After a protracted litigation, it resulted in a decree adjudging Maloy indebted to Duden upon the partnership account for \$5,670, and to have no interest in the assets of the firm. Before that suit was at issue, Duden had become the sole surviving member of the Brussels firm. One of the principal issues litigated in the suit was as to the amount of the indebtedness owing by the New York firm to the Brussels firm. It was claimed by Duden that the amount was \$371,470, including interest. It was claimed by Maloy to be \$288,706. If it had been found to be as claimed by Maloy, there would have been a considerable balance due him from Duden in the firm account; if as claimed by Duden, nothing was due, but Maloy was indebted to Duden. The issues in the cause were referred to a master, and he found and decided that the New York firm was indebted to the Brussels firm for \$371,470, and that at the time of the dissolution of Duden & Co., of New York, the liabilities of that firm exceeded its assets. The findings of the master were confirmed by the circuit court. 43 Fed. 407. And the decree was subsequently affirmed upon appeal by the United States circuit court of appeals. 63 Fed. 183. The bill of complaint in the present suit was filed by Maloy, in behalf of the New York firm, against Duden, as surviving partner of the Brussels firm, and alleges that the New York firm was not indebted to the Brussels firm in the sum of \$371,470, and prays relief, that defendant account to the New York firm for the difference between that sum and the amount really owing to the New York firm, and for other supplementary relief.

It is undoubtedly true, as contended for by the appellant, that, if the adjudication in the former suit would not operate as an estoppel



against the defendant in any suit that he might see fit to bring against the New York firm to recover a larger sum than was decided in the former suit to be owing, it cannot operate as an estoppel in his favor. It is insisted that it would not, because, in his capacity as surviving partner of the Brussels firm, he was not a party to the former suit. But he was the Brussels firm, in fact and in law, precisely as he is in the present suit.

We entertain no doubt that if in the former suit it had been decided that the New York firm owed the Brussels firm only one-half as much as was in fact owing, and Duden, suing as surviving partner of the Brussels firm, should seek, in an action against the complainant, to re-examine the matter, Maloy could avail himself of the former adjudication, and insist upon it as a finality. The Brussels firm was represented in the controversy by the man who was all there was of that firm,—the only person who had authority to sue or defend for it, to collect its demands or release them, or represent it in any business transaction.

To give full effect to the principle by which parties are held bound by a judgment, and are not permitted to re-examine the controversy decided by it, not only those who are nominal or formal parties are considered, but so are all others who are identified in interest with either of the immediate parties, and who actually participate in conducting the controversy. The real principal who is behind the formal party, and is actually represented by him throughout the controversy, is the real party; and in order to invoke a judgment as an estoppel, for or against him, it is always competent to show what the real situation was, and what part in promoting or defending the suit was actually taken by him. 1 Greenl. Ev. § 523; *Lovejoy v. Murray*, 3 Wall. 1; *Robbins v. Chicago City*, 4 Wall. 657. It is upon this principle that it has often been held that the owner of a patent can invoke a former adjudication of its validity as an estoppel in a subsequent suit against an infringing defendant, although the defendant was not a party of record in the former suit. *Miller v. Tobacco Co.*, 7 Fed. 91; *Manufacturing Co. v. Miller*, 41 Fed. 357; *David Bradley Mfg. Co. v. Eagle Mfg. Co.*, 6 C. C. A. 661, 57 Fed. 985.

It is obvious that, if the complainant in the present suit could obtain a decree, he could not reap any advantage by it, but, on the contrary, Duden would derive the fruits of the decree. In any action between complainant and Duden to determine the respective interests of the parties in the recovery, the former suit would conclude their rights; and it would have to be decided that the complainant has no interest in the recovery as a firm asset, and that he has no claim against Duden for anything arising out of their partnership accounts, because these things have been decided in the former suit, and that decision is conclusive between them whenever and wherever those issues arise. The case for the complainant does not rest upon any substantial basis, because in no event can he succeed in reaching a result which will be beneficial to him.

The decree of the circuit court is affirmed, with costs.

**WHITTEN v. BENNETT et al.****(Circuit Court of Appeals, Second Circuit. March 2, 1898.)**

No. 62.

**1. FALSE IMPRISONMENT—ARREST UNDER VALID WARRANT.**

Arrest under a warrant, valid in form, issued by competent authority on a sufficient complaint, is not false imprisonment, though the indictment under which the warrant was issued was procured maliciously, and by artifice and misrepresentation, for the purpose of extorting money. The proper remedy in such case is not an action for false imprisonment, but for malicious prosecution. 77 Fed. 271, affirmed.

**2. MALICIOUS ABUSE OF PROCESS.**

An action for malicious abuse of process does not lie when the process has been used for the purpose which by law it was intended to effect. Such an action presupposes that the arrest under the process was justifiable and proper in its inception, and is founded on grievances arising in consequence of subsequent proceedings.

**In Error to the Circuit Court of the United States for the District of Connecticut.**

William H. Baker, for plaintiff in error.

William L. Bennett, for defendants in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is a writ of error by the plaintiff in the court below to review a judgment for the defendants upon demurrers to the complaint.

The complaint, after stating facts showing the requisite diversity of citizenship between the parties to confer jurisdiction upon the court, and averring the defendant Bennett to be the duly-authorized executor of the last will and testament of Tilton E. Doolittle, deceased, alleges in substance that at a term of the superior court of New Haven county, in Connecticut, the grand jury found an indictment against the plaintiff, charging him with the crime of murder in the second degree; that the grand jury did not intend to indict the plaintiff, but were misled into indorsing the indictment as a true bill by the artifice and misrepresentation of Doolittle, who was the prosecuting attorney for New Haven county; that Doolittle procured the indictment maliciously, and for the purpose of extorting money from the plaintiff; that upon the application of Doolittle the governor of Connecticut granted a requisition upon the governor of Massachusetts, in which state the plaintiff then was, for the surrender of the plaintiff as a fugitive from justice, and the governor of Massachusetts issued an executive warrant for the arrest and rendition of the plaintiff, and designated the defendant Leete to execute it; and that the plaintiff, by the instruction of Doolittle, was arrested by the defendant Leete and imprisoned upon said warrant, and in consequence thereof sustained damages, etc.

We are of the opinion that the complaint does not state any cause of action. It does not allege that Doolittle actually used the indictment and the warrant of rendition for any oppressive purpose, although it avers that he procured them for the purpose of such use. The process

was valid and lawful upon its face, and no use was actually made of it except such as was strictly authorized by it. The real grievance of the plaintiff arises from the conduct of Doolittle in procuring an indictment against him without evidence, and which the grand jury did not intend to find; and if the plaintiff had chosen to have the indictment quashed, or the prosecution terminated in any other mode, he would have been entitled to maintain his action of malicious prosecution. The case is essentially like that of *Coupal v. Ward*, 106 Mass. 289, where it is held that, when one has procured the arrest and imprisonment of another on a lawful warrant, he is not liable to an action of assault or false imprisonment, although he obtained the warrant by misrepresentation.

The complaint does not state a cause of action for false imprisonment. Arrest under a warrant, valid in form, issued by a competent authority upon sufficient complaint, is not false imprisonment. It cannot be attacked collaterally, and is a perfect shield, in such an action, to the officer and the party who has procured its issuance. *Hallock v. Dominy*, 69 N. Y. 238; *Hayden v. Shed*, 11 Mass. 500. The indictment was regular and sufficient upon its face, and authorized the proceedings of the governor of Connecticut and the governor of Massachusetts in extradition, and the warrant issued by the latter was a protection against such an action. *Kingsbury's Case*, 106 Mass. 225; *Davis' Case*, 122 Mass. 328.

The remedy of a party who has been unjustly imprisoned upon process obtained without probable cause, or for unworthy motives, is an action for malicious prosecution. Malicious motive and the want of probable cause do not give him an action for false imprisonment, although they may aggravate his damages. *Marks v. Townsend*, 97 N. Y. 590.

It is not argued for the plaintiff in error that the complaint alleges a good cause of action for malicious prosecution. Clearly, it does not, because it does not aver that the indictment against the plaintiff was quashed or dismissed, or terminated in any way. But it is insisted for the plaintiff in error that it states a cause of action for the malicious abuse of process. Such an action does not lie when the process has been used for the purpose which by law it was intended to effect. *Mayer v. Walter*, 64 Pa. St. 283. Such an action presupposes that the arrest proceeding upon the process was justifiable and proper in its inception, and is founded upon the grievances which arise in consequence of subsequent proceedings. *Wood v. Graves*, 144 Mass. 365, 11 N. E. 567.

There is a class of cases in which a party who has been injured by the use of legal process which is neither void nor invalid has a remedy by action upon the case, sometimes termed an "action for abuse of process," and which is in effect an action for malicious prosecution. These are where the process is in an *ex parte* proceeding, and there can be no termination of the proceeding in favor of the plaintiff, as where the defendant maliciously obtains a search warrant, or demands sureties of the peace against the plaintiff. *Bump v. Betts*, 19 Wend. 421; *Steward v. Gromett*, 7 C. B. (N. S.) 191; *Hyde v. Greuch*, 62 Md. 577; *Fortman v. Rottier*, 8 Ohio St. 548.

The judgment of the court below was correct, and, in the view we have taken of the case, it is unnecessary to consider whether, by force of the Massachusetts statutes in regard to the abatement of actions, a right of action for malicious prosecution, or for abuse of legal process, survives the death of the wrongdoer.

The judgment is affirmed.

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GULF, C. & S. F. RY. CO. et al. v. MIAMI S. S. CO.

(Circuit Court of Appeals, Fifth Circuit. March 29, 1898.)

No. 689.

**1. CARRIERS—CONNECTING LINES—PREPAYMENT OF FREIGHT.**

A common carrier engaged in interstate commerce may at common law, and under the interstate commerce law, demand prepayment of freight charges, when delivered to it by one connecting carrier, without exacting such prepayment when delivered by another connecting carrier, and may advance freight charges to one connecting carrier without advancing such charges to another connecting carrier.

**2. SAME—THROUGH TRANSPORTATION—JOINT RATES AND BILLING.**

Such carrier may enter into a contract with one connecting carrier for through transportation, through joint traffic, through billing, and for the division of through rates, without being obligated to enter into a similar contract with another connecting carrier.

**3. SAME—LAWS OF TEXAS.**

Rev. St. Tex. 1895, arts. 4536, 4537, 4539, do not apply to interstate commerce, because the power to regulate such commerce is vested in congress, and has been fully exercised by the enactment of the interstate commerce law.

**4. SAME—ANTI-TRUST LAW.**

Under the act of July 2, 1890, entitled "An act to protect trade and commerce against unlawful restraints and monopolies," the only remedy given to any other party than the government of the United States is a suit for threefold damages, costs, and attorney's fees, and the only party entitled to maintain a bill of injunction for an alleged breach of the act is the United States, by its district attorney, on the authority of the attorney general.

Appeal from the Circuit Court of the United States for the Eastern District of Texas.

James Hagerman, T. S. Miller, N. A. Stedman, and J. W. Terry, for appellants.

M. C. McLemore, John Neethe, and F. Chas. Hume, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. The bill in this case alleges that:

"The Miami Steamship Company, a corporation duly incorporated under and by virtue of the laws of the state of New York, complaining of the Gulf, Colorado & Santa Fé Railway Company, the International & Great Northern Railroad Company, and the Missouri, Kansas & Texas Railway Company of Texas, in this behalf says: That the Gulf, Colorado & Santa Fé Railway Company is a corporation duly incorporated under and by virtue of the general and special laws of the state of Texas, having its general offices at Galveston, Texas, in said state, and of which L. J. Polk is general manager; that it is a component part of, and subsidiary to, the Atchison, Topeka & Santa Fé Railroad Company, and what is commonly known as the Santa Fé System; that it

has and maintains traffic relations with connecting lines, and is engaged in the traffic of state and interstate commerce. That the International & Great Northern Railroad Company is a corporation duly incorporated under and by virtue of general and special laws of the state of Texas, and has its general office at Palestine, in the state of Texas, and of which Leroy Trice is general superintendent; that it is a component part of, and subsidiary to, what is known commonly as the Missouri Pacific, or Gould, System, and is engaged in traffic of state and interstate commerce. That the Missouri, Kansas & Texas Railway Company of Texas is a corporation duly incorporated under and by virtue of general and special laws of the state of Texas, and has its general offices at Dallas, Texas, and of which A. A. Allen is general manager; that it is a component part of, and subsidiary to, what is commonly known as the Missouri, Kansas & Texas Railway System; that it has and maintains traffic relations with connecting lines, and is engaged in the traffic of state and interstate commerce. That said three railway companies are the only trunk lines of road running through the state of Texas, and connected by close traffic relations with the systems of railway reaching points beyond the state of Texas and in states and territories north and west of Texas, a market and field from which and to which large quantities of freight are consigned and shipped, and having termini at Galveston, Texas, connecting with the Mallory Line and your orator. That your orator is engaged as a common carrier for hire in the traffic of state and interstate commerce, owning and operating a line of steamships between the ports of New York, in the state of New York, and Galveston, in the state of Texas; and at Galveston, Texas, it connects with the lines of the railway companies hereinbefore named. That its steamships are commodious, safe, and seaworthy, and amply fitted for the purpose of transporting freight between the points named. That in the city of New York it connects with all the lines of railway running into said city, and has in the said port and at the port of Galveston wharves and sheds sufficient to accommodate and protect all freights delivered to it, and has in every respect facilities sufficient to serve the public with dispatch, comfort, and safety. That it has been operating its said line of steamships between said ports since the 15th day of July, 1897, and has done a large business in every respect satisfactory to its patrons. That since said day your orator has received from and delivered to said railroad companies large quantities of freight on its wharf in the city of Galveston, destined to or shipped from points on the several lines of said railroads and their connecting lines, and it has received from and granted to said railroad companies the same rights, privileges, conditions, and exactions as to or by any other line of steamships in similar service as your orator granted or demanded in the interchange of freight. That there is one, and only one, other line of steamships which plies between Galveston and New York, which is owned and operated by the New York & Texas Steamship Company, commonly known and called the Mallory Line, and which hereinafter will be referred to as the Mallory Line. That said line of steamships is engaged in exactly similar service as those of your orator, and said line has at New York and at Galveston wharves and sheds which connect with the several lines of railway running into said cities. That said Mallory Line has been in operation between said ports for a number of years, and for several years prior to the time your orator's line of steamships was put in operation had no competitor for the business between said ports. That the accommodations of said Mallory Line and of your orator for the reception and delivery of freight, in unloading and loading vessels, in receiving and delivering freight, are in every respect similar and equal. Their respective wharves connect with the several lines of the respondents in the same and similar manner, and the same and similar accommodations prevail for the reception and delivery of freight, for the loading and unloading of cars. That the cost of loading and unloading cars at the respective wharves is the same, and the respondents have contracts for loading and unloading cars at the respective wharves for the same price. That it has been, and is now, the established custom and usage by and between said railroad companies and the Mallory Line and your orator, in the interchange of freight, for the line over which freight might be routed to advance to the line over which the freight originated the charges attached to such freight up to the time of delivery to the steamship company or railroad company over which it was to be forwarded to destination.

That it is, and has been, an established custom and usage between the respondents and the Mallory Line and your orator since it has been in business, with reference to freight originating at New York or beyond, and destined to points in Texas on the lines of railway operated by respondents, for the Mallory Line and your orator to bill such freight through from its point of origin to the point of destination at a through rate previously agreed upon, but on equal, exact, and similar conditions with reference to both steamship lines, and for said railroads to pay to the steamship company delivering the freight at Galveston the freight charges earned by it in transporting the freight from point of origin to Galveston under such agreement, and to receive the freight tendered by such steamship company, and forward same to its destination under such agreement. And it is, and has been, an established custom and usage between the respondents and the Mallory Line and your orator, with reference to freight originating at points on the lines of the several railway companies in Texas destined for New York or to points beyond on lines of railway connected with the Mallory Line and your orator at that point, to bill freight from point of origin to point of destination at a through rate previously agreed upon, and at the same and similar rates and under the same exact and similar conditions, and for the steamship company receiving such freight to pay to the railroad company delivering the freight at Galveston the charges for freights earned by said railroad company in transporting the freight from point of origin to Galveston, Texas, under said agreement, and to receive the freight tendered by the railroad company, and forward the same to New York, if that be the point of destination, or, if beyond, to deliver same to connecting lines reaching said point, under said agreement. This custom and usage is established in all cases, except in the case of perishable goods, when the custom does not apply.

"That there is a combination of railway companies and steamship companies known and designated by the name of the Southwestern Freight Bureau, composed of and by the principal railway systems in the southwestern portion of the United States, of which the respondents the Southern Pacific Company, the Morgan Steamship Company, and the Cromwell Steamship Company, which latter steamship companies operate lines of steamship between the ports of New Orleans, in the state of Louisiana, and New York, and the Mallory Line, are members, organized for the purpose of controlling freight of interstate commerce in that portion of the United States reached by the said railroads and their connections by rail and water. That heretofore, to wit, on or about the 31st day of January, 1898, at a meeting of said freight bureau, called for that purpose in the city of New York, state of New York, at which representatives of the lines herein complained of,—the Mallory, the Morgan, and the Cromwell Steamship Lines, thereunto duly authorized,—were present, said railroads entered into a conspiracy with said steamship companies against your orator, wherein and whereby it was and is attempted to prevent your orator from carrying on its business as a common carrier in interstate commerce. That said railroad companies entered into an agreement with said Mallory Line, the Cromwell Line, and the Morgan Line in substance and in effect as follows: 'That all through rates and divisions via Gulf ports be discontinued from and to domestic ports with steamer lines not members of this association, and all interchange of traffic with such lines be discontinued as far as possible. That in consideration of assistance given the Mallory Line by the adoption of this agreement the Mallory Line is to cancel all existing contracts or special arrangements with the Kansas City, Pittsburg & Gulf on Missouri river business, and hereafter abide by rates and regulations fixed by this association. That all rates less than authorized association basis between Texas points and all territories be withdrawn February 15th, and that prepayment of freight be demanded from the steamer lines not members of this association.' That your orator is the only steamer line running between New York and any of the Gulf ports not a member of the said association. That by the terms of said agreement respondents agreed to accept from and deliver to said lines members of said association freight upon conditions which they would not grant to your orator, or any other competitor in this field, not a member of said freight bureau. That by the terms of said agreement said railroad companies bound themselves to break off all relations with your orator except those coupled with such discriminating conditions as to amount to a practical refusal to transact any business

with your orator. That pursuant to said agreement, and in the execution thereof, said railroad companies have served upon your orator notices in substance and effect that on and after February 15, 1898, they will not accept any freight from your orator destined to points on their respective lines, or points reached by their connections, unless the freights on same be prepaid; nor will they accept any freight consigned to your orator except upon same and similar conditions; that they will no longer permit your orator to bill through freight as is and has been heretofore the custom between said railroad companies and the only two lines running into Galveston from New York, but will require and demand of your orator on all freight shipped by its line full local rate from Galveston to point of destination; nor will they accept any freight consigned from New York or to points on the connecting line at that place routed by your orator's line except that full locals be paid to Galveston, and freight rebilled at that point to point of destination. Your orator alleges that these conditions, exactions, and demands will apply only to your orator, and that they will not apply to the Mallory Line, or to any other line running from New York to Gulf ports, members of the said freight bureau. But, on the contrary, it alleges that said lines will continue to act in conjunction with the Mallory Line as a member of said association, as is and has been the custom heretofore, and as hereinbefore alleged and set forth. That by so doing the said International & Great Northern Railroad Company, the Missouri, Kansas & Texas of Texas, and the Gulf, Colorado & Santa Fé threaten and intend to unlawfully and willfully violate the express provisions of the laws of the United States; and in carrying into effect the threats made your orator will be prevented from engaging and continuing in the traffic of interstate commerce, and now carried on by it. It will be required to accept and transport freight at a price largely below the cost of carriage in order to compete in the same field with the Mallory Line and other steamship lines having connections under similar circumstances, members of said association. That such steps on the part of said railroad companies will be, in effect, granting to the Mallory Line and other steamer lines similarly engaged, members of said association, undue and unreasonable preference over your orator, and will subject it to undue and unreasonable prejudice and disadvantage.

"Your orator further alleges that the said railroad companies and the Mallory Line have entered into an agreement and compact by which said railroad companies agree to accept on and after February 15, 1898, freight from the Mallory Line originating at New York, and destined to points on their line in the state of Texas, or to points of connecting roads, on a through rate which is less than the combination of local rates which will be demanded of your orator on and after said date; and they have agreed further that, in the event freight originating outside of New York City, for the carriage of which to New York the Mallory Line or consignors of said freight would be required to pay not more than thirty-five cents per hundred pounds; that the cost of such transportation to New York so required shall be absorbed, and all lines participating in the carriage of such freight from New York shall prorate such cost of carriage to New York with the Mallory Line, and the Mallory Line will be called upon to pay only thirty-five per cent. of such charge. The said agreement affects all freights originating outside of New York City, and imposes upon your orator in its competition for such freight the amount, at least, rebated to the Mallory Line as its pro rata of the arbitrary paid out in getting said freight to New York. That said roads have agreed with said Mallory Line that upon all freights transported by it from New York to Galveston, and from Galveston to New York, destined to points on the lines of the several railways outside of Galveston, shall receive thirty-five per cent. of the through rate, the balance to be prorated upon an agreed basis between the participating railroads. That said railroads will not grant, but, on the contrary, will refuse to grant, to your orator equal rights and privileges with the Mallory Line as above set forth, but exact and demand that all freight routed via your orator's line, whether it originates at New York or beyond, or at points on respondents' lines of railway, shall be required to pay the total of local rates, which would be largely in excess of the amount required and exacted of the Mallory Line or other members of such association, and that all freights routed over your orator's line will have to pay a higher rate than if the same were routed by way of the Mallory Line. That,

as hereinbefore alleged, the service, accommodation, connections, and facilities of the Mallory Line and those of your orator are in every sense equal, exact, and similar; and that by the imposition on the part of the railroads herein complained of your orator will be caused to suffer great and irreparable injury, its business prostrated, and probably prevented from continuing in its line of business. That at law there exists no plain, full, complete, and adequate remedy; that your orator believes, and it so charges, that respondents intend to and will enforce said threats and demands on and after February 15, 1898, and thereby divert business and freight from it to the Mallory Line, and prevent it from competing with said line in the transportation of state and interstate commerce.

"Wherefore your orator prays that your honors will grant your most gracious writ of injunction restraining the respondents, and each of them, their agents and servants, from in any way interfering with the business of your orator as it has been heretofore and is now being carried on between the respondents and your orator in the manner and by the means hereinbefore alleged, and restraining them from discriminating against your orator in the making and granting of through rates, restraining them, and each of them, from carrying out the agreement between them and others in so far as it affects your orator, and commanding them to afford to your orator the same facilities, and to accept freight under the same conditions, as by them extended and granted to the other connecting steamship lines between Galveston and New York, and commanding them to make the same rate of freight on interstate and through business, and to allow your orator the same pro rata of through rates, as is given to the Mallory Line; that upon the final hearing had said injunction be made permanent; and for such other and further and general relief as to your honors may seem meet and proper."

On February 12, 1898, this bill was exhibited to one of the judges of the circuit court for the Eastern district of Texas, who thereupon ordered:

"Upon consideration of the within petition, the same is set down for hearing before me at Galveston, Texas, on February 21, 1898, at 10 o'clock a. m. of said day, at the United States court house, and in the meantime respondents are directed to maintain with complainant the same relations with respect to rates, divisions, and freights as are by them granted to the Mallory Line."

At the time and place appointed the defendants appeared by counsel. The Missouri, Kansas & Texas Railway Company of Texas submitted an answer, which, after certain admissions and denials not necessary to note, proceeded thus:

"This defendant, for full and complete answer to the bill of complainant filed herein, shows: It is engaged in the operation of lines of railway lying wholly in the state of Texas, with a mileage of about nine hundred and seventy-six miles, extending from Galveston, Texas, in a northwesterly direction to the north line of the state of Texas near Denison, in Grayson county, Texas, together with certain branches in the state of Texas, and that it reaches with its own lines many of the most important cities in Texas, such as Houston, Waco, Ft. Worth, Dallas, Denison, Sherman, and others, and connects with all the principal railroads in said state, and that its business consists of the transportation of passengers, freight, mail, and express, and that such business constitutes international, interstate, and state commerce, and that such commerce in the natural course of business moves in all directions over this defendant's lines of railway and its connections. It is to the best interests of this defendant, as well as to the best interests of its connecting lines and the general public which they serve, as the defendant believes and avers, that this commerce be carried at reasonable, open, published, and stable rates, filed with the interstate commerce commission where the commerce is interstate, and with the railroad commission of the state of Texas where the commerce is state. It is likewise to the interest of this defendant, its connections, and the public generally, that it should have a joint through tariff from points on its lines and connections to New York in connection with some steamship line from Galveston; and this defendant shows that recently, and a short time before the filing of the bill



herein, it effected an arrangement with the New York & Texas Steamship Company, hereinafter and in the bill referred to as the 'Mallory Line,' by which a through rate has been agreed upon between New York and what is known as 'Atlantic Seaboard Territory' and points on this defendant's lines and its connections, and in conformity thereto a joint through tariff has been adopted by this defendant and the Mallory Line and others, and filed with the interstate commerce commission, a copy whereof is hereto appended, marked 'Exhibit A,' for convenient reference, and made a part hereof; and that the rates therein agreed upon, published, and established are reasonable and just, and under the provisions of the act of congress to regulate interstate commerce constitute the maximum and the minimum charges which can be made by this defendant and the Mallory Line for the transportation of freight between the points named. This defendant shows that prior to July 15, 1897, when the complainant first entered its ships in the service between Galveston and New York, this defendant, in connection with other railroads of the Southwest, had in force certain joint tariffs from New York to points on its line and those on its connections, by the Gulf ports, but the assent of the steamship companies was never given to such joint tariffs by filing the same with the interstate commerce commission, or by general adoption thereof, and the steamship companies were bound by said through tariffs only when they accepted shipments of freight thereunder. That almost immediately after the complainant entered into the New York and Galveston trade a rate war broke out as to Texas traffic between it and the Mallory Line, which resulted in a notice being given by this defendant to the complainant and the Mallory Line that it would charge them its regular established rates from and to Galveston on Texas traffic; and since such notice was given this defendant has charged on all freight to and from said steamship lines its regularly established rates to and from Galveston; and the Mallory Line and the complainant have at all times allowed such rates to this defendant, and at the time of the filing of the bill of complaint herein no other or different arrangements were in effect between this defendant and the complainant, or between this defendant and the Mallory Line, save and except that this defendant had made a contract arrangement with the Mallory Line for joint through rates and joint billing such as hereinbefore stated and hereinafter set out, and pursuant thereto this defendant and the Mallory Line filed with the interstate commerce commission such joint through tariff as stated. The defendant further avers that the complainant has substantially at all times since it has been engaged in the trade between New York and Galveston allowed to this defendant its established rail rates to and from Galveston on such traffic; and further avers that the defendant has not and does not intend to deny the right to the complainant hereafter of having its commerce carried to and from Galveston at the defendant's regularly established Galveston rates. And defendant further alleges that its regularly established rates heretofore, now, and hereafter to be in effect to and from Galveston have been, are, and will be reasonable, just, and lawful.

"The contract agreement between this defendant and the Mallory Line includes a through joint rate between the points established by the joint tariff hereinabove referred to, through bills of lading, and through billing, and, for the present, a division of the through rate on the basis of allowing the defendant and its connecting lines, as their proportion of the through rate, the established tariff rate from Galveston to the southwestern inland point of origin or destination. The defendant, however, alleges that it is and will be entirely lawful for the defendant and the Mallory Line to make any division of the through rate between themselves, as from time to time they may determine to be just and equitable. The reasons which led the defendant to enter into this contract arrangement with the Mallory Line are, among others: (1) The Mallory Line has been long running, and is now running, and is to continue to run, well-equipped steamships between New York and Galveston, carrying a large commerce, and has a well-established business, and the good will of the shippers of the country, and is competent and reliable, and in every way capable, trustworthy, and responsible. (2) That the arrangement between the defendant and the Mallory Line, whereby they carry upon a joint through rate, published and known to the world, and filed with the interstate commerce commission, can but be beneficial to the public at large, and redound to the mutual advantage and benefit

of both parties to the arrangement. (3) The steamships of the Mallory Line engaged and to be engaged in the Galveston and New York business are equal, if not superior, to any steamships in the United States engaged in what is known as the 'Atlantic Coast Service.' (4) The steamships of the Mallory Line are provided with ample facilities for the carriage of both freight and passengers. (5) The Mallory Line is equipped with much better ships than any other line running between Galveston and New York, and makes several days' better time between the two ports than any other ships. (6) The steamships of the Mallory Line plying between Galveston and New York arrive and depart at regular stated times; and in the arrangement which has been made between this defendant and the Mallory Line hereinabove referred to it has been understood and agreed that the necessary number of steamships of the Mallory Line should arrive and depart each week, arriving and leaving upon certain days of the week so far as possible. (7) The Mallory Line afforded the best opportunity and the best facilities for a through business connection with the defendant.

"The defendant further shows that the complainant company has not such a service between New York and Galveston as to make it specially desirable for this defendant to establish a joint through tariff with it, with through bills of lading and through billing. The complainant's steamships are not equal in speed or appliances to those of the Mallory Line. They require eight to ten days to make the trip between Galveston and New York, while the steamships of the Mallory Line make the trip in about six days. The steamships of the complainant are not combined freight and passenger ships, but are built only for freight, though they may be able to carry a few passengers. Since the complainant entered the Galveston and New York trade, its ships have not arrived or departed at regular and stated periods. At first they ran a ship about once a week, but leaving upon no particular day, and for some time past and at present their ships are not running so often, and arrive and depart on no particular day or regular time. This defendant further distinctly avers that it does not intend, by the establishment of the through rate and through billing and through business connections with the Mallory Line, to in any way unduly or unreasonably discriminate against the complainant's line, and states that whatever advantage the Mallory Line may secure over the complainant's line is the result of the contract arrangement between the Mallory Line and the defendant, and that such contract arrangement is reasonable, justifiable, and lawful. The defendant avers that it is, and will be at all times, ready to deliver to or receive from the complainant's line all business which shall be consigned to or from that line, and destined over the line of the defendant or its connections. But the defendant avows the purpose of requiring, so long as it deems proper, the prepayment of freight delivered by the complainant to the defendant, and says that such requirement is and will be no unjust discrimination against complainant, but one that is authorized and justified by law. The defendant states that it is not ready to enter into an arrangement with the complainant for a through joint service such as it has made with the Mallory Line, and submits that it ought not and cannot be required to enter into such an arrangement, as under the law the defendant is not bound to carry beyond its own line. The defendant will at all times move with promptness and dispatch to and from complainant all freight which may be tendered at the established rates from Galveston, and accord to the complainant every right which it accords to every other shipper tendering it freight at Galveston. The defendant further shows that the complainant, by the bill, seeks to avail itself of the benefits of a contract arrangement entered into between this defendant and the Mallory Line, which it has no right to do. The defendant shows that the complainant is not subject to the interstate commerce laws, and has not moved, and does not move, its commerce under any tariff filed with the interstate commerce commission; and, not being subjected to the burdens and penalties of the interstate commerce laws, cannot, in this proceeding, avail itself of the benefits thereof by securing the advantage of a joint through rate, which, under the interstate commerce laws, can only be made by the joint assent of the parties. The defendant further shows that the complainant has moved the freight which it carried between Galveston and New York at rates not published, and varying from time to time, and that the rates at all times heretofore charged by the complainant since it has been in the business of carrying between Gal-

veston and New York have been such that, when added to the established railroad rates from Galveston over defendant's line and connections, would be less than the through rates established by the arrangement hereinbefore referred to which has been made between the defendant and the Mallory Line to and from New York and a large portion of seaboard territory."

The other defendants each separately submitted its demurrer, on the following grounds, and in identically the same words:

"(1) That the said complainant hath not, in and by its said bill, stated such a case as doth or ought to entitle it to any such relief as is thereby sought and prayed for from or against this defendant. \* \* \* (3) That, if the matters stated do give the complainant any cause of complaint against this defendant, the same is triable and determinable at law, and ought not to be inquired of by this court. (4) That it appears from the bill of complaint that the relief is sought for under and by virtue of an act of congress approved July 2, 1890, entitled 'An act to protect trade and commerce against unlawful restraints and monopolies.' That under the said act the only remedy given to a private party, or any party other than the government of the United States, is that of a suit for threefold damages, costs, and reasonable attorney's fees; and it appears from the said act that the only party entitled to maintain bill for injunction for any alleged breach thereof is the government of the United States, by its district attorney, on the authority of the attorney general. That it further appears that, independently of such statute, the matters set forth in the bill of complaint do not show any cause of action, at law or in equity, as independently of such statute the matters set forth in the said bill do not show any illegal or wrongful combination or conspiracy. And herein this defendant says that it has the legal right to decide what parties it will credit and what parties it will not credit, by refusing to carry freight without prepayment of charges, and has the right to decide what parties it will lend money to by advancing charges and what parties it will refuse to so lend money to. And herein this defendant further says that it is under no legal obligation to transport or enter into any extra terminal arrangement concerning the transportation of freight except on its own terms; and when it does, of its own volition, enter into such extra terminal arrangements for the through carriage of freight, through billing, through bills of lading, etc., it is entitled to select the connection with which it desires to establish such arrangements, and that it has the perfect right to make such arrangements with one connection without making the same or similar arrangements with others. Defendant further says that the bill fails to allege any facts which show that complainant is entitled to have this defendant compelled by process of the court to enter into traffic relations with it."

On March 2, 1898, the judge of the circuit court passed his decree as follows:

"This cause having been brought on to be heard on the pleadings and affidavits in support of same, and solicitors for both complainant and respondents having been heard, and due deliberation having been had, it is ordered, adjudged, and decreed by the court that the preliminary injunction prayed for in complainant's bill be granted; and the respondents the Gulf, Colorado & Santa Fé Railway Company, the Missouri, Kansas & Texas Railway Company of Texas, and the International & Great Northern Railroad Company, and each of them, their respective agents and servants, are hereby enjoined, until final hearing of this cause, from interfering in any way with the business of the Miami Steamship Company, as it has heretofore and is now being carried on between said railway companies and the Miami Steamship Company, or from discriminating against said Miami Steamship Company in the making and granting of through rates, in the manner and mode of payment of freight and charges, and in the manner of through billing of freight, and from enforcing and carrying into effect the agreement between them and others operating as the Southwestern Freight Bureau, in so far as the same affects the Miami Steamship Company; and you and each of you, your respective agents and servants, are hereby commanded to afford to the Miami Steamship Company the same facilities with reference to the interchange of freight, to accept from and deliver to it freight

under the same conditions and terms, as are by you or either of you granted and extended to any other steamship line operating between New York and Galveston; and you are further commanded to make to Miami Steamship Company the same rate of freight on interstate and through business, and to allow to said Miami Steamship Company the same pro rata or division of such through rates as by you or either of you given to any other steamship line operating between New York and Galveston, and especially to the New York & Texas Steamship Company."

The defendants jointly and severally asked to be allowed to appeal, and have jointly and severally assigned errors as follows:

"(1) The court erred in entertaining the bill for injunction, for the reason that it disclosed no equity on its face. (2) Defendants had and have, and each of them had and has, the right to demand prepayment of freight charges when delivered to them or either of them by a connecting carrier, without exacting such prepayment when delivered by another connecting carrier. (3) The defendants had and have, and each of them had and has, the right to advance freight charges to one connecting carrier from which they or either of them may receive freight for further transportation, without obligation to advance freight charges to another connecting carrier. (4) The defendants had and have, and each of them had and has, the right to enter into a contract with one connecting carrier for the through transportation of freight, for through joint rates, for through billing, and for the division of through rates, without being obligated to make the same contract with another connecting carrier. (5) The bill fails to show any such discrimination as falls within the purview of the third section of the act to regulate commerce. [Specifications 6 to 15, inclusive, omitted.] (16) The act to regulate commerce (and the several amendments thereof) provides its own machinery and its own remedies for the enforcement thereof, which remedies were intended to be exclusive, and no right to injunction is thereby given upon the complaint of any private suitor."

The appellants contend that the several arrangements effected between the Mallory Line and the defendant railway companies do not violate the common law, or the interstate commerce law of the United States, or any statute of the state of Texas. They contend that there is no obligation imposed upon the defendant companies to make any arrangement for through joint shipments, with a joint tariff, through billing, and a waiver of prepayment of freight, with the Lone Star Line because of the fact that they have such arrangements with the Mallory Line. They contend that there is no general usage or custom having the force of law or local custom at Galveston, Tex., which gives to one connecting carrier the right to have the same arrangements as to through shipments on joint tariffs which other carriers may have acquired by contract. They contend that the arrangements existing between the Mallory Line and the defendants are several contract arrangements between it and each of the defendants, and that the same are in no way affected by the fact, if it is a fact, that there was an understanding in advance between the defendant railway companies that they would each make a several arrangement with the Mallory Line. The alleged agreement between the steamer lines and the defendants, so far as it provides "that the Mallory Line is to cancel all existing contracts or special arrangements with the Kansas City, Pittsburg & Gulf on Missouri river business, and hereafter abide by rates and regulations fixed by this association," does not appear, on the face of it, or in the allegations of the bill, to give any ground of grievance to the complainant. The complainant does not expect to receive any

freight from these steamer lines, or desire to furnish any freight to either of them, but, so far as it is related to either, it is a rival of each, competing with each, more or less, for the "Missouri River business." This part of the agreement looks like it would work in the interest of the complainant by throwing to it all of the business of the Kansas City, Pittsburg & Gulf Railroad and any other carriers in the territory from which the complainant solicits traffic who are not members of the Southwestern Freight Bureau. The provision "that all rates less than association basis between Texas points and all territories be withdrawn February 15th" would likewise seem to affect the complainant favorably, whether the complainant's rates are lower or not so low as those authorized by the association basis. If the complainant's rates are lower, this provision would seem to constitute an inducement to traffic to patronize the complainant's line. If its rates are higher, the provision is an abatement of competition to the extent that the association rate is higher than the rate that the other steamship lines have been offering, for it is only "rates less than association basis" that are to be withdrawn. There is then left as the subject of complaint by the appellee the provision "that all through rates and divisions by Gulf ports be discontinued from and to domestic ports with steamer lines not members of this association, and all interchange of traffic with such lines be discontinued as far as possible, and that prepayment of freight be demanded from the steamer lines not members of this association."

It is urged that at common law a common carrier is not bound to carry except on its own line, and, if it contracts to go beyond, it may, in the absence of statutory regulations, determine for itself what agencies it will employ, and its contract is equivalent to an extension of its line for the purpose of the contract. And if it holds itself out as a carrier beyond its line, so that it may be required to carry in that way for all alike, it may nevertheless confine its carrying to the particular route which it chooses to use. It puts itself in no worse position by extending its route with the help of others than it would occupy if the means of transportation employed were all its own. It may select its own agencies and its own associates for doing its own work. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, 110 U. S. 667, 4 Sup. Ct. 185. We listened attentively and with interest to the able oral argument of counsel who appeared for the appellee, and we have diligently examined the printed brief which they submitted, and the numerous authorities cited thereon, but we do not find in all that they have advanced, or in any of the authorities we have examined, anything to weaken the force of the above suggestions and the authority on which the suggestions rest. On a subject so prolific of litigation as the rights, duties, and liabilities of railroad carriers, and the rights of individual consignors and consignees and of connecting carriers doing business with the railway companies, an immense mass of litigation has necessarily arisen, and a large number of adjudged cases from courts of high respectability are reported. Many of these cases are comprehensive in the reach of their authority, and more comprehensive in the compass of their

dicta. They distribute themselves more or less through all the questions involved in the case now before us, and are hardly susceptible of close alignment with the questions here, or satisfactory review in connection with these questions. They are instructive in their analogies, but the facts are different from those we have now to consider, and we think it best to let our application of their analogies appear rather in the disposition of the questions on which we are called to pass than in any attempted formulation of their doctrine in language which, quoted out of its logical connection, and construed from the standpoint of new cases hereafter arising, might tend to mislead.

Counsel for the appellee cite sections 2, 3, and 7 of the act to regulate commerce of February 4, 1887; also section 2 of the act of March 2, 1889 (amending section 10), to amend the act to regulate commerce. Section 2 of the act of 1887 clearly defines what shall constitute the unjust discrimination which it prohibits, and cannot be made to apply to this case without assuming that the contract existing between each of the defendants and the Mallory Line for the extension of the business of each over that line does not constitute substantially dissimilar circumstances and conditions under which the defendants are doing business with the Mallory Line from the circumstances and conditions under which the Lone Star Line is claiming the right to do business with the defendants. Such an assumption, we think, is repelled by the authorities which support our conclusion as to the defendants' contract arrangements being valid at common law. To support appellee's claim under the third section of the act to regulate commerce, we should have to hold that the defendant carriers could not contract with the Mallory Line for extending their business over that line without at the same time making a similar contract with any other party who is shown to be able and offering to do the same carrying with equal safety, dispatch, and responsibility, and that to decline to let such stranger carrier into their contract, or to make an equivalent contract with it, is to give an undue and unreasonable preference and advantage to the line contracted with and to subject the stranger to an undue and unreasonable prejudice or disadvantage in respect to the traffic it desires to carry. If it should not be so held, the contract arrangements which the defendant carriers have with the Mallory Line do not constitute the facilities for the interchange of traffic, or that discrimination in rates and charges between connecting lines to which the second paragraph of section 3 applies. The last clause of the second paragraph of section 3 provides that that paragraph shall not be construed as requiring any such common carrier to give the use of its tracks or terminal facilities to another carrier engaged in like business. It is provided in section 6 that every common carrier subject to the provisions of the act shall file with the commission copies of all contracts, agreements, or arrangements with other common carriers in relation to any traffic affected by the provisions of the act to which the carrier may be a party. And in cases where passengers and freight pass over continuous lines or routes operated by more than one common carrier, and the carriers operating such lines or routes establish joint tariffs of rates or fares or charges for such

continuous lines or routes, copies of such joint tariffs shall also in like manner be filed with the commission. These provisions do not expressly authorize the separate carriers to contract with reference to through routes and joint tariffs because the carriers had that authority. But these provisions do necessarily imply the recognition that that authority did exist, and that it could be exercised after the passage of the act in like manner as it was known to have been exercised for long periods before the passage of the act, and to be in general use at the time of its passage. The act does not expressly authorize the separate carriers to establish rates, fares, and charges on their respective lines, but it recognizes that such carriers have that right, in like manner as it recognizes that two or more connecting carriers have the right to contract for through routing and a joint rate, subject in each case to the leading limitations embraced in the first four sections of the act. The fact that these parties were left free to contract in reference to this subject necessarily includes a freedom to decline to contract in case they cannot agree upon the terms, or in case they consider it to their interest not to contract on any terms. This legislation was had, as all useful legislation is had, in reference to the existing conditions and the manifest tendencies of the subject embraced. It was at that time matter of common knowledge, and minutely within the knowledge of the committees of congress which had this subject in charge, that freight and passengers were being carried through all the states from one extremity of the Union to the other, over continuous lines or routes, operated by more than one carrier, on tariffs of rates and fares and charges regulated as to their amount, the time and place of their receipt, the pro rata division thereof by the respective carriers, the accounting for, paying, and distribution of the same by and to the respective carriers according to their contract agreement or understanding, express or implied. The committees of congress, especially certain members who were most active in promoting this legislation, had knowledge of the English acts on the same subject, and studied profoundly the different clauses, and even the phraseology, of those acts, and their practical application to the business of transportation in England, and the decisions of the commission there established and of the courts in construing those acts. And we are greatly aided in construing our act by observing what provisions of the English act it adopts, what provisions it modifies, and how they are modified, and what provisions are omitted. The English act of 1873, amendatory of the act of 1854, authorized the commission by it established to establish through routes, and to fix through rates between connecting lines, and provided that the facilities to be afforded shall include the due and reasonable forwarding and delivering by any railway company and canal company, at the request of any other such company, of through traffic to and from the railway or canal or any other such company, at through rates, tolls, or fares, but required the commissioners, in the apportionment of such through rates, to take into consideration all the circumstances of the case, including any special expense incurred in respect of the construction, maintenance, or making of the route, or any part of the route, as well as any special charges which

any company may have been entitled to make in respect thereof. This provision is wholly omitted from our act. The interstate commerce commission was early impressed with the view that there were cases in this country where through routes and reduced through rates, which would facilitate the movement of traffic, and thereby benefit the public, are prevented from being made by the unreasonable refusal of carriers to unite in granting such facilities; and, being impressed with the view that the statute was apparently designed to require connecting carriers to join in the formation of through routes at lower aggregate rates than a combination of their locals, have repeatedly called the attention of congress to the fact that it had failed to provide the machinery necessary to accomplish that purpose. As the commission, in one of their latest opinions, say, the correction of this defect requires the exercise of some public authority which can investigate the circumstances of each case, allow the parties to a proposed through rate an opportunity to be heard, and fairly determine the matter—including, if need be, the aggregate rate and divisions thereof—with due regard to the interest of the several carriers as well as the public. Such a scheme for establishing compulsory through rates should be surrounded by proper safeguards, and its operation limited by proper restrictions. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.*, supra; *Interstate Commerce Commission v. Baltimore & O. R. Co.*, 145 U. S. 263, 12 Sup. Ct. 844; *Cincinnati, N. O. & T. P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 184, 16 Sup. Ct. 700; *Texas & P. Ry. Co. v. Interstate Commerce Commission*, 162 U. S. 197, 16 Sup. Ct. 666; *Interstate Commerce Commission v. Alabama M. R. Co.*, 18 Sup. Ct. 45; *Kentucky & I. Bridge Co. v. Louisville & N. R. Co.*, 37 Fed. 626 et seq.; *Railroad Co. v. Platt* (decided by the Interstate Commerce Commission June 26, 1897).

As we view the complainant's bill and construe sections 2 and 3 of the act to regulate commerce, in connection with the contract or arrangement shown to exist between the defendant carriers and the Mallory Line, section 7 of the act and section 10 as amended have no bearing on the case made. We think it clear from our construction of the text of the interstate commerce act and its amendments, and the reasoning and authority of the few cases just cited, and the numerous other cases in line with them, more or less pertinent to our inquiry, that the case attempted to be made in the appellee's bill of complaint to the circuit court cannot be maintained under the interstate commerce act. The bill shows that for many years prior to July 15, 1897, there had been no competition with the Mallory Line in the transportation of traffic by steam vessels from Galveston to New York; that the complainant's own line began business on the 15th of July, 1897, or seven months, less three days, before the exhibition of its bill. The custom and usage that obtained with reference to this interstate and foreign traffic, if any existed and was observed by the defendant carriers before July 15, 1897, was necessarily restricted to receiving and delivering freight from and to the Mallory Line (as they are continuing to do), and not of delivering or receiving to or from other lines, or to or from all lines, because none other than the Mallory Line theretofore existed.



It can hardly be claimed that the usage which has obtained with the complainant's line has acquired the force of local custom. Where a local custom does exist in reference to matters about which parties contract, and they refer expressly to the custom of the port or place, or make no express reference to it, such custom will be considered in construing such contracts. But it is beyond the power of a local custom to compel parties to contract, or to impose its terms on their dealings, against their expressed will, or against the duly-expressed will of either of them.

Counsel for appellee also cite articles 4536, 4537, and 4539 of the Revised Statutes of Texas of 1895. It is shown by the bill that all the traffic which the complainant is engaged in handling is interstate or foreign commerce. Such commerce is subject to exclusive regulation by the national government. This power to regulate such commerce is vested in congress, and is not a dormant power, but has been put into full exercise by the act of February 4, 1887. Hence the articles of the Texas statutes cited can have no application to such commerce as that which the complainant is engaged in conducting. There is nothing in the language of the Texas statute that indicates a purpose upon the part of the legislature that the articles quoted should apply to interstate or foreign commerce.

The appellee contends that the defendant railway companies entered into such a combination, conspiracy, and agreement as is prohibited by the act to protect trade and commerce against unlawful monopoly, approved July 2, 1890, for the purpose and with the intention of monopolizing the traffic of interstate commerce between New York and Galveston, in restraint of such commerce, and for the purpose of preventing complainant from carrying on its business of common carrier in such traffic. Counsel cite sections 1, 2, 4, and 7 of the act named. Sections 1 and 2 are strictly penal. So far as section 4 confers any new jurisdiction upon the circuit courts of the United States to prevent and restrain violations of this act, such new jurisdiction, if any is conferred, appears to be limited in its exercise to suits on behalf of the government instituted by the district attorneys of the United States in their respective districts, and under the direction of the attorney general. *Blindell v. Hagan*, 54 Fed. 40; *Hagan v. Blindell*, 13 U. S. App. 354, 6 C. C. A. 86, 56 Fed. 696. Section 7 provides that any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by the act may sue therefor in any circuit court of the United States in the district in which the defendant resides or is to be found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee. In the case of *Blindell v. Hagan*, supra, it was said by the learned judge of the circuit court that this act makes all combinations in restraint of trade or commerce unlawful, and punishes them by fine or imprisonment, and authorizes suits at law for triple damages for its violation. But it gives no new right to bring a suit in equity, and a careful study of the act leads to the conclusion that suits in equity or injunction

suits by other than the government of the United States are not authorized by it. However, as the citizenship of the parties was such that the United States court had jurisdiction, the learned judge retained the case, and awarded the preliminary injunction prayed for, because the nature of the alleged injury was such that it would be difficult to establish in a suit at law the damage to the plaintiff, and because to entertain it would prevent a multiplicity of suits. In the same case on appeal this court said:

"We concur in the conclusion reached by the learned judge who decided the case below, as expressed in his opinion, and which is made a part of the record, that the jurisdiction is maintainable on general principles of equitable jurisdiction, and a careful examination of the case satisfies us that under all the facts before it there was no error in the court awarding a preliminary injunction."

In *U. S. v. Debs*, 64 Fed. 724, the circuit court, to sustain its jurisdiction, relied mainly on the act of July 2, 1890. When the case came in review before the supreme court in *Re Debs*, 158 U. S. 564, 15 Sup. Ct. 900, that court entered into no examination of the act of July 2, 1890, preferring to rest its judgment on the broader ground of the general jurisdiction of a court of equity to prevent injury in such cases. The supreme court was careful to observe that it must not be understood from its putting its judgment on the broader ground that it dissented from the conclusion of the circuit court in reference to the scope of the act. The provisions of the act in question apply to railroads, and render illegal all agreements made by them which are in restraint of trade or commerce. *U. S. v. Association*, 166 U. S. 290, 17 Sup. Ct. 540. We do not doubt the general jurisdiction of the circuit court as a court of equity to afford preventive relief in a proper case against threatened injury about to result to an individual from any unlawful agreement, combination, or conspiracy in restraint of trade. Does the complainant present a proper case for affording such preventive relief? It asks for a preliminary injunction restraining the respondents from interfering with its business as it has been heretofore and is now being carried on between the respondents and the complainant in manner and means in the bill alleged, and restraining them from discriminating against the complainant in making and granting through rates, and restraining them from carrying out the agreement between them and others in so far as it affects the complainant, commanding them to afford to complainant the same facilities, and accept freight under the same conditions, as by them extended and granted to the other connecting steamship lines, etc. Although the language "restraining them" is used in this prayer, it is manifest from the nature of the case and all the allegations in the bill that the preliminary injunction sought for and obtained by the appellee is wholly mandatory in its nature and effect. The bill does not claim that the complainant has any contract arrangement with the defendant railroad carriers which those carriers are about to breach. It does not charge that the carriers are obstructing the complainant's traffic in any particular by violence or other affirmative action so as in any way to hinder the prompt, safe, and

convenient interchange of traffic between its line and the respondents' lines, or to hinder the prompt dispatch thereof to its respective destination, at the reasonable rates therefor, which the respondents demand and receive from all persons not connected with them by their contract arrangement for through routing, billing, and rating. It therefore is manifest that the circuit court has no power to grant the relief asked, unless it has power to command that the respondents shall contract with the complainant for such through routing, billing, and rating; and, not only so, but shall contract with the complainant therefor on the same terms that they have contracted with the Mallory Line. All the reasons which have prevailed with congress to withhold this power from the interstate commerce commission, and many additional reasons with strongest force, forbid that the numerous circuit courts should, in advance of legislative action, take jurisdiction, and by mandatory injunction compel such through routing, billing, and rating.

We conclude that the several arrangements effected between the Mallory Line and the defendant railway companies are not violative of the common law; that the case attempted to be made in the appellee's bill of complaint in the circuit court cannot be maintained under the interstate commerce act; that the statutes of Texas relied upon do not and cannot apply to interstate commerce; and that the bill does not present such a case as the circuit court has jurisdiction to relieve by mandatory injunction, either under the anti-trust act or under its general jurisdiction as a court of equity. From these conclusions it results that the decree of the circuit court must be reversed. It is therefore ordered that the order of the circuit court granting an injunction pendente lite be, and the same is hereby, reversed, and the injunction dissolved, and this cause is remanded, with instructions to thereafter proceed in accordance with the views expressed in this opinion, and as equity may require.

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SOUTHERN RY. CO. v. RHODES.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1898.)

No. 548.

1. RAILROADS—NEGLIGENCE—THROWING MAIL POUCH FROM MOVING TRAIN.

Where it is the practice of the post-office employes to throw mail pouches from moving trains onto passenger station platforms, so as to endanger passengers, it is the duty of the railroad company to notify passengers of the danger, and take such further steps as may be necessary to prevent the continuance of the practice; but this duty does not arise until the railroad company has had notice of such practice, either express, or implied from its long continuance.

2. APPEAL—PART OF RECORD LOST.

Where, by reason of the accidental destruction of part of the record, it is uncertain on the appeal what action had been taken on a demurrer, and whether the defendant ever filed any plea, but it appears that the parties proceeded to trial on the merits without objection, the appellate court will assume that the demurrer was waived, and proceed on the assumption that the case was tried on the general issue, where the conduct of the parties is such as to render that course necessary in order to do justice between them.

In Error to the Circuit Court of the United States for the Southern Division of the Eastern District of Tennessee.

Leon Joroulmon, for plaintiff in error.

W. H. Payne, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

SEVERENS, District Judge. This was an action brought by G. W. Rhodes, the defendant in error, against the Southern Railway Company, the plaintiff in error, to recover damages for personal injuries sustained by him through the alleged negligence of the railway company. The declaration alleged, in substance, that the plaintiff, on or about the 24th day of November, 1895, had purchased a ticket of the defendant's agent at Sherman Heights, in Hamilton county, Tenn., for passage to Charleston, a station on the defendant's road in the same state, and was in the depot at Sherman Heights, awaiting the arrival of his train; that he was notified by the ticket agent that the train would be due in a short time; that while so waiting he heard a train approaching, which he supposed was the one by which he intended to take passage, but was in fact one running in the opposite direction, and went out of the station, upon the platform in front, for the purpose of getting on board; that directly after he passed out of the door upon the platform, and while standing upon the platform, the train which he had heard (a passenger train upon the defendant's road) approached and passed said station, running at a rapid rate of speed, from which a mail pouch, containing mail, was thrown, and struck the plaintiff with great violence, knocking him down, and rendering him insensible for a considerable time, cutting and bruising his body and injuring his spine, in consequence of which he was for a long time disabled from doing any kind of work, and has been obliged to expend considerable money for medical attention, nursing, etc. The declaration further alleged that it had been the custom and rule at that station, long prior to the injury received by him, for the mail pouch to be thrown from the defendant's train at the point where it was thrown on that occasion, and that the defendant and its officers had notice of this custom; but that, notwithstanding such notice, the defendant had given no notice to the plaintiff of such custom, or of the danger of injury therefrom, and had not posted any notice thereof at that station or elsewhere, and also alleged that the plaintiff had no knowledge of such practice. The case was originally brought in the state circuit court for Hamilton county, Tenn. The case was removed, on petition of the defendant below, into the circuit court of the United States for the Southern division of the Eastern district of Tennessee, where the defendant filed a demurrer to the plaintiff's declaration, upon several grounds, the first and second of which are as follows:

"(1) Said declaration does not show any cause of action against defendant. (2) Said declaration shows that the injuries complained of were caused by the act of the mail clerk, and not by the act of the defendant, or any servant or agent of the defendant."

Nothing appears in the record to show what the action of the court was upon this demurrer, or that any plea was ever filed by the defend-

ant; but the case was tried in April, 1897, before the court and a jury. A part of the files and record was destroyed by fire, and the parties undertook to supply the loss by copies stipulated to be filed in lieu of the originals. No question was raised during the progress of the trial in respect of the pleadings, and it appears to have been assumed that the case was being tried upon an issue presented by a denial of the matters alleged in the declaration. The jury returned a verdict for the plaintiff for \$2,200. The defendant moved for a new trial, which was denied upon the condition that the plaintiff remit from the verdict the sum of \$800, which was done, and thereupon judgment was entered for the sum of \$1,400. The defendant reserved certain exceptions to the rulings of the court during the progress of the trial, and brings the case here for review upon a bill of exceptions.

We have found some embarrassment in dealing with the case, on account of the uncertainty of the condition of the pleadings at the time of the trial in the court below; but having regard to the circumstance of the accidental destruction of part of the record, from which it may be inferred that the record at one time may have been more complete than the copies supplied show it to have been, and the evident fact that the parties intended to bridge any chasm in the pleadings by proceeding to trial of the merits upon a general denial of the declaration,—and no error is now assigned in respect to that feature of the case,—we think it right to treat the case upon the assumption that it was tried upon the general issue. The presumption which arises from the fact that the parties went to trial without a determination upon the demurrer is that the demurrer was waived. *Basey v. Gallagher*, 20 Wall. 670. And the lack of a pleading may be disregarded, or its previous existence and loss may be presumed, according to the circumstances, where the conduct of the parties has been such as to render that course necessary, in the appellate court, in order to do justice between them. *The Georgia*, 7 Wall. 32; *Fretz v. Stover*, 22 Wall. 198; *Boogher v. Insurance Co.*, 103 U. S. 90. Upon the facts which the evidence tended to prove (that is to say, that the plaintiff had purchased his ticket, and was at the station, awaiting the arrival of his train, expected shortly to arrive), there could be no doubt that he was entitled to the rights of a passenger; and if, without negligence or carelessness, he went out upon the platform for the purpose of taking what he supposed was the train by which he was to travel, the railroad company was bound to take all due precaution to protect him from injury. *Shear. & R. Neg.* (2d Ed.) § 262. We do not understand that the company disputes this general proposition.

The assignments of error which are discussed in the briefs of counsel, and were argued at the bar, are these:

"(3) The court erred in refusing the request to direct a verdict for the defendant below. (4) The court erred in charging the jury that there was some proof tending to show that it was frequent or customary to discharge the mail in such a way and at such places as that passengers, being lawfully on the platform, would be hurt."

The fourth assignment appears to be a specification of a particular ground or reason advanced in support of the third. With respect to the proof referred to by the fourth assignment of errors, it appears

from the bill of exceptions that there was proof undoubtedly sufficient that the plaintiff received an injury substantially such as is described in the declaration, and at the place and under the circumstances stated in the declaration, unless it be with reference to the particular subject to which the challenge of the defendant in the court below was directed; that is to say, whether there was sufficient proof to justify the submission to the jury of the question as to whether it was frequent or customary to discharge the mail upon the platform in such a way and at such places as that passengers, being lawfully on the platform, would be hurt. It appears that the mail pouch, at the time of the accident, and prior thereto, was thrown off by an employé of the post-office department of the United States, who was working under rules and regulations, one of which was as follows:

"Under no circumstances shall the mail be thrown on the station platform from the train in motion, except by special instruction of the division superintendent. The utmost care should be taken in the deliveries to avoid injuries to persons or property."

And it was proven that there was no instruction from the division superintendent modifying this rule. The railroad company had no direct control over the matter; the carriage of the mail being under contract with the United States, and subject to the control of the government officials and employés in respect to the manner of delivering the mail pouch from the train. However, the duty to its passengers remained with the railroad company, if there was a dangerous practice of the kind alleged, and the company had notice of it, to take such steps as were necessary and appropriate to inform the department of any breach of its contract, and the violation of the department's rules which resulted in danger to passengers, and to take such further steps as were necessary to prevent the continuance of the practice. It is true that such a duty is not expressly charged in the declaration, and is only to be implied from the facts therein alleged; but no question upon that point, or in respect to any variance from the declaration, was raised in the court below, or is raised by the assignment of errors here. If the practice existed, and was not stopped, it was the duty of the railroad company, on getting notice of it, to give warning of the danger to its passengers.

We come now to the subject upon which the contest was made in the court below, and is now involved by the assignment of errors. The mail grab was a structure designed for the purpose of taking in the mail pouch when trains passed the station without stopping, and had no relation to the delivery of the mail which was destined for that place. The delivery might be made at any convenient point where it would not be attended with danger to passengers or others who might lawfully be there. In order to affect the railway company with the charge of negligence, it was necessary to prove that the company had notice of a practice of the postal employés to throw off the mail pouch at a place where it was dangerous. This notice might be express, or it might be implied from a long continuance of such practice. There was no proof of express notice. The plaintiff attempted to prove that it had been so long customary to throw off the mail so near to the depot as to endanger passengers that the railway company ought

to have had knowledge of it. For this purpose he called two witnesses, one of whom was B. M. Lawson, who testified that he lived for several years at Sherman Heights, not far from the depot where Rhodes received his injury; that he had been at the depot, and noticed the throwing off of the mails at that station, and that it was customary for the trains to run by and throw off the mails there; that he used to go over there some evenings, and watch the depot, at times when the operator had gone to supper, and when trains had passed he had sometimes noticed the delivery of the mail by throwing it off; that he had seen it thrown off several times, and had noticed the occurrence ever since he had been there, which was about eight years; that "sometimes they threw it off at the regular place (at the mail grab), and sometimes they threw it off between the mail grab and the depot. They did not always throw it off at the mail grab." He further testified that he did not observe any notice posted at the depot, giving warning to persons to look out for the mail sacks or anything else thrown from the train. Another witness produced by him was S. C. Lawson, who testified that he had lived at Sherman Heights for seven years; that he knew something about how mail was delivered from the trains; that it was thrown off all the way from the mail grab down to the depot, and below the depot; that he saw this frequently; that he had seen it thrown off in the sitting-room door, but did not know how long before; that "he had seen it thrown off a dozen times between the depot and the mail grab"; that he never observed any notice posted there, giving warning about the mail sacks being thrown off; that there was none; he had been around there very often, and was at the depot almost every day when that train came in, and saw the mail thrown off, and that that was the custom of delivering the mails. This was all the evidence produced in support of the plaintiff's averment that the custom of delivering the mail in a dangerous way had existed, and for so long a time that the railway company ought to have known it, before the time of the accident. The testimony of B. M. Lawson was, in substance, that he had on several occasions seen the mail pouch thrown off between the mail grab and the depot. But there was nothing in his testimony tending to show that this was improper, or attended with danger to any one. The testimony of S. C. Lawson is rather more to the point. But he fails to state when the acts of which he speaks occurred. It was incumbent on the plaintiff to show that they had occurred sufficiently long before the accident to support the presumption that the railway company had knowledge of it. It could not be fairly inferred from the testimony of this witness that there had been such a succession of such acts as were dangerous to passengers as could be said to make it customary, and for a period sufficiently long to charge the defendant with notice. He speaks of an occasion when he saw the mail pouch thrown into the door; but when it was, he does not state. He does not state where between the mail grab and the depot he had seen the mail thrown off, and for aught that he says, with the single exception of the occasion when he says he saw the mail pouch thrown into the door of the depot, he does not state, nor is it otherwise shown, that the localities where the mail fell were such as were used by passengers. We think this evidence was

not sufficient to justify a finding that a custom of throwing off the mail at that station at a place where it was dangerous to passengers had existed for a period sufficiently long prior to the accident as that the defendant was chargeable with notice of it. The court was requested by the counsel to instruct the jury to find a verdict for the defendant. For the error in refusing to give this instruction, the judgment must be reversed, with costs, and a new trial awarded.

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GREEN v. UNDERWOOD.

UNDERWOOD v. GREEN.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

Nos. 1,000, 1,028.

1. **ABATEMENT—PLEA OF LIS PENDENS.**

In a court of chancery, where the rules of equity possess such flexibility as to permit the court to proceed, *ex æquo et bono*, to preserve the rights of the parties under certain contingencies, it will not, upon the plea of *lis pendens*, dismiss the suit in the federal court, but will simply postpone the hearing until the determination of the suit in the state court.

2. **SAME.**

A plea setting up the pendency of an earlier action between the same parties in a state court, and alleging that the question of liability of defendant to plaintiff by reason of the matters alleged in the complaint, and the extent thereof, are in issue in said cause, but not stating whether the suit is one at law or in equity, whether the relief sought is the same, nor what is the state of the pleadings, is defective in substance, and bad.

3. **SAME.**

As a plea of *lis pendens* is wholly technical, does not go to the merits of the cause, and is intended to stay the hand of justice in a court having jurisdiction over the parties and the subject-matter, the party interposing such a plea must bring himself within the strictest rules of correct pleading.

4. **PLEADING—LIS PENDENS—DEMURRER—LEAVE TO PLEAD OVER—COLORADO.**

Code Civ. Proc. Colo. § 55, makes the pendency of another suit a ground of demurrer, when the fact appears in the petition; and section 59 provides that, if the fact does not so appear, it may be raised by answer. *Id.* § 4, p. 73 (Sess. Laws 1889), provides that "when a demurrer is decided the court \* \* \* may proceed to final judgment thereon in favor of the successful party unless the unsuccessful party shall plead over or amend on such terms as shall be just, and the court or judge may fix the time for pleading over and filing the amended pleadings, and if the same be not filed within the time so fixed, judgment by default may be entered as in other cases." *Held*, that the court, on sustaining a demurrer, is only authorized to proceed to final judgment thereon when the unsuccessful party declines or fails to plead over.

5. **APPEAL AND ERROR—COUNTERCLAIM.**

Where a dismissal of the original petition does not carry with it the counterclaim, the cross complainant, on failure of the other party to plead to his counterclaim, should ask for judgment as for want of an answer, and the court may refuse to order the cross defendant "to plead to his counterclaim."

6. **SAME.**

A writ of error is not the appropriate remedy where a court refuses to proceed to hear and determine a cause, and therefore does not lie from a refusal of the court to order a cross defendant to plead to a counterclaim.

In Error to the Circuit Court of the United States for the District of Colorado.



Clinton Reed (Willard Teller, on brief), for Willard R. Green.  
D. V. Burns (Charles H. Toll, on brief), for Frank L. Underwood.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge. The plaintiff in error in case No. 1,000 brought suit against the defendant in error to recover the sum of \$22,500, with interest; representing the value of 450 shares of the capital stock of the Kansas City & Independence Rapid-Transit Railway Company, alleged to have been delivered and sold by the plaintiff in error to the defendant in error. To this petition the defendant below made answer, tendering the general issue in the first count, and in the second count pleading the pendency of another suit, as follows:

"For a second defense, the defendant says that in a certain civil action, in which the plaintiff above named is plaintiff and this defendant is defendant, commenced in the district court of Arapahoe county, in the state of Colorado, long prior to the institution of this action, and now pending and undetermined in said court, the questions of the liability of this defendant to the plaintiff by reason of the matters alleged in the complaint, and the extent of such liability, are, and long prior to the commencement of this action were, in issue in said cause in said district court; that the issues joined therein are material issues in said cause; that said district court is a court of general jurisdiction, and has, and since long prior to the commencement of this action has had, full and complete jurisdiction in said cause therein pending, over the parties hereto, and of the questions of the liability of this defendant by reason of the matters alleged in the complaint herein, and the extent of any such liability."

The answer then set up a counterclaim in favor of the defendant against the plaintiff. The plaintiff demurred to the second defense for the reasons following:

"That the matter alleged in said second defense does not state facts sufficient to abate the suit, or that are any defense to the action. (2) Because the said answer does not sufficiently describe or state what the matters in said cause are. (3) Because it does not appear that the matters in issue in this case are the only matters in issue in the former suit, or that all the matters in this cause are at issue in the former suit. (4) Because it is not stated in said second defense that the former suit is between the same parties as the present suit, or who the parties to the said former suit are. (5) Because the said second defense, as the same is pleaded, is uncertain and insufficient. (6) Because the same is not sworn to."

The court took this demurrer under advisement, and afterwards overruled it and dismissed the suit, without more. At the time the court took this action, neither of the counsel for the respective parties was in court. The knowledge of this action by the court coming to plaintiff's counsel, he notified defendant's counsel that he would move the court to vacate the order and judgment entered in said cause, and for permission to reply to the defense pleaded in the answer. Accordingly, on the next day plaintiff filed such motion in court; and, counsel for both parties appearing, the court heard said motion, and overruled it, and refused to permit plaintiff to reply to the answer. Sixteen days thereafter the bill of exceptions recites that the "defendant moved the court for an order requiring the plaintiff to plead to his counterclaim herein within a time to be

fixed by the court, which motion the court denied, holding that the counterclaim followed the cause made by the complaint, and had been dismissed from this court, to which ruling the defendant at the time excepted." Both parties sued out writs of error to reverse the action of the court, and the two cases are submitted together.

No rule of practice is better settled than that in an action at law, in personam, pending in the United States court, the plea of *lis pendens* between the same parties in a suit brought in the state court is no bar to the prosecution of the action in the United States court. *Crescent City Live-Stock Landing & Slaughter-House Co. v. Butchers' Union Live-Stock Landing & Slaughter-House Co.*, 12 Fed. 225; *Stanton v. Embrey*, 93 U. S. 554; *Insurance Co. v. Brune*, 96 U. S. 588; *Gordon v. Gilfoil*, 99 U. S. 178; *Briggs v. Stroud*, 58 Fed. 720; *Holton v. Gwynn*, 76 Fed. 97; *Story, Eq. Pl. 741*; *Fost. Fed. Prac. § 129*. This court has, in an equity proceeding, held that where there was pending in a state court, between the same parties, a proceeding in equity involving the same matters, such as the possession of specific real or personal property, or to quiet the title to real estate, in which it might become necessary to appoint a receiver *pendente lite*, or in which it might become necessary to grant an injunction, or to take some other preservative auxiliary action, the court which first acquires jurisdiction of the parties and the subject-matter ought to be permitted to proceed to final judgment. But even in a court of chancery, where the rules of equity possess such flexibility as to permit the court to proceed, *ex æquo et bono*, with large discretion, to preserve the rights of the parties, it will not, upon the plea of *lis pendens*, dismiss the suit in the federal court, but will simply postpone the hearing thereof until after the determination of the suit in the state court. *Merritt v. Barge Co.*, 49 U. S. App. 85, 24 C. C. A. 530, and 79 Fed. 228; *Zimmerman v. So Relle*, 49 U. S. App. 387, 25 C. C. A. 518, and 80 Fed. 417. The reason of the rule at law is very elaborately discussed in *Hatch v. Spofford*, 22 Conn. 485. The plea therefore was bad in law. It was, moreover, defective in substance. *Story*, in his work on *Equity Pleading* (section 736 et seq.), says this plea is analogous to the plea at common law; that it should set forth with certainty the commencement of the former suit, its general nature and character, its object, and the relief prayed. "The plea should aver, and so the facts should be, that the second suit is for the same subject-matter as the first. And therefore a plea which did not expressly aver this, although it stated matter tending to show it, was considered as bad in point of form. It should state that the same issues are joined in the former suit as in the suit now before the court, and that the subject-matter is the same, and that the proceedings in the former suit were taken for the same purpose. The plea should also aver that there have been proceedings in the suit, such as an appearance, or process requiring appearance, at least." Instead of the plea in this case containing substantially these requisites, in the form of direct allegations, it pleads the facts inferentially, and states conclusions rather than facts. It does not state whether the suit in the state court is one at law or in equity. It does not state whether the relief sought is the same as in

this action, nor what is the state of the pleadings therein. It simply states that the plaintiff commenced an action in the district court of Arapahoe county, in the state of Colorado, prior to the institution of this suit, which is pending, and that the questions of liability of this defendant to the plaintiff by reason of the matters alleged in the complaint, and the extent thereof, are in issue in said cause. For aught that appears in these averments, the suit pending in the state court may have been a bill in equity, involving other issues and demanding other relief; and, if so, the plea was bad. *Id.* § 742; *Hatch v. Spofford*, 22 Conn. 490, 491; *Blanchard v. Stone*, 16 Vt. 234. As such a plea is wholly technical, and does not go to the merits of the cause, and is intended to stay the hand of justice in a court having jurisdiction over the parties and the subject-matter, it is but right and just that the party interposing such a plea should bring himself within the strictest rules of correct pleading. *Thompson v. Lyon*, 14 Cal. 39; 2 *Estee, Pl. & Prac.* § 3183. The defendant in error takes shelter under section 1011, Rev. St. U. S., which reads as follows:

"There shall be no reversal in the supreme court or in a circuit court upon a writ of error for error in ruling any plea in abatement other than a plea to the jurisdiction of the court."

This provision first appeared in the judiciary act of 1789. 1 Stat. 85. It has accordingly been held by the supreme court that the plea in question is in the nature of a plea in abatement, and therefore the error of the court in ruling thereon is not reviewable on writ of error. *Piquignot v. Railroad Co.*, 16 How. 104; *Stephens v. Bank*, 111 U. S. 197, 4 Sup. Ct. 336, 337. In the event of further proceedings in this case, the plaintiff may safely rely upon the disposition of the circuit court to correct its own error in this respect.

The action of the court in proceeding to final judgment, and refusing to permit the plaintiff to plead over to the answer, is reviewable on writ of error. At common law the rule of practice was that, upon an issue of law arising on dilatory plea, the judgment, if for the plaintiff, was that the defendant answer over; and such judgment was designated as a "judgment of respondeat ouster." Not being a final judgment, the proceedings were resumed. *Steph. Pl.* 115; *Bliss, Code Pl.* § 303; *Lambert v. Lagow*, 1 Blackf. 388. "The judgment for the defendant on a plea in abatement, whether it be on an issue of fact or law, is that the writ be quashed, or, if temporary disability or privilege be pleaded, that the plaint remain without day until," etc. 1 *Chit. Pl.* 466. But the rule of practice in this respect is now regulated by code in the state of Colorado, as in many of the other states, which rule the federal court, sitting in the code states, follows, since the adoption of section 914, Rev. St. U. S. 1878. Under codes like that of Colorado, there is but one answer, in which the defendant may set up all the defenses he has, whether they be such as at common law were denominated pleas in abatement, or to the merits. He may not only conjoin in the answer matters in abatement with those to the merits, but where he relies upon both characters of defense he should so unite them. *Code Civ. Proc. Colo.* § 53; *Bliss, Code Pl.* § 343; 2 *Estee, Pl. & Prac.* §§ 3170-3183; *Little v. Harring-*

ton, 71 Mo. 390; *Cohn v. Lehman*, 93 Mo. 582, 6 S. W. 267. Code Civ. Proc. Colo. §§ 55, 59, classifies the pendency of another like suit between the parties among defenses. The first-named section makes this fact the ground of demurrer,—meaning, of course, where the fact appears on the face of the petition,—while said section 59 provides that, if such fact does not appear on the face of the petition, it may be raised by answer. Section 65 of the Code provides that, when the answer contains new matter constituting a defense, the plaintiff may reply or demur to the same for insufficiency, and may also demur to one or more of the defenses set up in the answer. Section 77 declares that:

“When the demurrer to the complaint is overruled and no answer filed, the court may, upon terms, allow the answer to be filed. If the demurrer to the answer be overruled and there be no replication then filed, the court may, upon terms, allow a replication to be filed.”

This section as it appeared in the statute of 1883 was amended in 1889 as follows:

“When a demurrer is decided, either in term time or vacation, the court or judge shall immediately cause the decision thereof to be entered in the record and may proceed to final judgment thereon in favor of the successful party, unless the unsuccessful party shall plead over or amend upon such terms as shall be just, and the court or judge may fix the time for pleading over and filing the amended pleadings, and if the same be not filed within the time so fixed, judgment by default may be entered as in other cases.” Code Civ. Proc. Colo. p. 73, § 4 (Sess. Laws 1889).

Under this amendment, in force at the time of the proceedings herein in the court below, the court on sustaining a demurrer is only authorized to proceed to final judgment thereon in favor of the demurrant when the unsuccessful party declines or fails to plead over. The clear import of the term “unless” is a limitation of the duty, or the right of the court to proceed to final judgment when the unsuccessful party shall make timely offer to plead over, as was done in this case. To such an offer, to take issue by reply to the new matter by way of defense pleaded in the answer, the only condition the court can impose is: “such terms as shall be just.” The power of the court to prescribe “terms” is neither arbitrary nor absolute, for the terms imposed must be such as are “just.” This clear meaning of the statute renders inapplicable the ruling of the supreme court of California in *Thornton v. Borland*, 12 Cal. 438. In the first place the defendant there had trifled with the administration of justice by interposing a demurrer to a petition so palpably unobjectionable in its statement of the cause of action as to satisfy the court that the defendant sought only to delay the hearing of the case. The court held that as under the California Code the allowance of a plea over after a demurrer to the merits rested in the discretion of the court, under like circumstances which characterized the conduct of the defendant therein, it was not an abuse of discretion to refuse leave to plead further, in the absence of a satisfactory showing that the defendant had “a substantial defense on the merits of the action.” The language of the Colorado practice act, then in force, was, “the court may, upon such terms as shall be just and upon payment of costs, allow the defendant to file an answer,” which was

substantially the same as the Colorado statute prior to the amendment of 1889. The case under consideration is likewise distinguishable from that of *Florence Oil & Refining Co. v. Interstate Nat. Bank*, 40 U. S. App. 444, 22 C. C. A. 604, and 76 Fed. 888. In that case the defendant's conduct clearly indicated a purpose to trifle with the court, and to delay the case. In the first place, he interposed an objection to the affidavit to the petition, which was without merit. When this was overruled, he filed a demurrer to the petition, which was a simple action in the usual form on a promissory note. The demurrer was filed out of time, and, when it was overruled, the party, being in default with his answer, had to depend upon the indulgence of the court for leave to plead further out of time. In such case it was held that the discretion of the court in refusing to permit an answer in the absence of disclosing a meritorious defense was properly exercised. In the case at bar the demurrer was not frivolous, but, as we have shown, was well taken. Nor does the existing Code of Colorado authorize a judgment on the demurrer where the unsuccessful party makes a timely offer to reply, and has not refused to comply with the terms imposed by the court. The plaintiff certainly has the right to be heard upon the question of fact as to whether such action is pending in another jurisdiction, and to have the final judgment of the court as to whether the defense is established with that certainty and exactness which the law demands, and what is the legal effect of such fact when established on the right of the plaintiff to prosecute his action in the United States circuit court. It is suggested by defendant in error that by requesting leave to plead over the plaintiff waived any objection to the sufficiency of the answer. It ought to be a sufficient answer to this suggestion that a party ought not to be visited with the consequences of a plea which the court would not permit him to make. It is true that, if the plaintiff had pleaded over to the answer, he would thereby have waived all objection thereto, except the objection that the same did not state facts sufficient to constitute any defense, "which objection may be raised at any time." Code Civ. Proc. § 60; 2 Estee, Pl. & Prac. § 3170; *MacDougall v. Maguire*, 35 Cal. 274. The court therefore erred in refusing leave to plaintiff to file reply, and in entering judgment on the demurrer.

The only remaining question for determination arises on the writ of error sued out by the defendant below. This is predicated on the action of the court, as now claimed by plaintiff on this writ of error, in refusing to proceed to the hearing of the counterclaim set up in the answer. His counsel misconceives the state of the record. All that the record discloses respecting this error is found in the recitation of the bill of exceptions set out in the foregoing statement of facts. The motion mentioned therein does not appear in the bill of exceptions. It is only recited in the bill of exceptions that the court refused to make "an order requiring the plaintiff to plead to his [defendant's] counterclaim herein within a time to be fixed by the court." If, as counsel contends, the dismissal of the petition did not carry with it the counterclaim, but left it pending as an independent cause of action, it was certainly an unprecedented proceeding on the part of the cross complainant to demand of the court an order on the cross defendant "to

plead to his counterclaim." The practice act prescribes the due course of proceeding where a party fails to plead. It is to move for judgment as for want of answer. Therefore the court properly declined to make the unwarranted order asked for. No matter what reason the court assigned for its refusal, if the refusal was right its action was not erroneous. But what is a more conclusive answer to the writ of error is, there was no final judgment entered by the court against the complainant to be reviewed on writ of error. *Toland v. Sprague*, 12 Pet. 331. It was rather the refusal of the court to proceed to judgment that the writ of error was demanded to correct. A writ of error is not the appropriate remedy where a court refuses to proceed to the hearing and determination of a cause. The only final judgment in this record is that complained of by plaintiff below, which is as follows:

"Wherefore it is considered by the court that this suit [i. e. the plaintiff's suit] be, and the same is hereby, dismissed out of this court, and that the defendant do have and recover of and from the plaintiff his costs by him in this behalf laid out and expended," etc.

The defendant below did not, and does not, complain of this judgment.

The writ of error, therefore, sued out by the defendant below, is dismissed, at his cost, and the judgment of the circuit court is reversed, at the cost of defendant in error, and the cause is remanded for further proceeding in conformity with this opinion.

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SPRING VALLEY COAL CO. v. PATTING.

(Circuit Court of Appeals, Seventh Circuit. April 21, 1898.)

No. 465.

1. MASTER AND SERVANT—NEGLIGENCE—COMPETENCY OF EMPLOYEE.

Where a cage in which a miner was being lowered into a mine through a shaft 360 feet deep escaped control of the engineer by reason of his failure to expel the water from the cylinder of the small engine, by which the brake and reversing apparatus were operated, and the miner was injured, and the past competency and experience of the engineer were proved by satisfactory evidence, this single act of negligence is not such proof of incompetency as to make the master liable.

2. SAME—FAILURE TO OBEY STATUTE.

Failure to provide a light at the bottom of a shaft, as required by the Illinois statute, "to insure, as far as possible, the safety of persons getting on or off the cage," does not make the master liable for injuries to a servant who was being lowered through the shaft in a cage, where the absence of the light neither caused nor affected the injury.

3. SAME—DEFECTIVE BRAKE.

Where a servant is injured while being lowered into a mine in a cage, and the same is caused by the engineer's failure to keep in proper condition the cylinders of the engines operating the brake and reversing apparatus, and the same would have been sufficient except for such neglect, the master is not chargeable with failure to supply a sufficient brake and reversing apparatus.

4. SAME—NEGLIGENCE OF CO-EMPLOYEE.

Where a servant is injured through the negligence of the engineer in charge of the engine operating the cage in which he is being lowered to a mine, such negligence is that of a co-employé, and the master is not liable.

**5. SAME—SUBMISSION TO JURY.**

Where the court submits a case to the jury upon four propositions, only one of which is proper, it is impossible to say on which proposition the verdict was returned, and it must be reversed.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

Henry S. Robbins, for plaintiff in error.

James D. Springer, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges

WOODS, Circuit Judge. Alex Patting, the defendant in error, recovered judgment against the Spring Valley Coal Company in the sum of \$10,000 for personal injury suffered on the morning of November 24, 1893, while being lowered through a shaft, 360 feet deep, to the mine of the company, in which for about two years he had been employed to dig coal. The cage in which, with eight or nine other miners, he was being lowered, escaped the control of the engineer, and descended with such rapidity that when it struck the bottom he was thrown out upon the ground beside the cage, and during the rebound one of his legs was caught beneath the cage and broken above the knee. Afterwards amputation became necessary, but, as the plaintiff in error claims on the testimony of "the doctor in charge," by reason of disobedience of the doctor's instructions. The declaration as amended contains a number of counts, but before entering upon the trial it was stipulated by the parties that plaintiff based his right of recovery in the case only upon the following grounds of negligence on the part of the defendant:

"First, that the defendant failed to furnish a sufficient brake; second, that the defendant was negligent in the employment and retention of a competent engineer; third, that there was no light at the bottom of the shaft at the time of the accident, and that this absence of a light contributed to the plaintiff's injury; fourth, that defendant was guilty of negligence in failing to supply a sufficient reversing apparatus and appliances."

At the proper time the plaintiff in error moved for a peremptory instruction that a verdict be returned in its favor, and also moved for an instruction in respect to each of the alleged grounds of recovery, separately, that it should be withdrawn from the consideration of the jury because not supported by the evidence adduced. The court overruled each motion, and submitted the case to the jury for determination upon all of the grounds alleged and included in the stipulation. Exceptions were duly saved, and error has been assigned upon each of the rulings, though it is to be observed that the brief for the plaintiff in error does not contain, after the statement of the case, "a specification of the errors relied on," as required by the second clause of rule 24 of this court (21 C. C. A. xcix, and 78 Fed. xcix). It is not a compliance with the rule to make a statement of "points." Unless the specifications of error are given substantially as they appear in the record, it is not evident on the face of the brief, as contemplated by the rule, whether "the points of law," which by the next clause of the rule are required to be clearly stated in "a brief of the argument," are properly presented. The supreme court deemed it worth while

to recommend these rules for adoption. This court deems it important that they be respected.

No good purpose would be served by a review of the evidence in the record. We consider it clear beyond reasonable dispute or debate that there was no evidence to justify the court in leaving to the consideration of the jury whether there was a liability on the second, third, or fourth ground. There is no evidence of the engineer's incompetency, unless it be in the circumstances and fact of the accident complained of. In that instance it is clear enough that he was guilty of negligence in not expelling the water from the cylinders of the small engines by which the brake and the reversing apparatus were operated, but in that single act of negligence there is not proof of a want of competency, and, if there were, it was impossible that the master should have known of it before it happened. The competency and experience of the engineer were proved by satisfactory evidence, and before the occurrence in question there was no known reason why the company should not have believed him equal to every emergency of the employment. That the absence of the light at the bottom of the shaft either caused or added to the effects of the injury it is impossible to believe, and the fact that such a light was required by statute "to insure, so far as possible, the safety of persons getting on or off the cage," is irrelevant and without significance.

There was no defect in the reversing apparatus. It did not work with prompt efficiency on this occasion because of the failure of the engineer to expel the water from the engine by which it was controlled, but the company is not responsible for the negligence of the engineer, who was a fellow servant of the plaintiff. In fact, the reversing apparatus is not intended, nor is it well adapted or adaptable, to check a too rapid movement of the cage on sudden emergency, and an attempt to use it in that way probably involves a new danger not less than that to be avoided.

On the first proposition, that the defendants had failed to furnish a sufficient brake, the question discussed in the briefs and at the hearing is whether, in addition to the one "sufficient brake on every drum," which the statute of the state (2 Starr & C. Ann. St. [2d Ed.] p. 2721, c. 93, § 6) requires, the company ought to have provided a brake to be operated by hand in case of the failure for any cause of the one worked by steam power. Whether such a brake, if present, would have been effective to prevent or to mitigate the injury suffered by the plaintiff, and whether the plaintiff in error was at fault in not foreseeing a necessity for it, are questions on which the court need not now express an opinion.

It cannot be said that the error of the court in refusing to withdraw other issues from the jury was harmless. If it were assumed that among the theories asserted there was one on which a verdict for the defendant in error could be upheld, it is impossible to say that the verdict returned was found, or beyond reasonable question ought to have been found, on that theory.

The judgment below is reversed, with direction to grant a new trial.



## HATCH v. HEIM.

(Circuit Court of Appeals, Seventh Circuit. April 16, 1898.)

No. 471.

## 1. BAILMENT—CONTRACT FOR CONTROL OF FARM.

The owner of a farm, on which he then lived and has since lived, agreed with his son that the son should take control and management of the farm, implements, and stock, make repairs, pay taxes, replace stock, and have the net proceeds, each party being free to terminate the agreement at any time. This arrangement continued, with an interval of a few months, for six years. *Held*, that the transaction was a bailment, which did not vest the title of any of the property, or of the proceeds of the farm, in the son, so as to subject it to an execution for his debts.

## 2. TITLE—POSSESSION—ILLINOIS.

The possession of five years which, under 2 Starr & C. Ann. St. Ill. 1896, p. 2020, § 7, establishes title, is an exclusive and undivided possession, and does not apply to a case where the possession, amounting only to custody, is held for the benefit of the owner, under circumstances which could not be promotive of fraud.

In Error to the District Court of the United States for the Northern Division of the Northern District of Illinois.

Geo. A. Dupuy, for plaintiff in error.

K. M. Landis, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The plaintiff in error, Lewis Hatch, filed in the court below his petition, entitled "Joseph G. Heim, Receiver, &c., v. Frank W. Hatch," averring in substance that he was the sole and absolute owner of certain personal property, consisting of live stock, farming implements, and farm products; that on Saturday, August 21, 1897, the property described was levied upon by virtue of an execution dated August 13, 1897, and issued out of that court, "to enforce the collection of a judgment for four thousand dollars debt and three hundred fifty-one and nine-hundredths dollars damages and costs, entered on July 20, A. D. 1897, in favor of said above-named plaintiff, and against the above-named defendant, Frank W. Hatch, in the above-entitled proceeding"; and that the property had been wrongfully levied upon and taken from his possession. It does not appear in the record, but was assumed at the hearing and in the briefs, that Heim was receiver of a national bank, and that for that reason the case was one of which the district court had jurisdiction. No answer or plea to the petition was filed, but a jury was impaneled and sworn to try "the issue joined," and, after hearing the evidence and the charge of the court, returned a verdict finding the issue for the receiver, and that the property levied upon was the property of Frank W. Hatch when the levy was made. Various errors are insisted upon. Those predicated upon the rulings of the court in admitting and excluding evidence do not seem to merit special consideration. If material error was committed, it is to be found in the court's charge to the jury.

The essential facts of the case are that, in 1883, Lewis Hatch, being the owner of a large and well-stocked farm, on which he then had and

has ever since maintained his home, entered into an agreement with his son, Frank W., then just out of school, whereby the latter was to take the control and management of the farm and of the implements of husbandry and the live stock thereon, maintain repairs, pay taxes, replace stock disposed of, and have as his own the net proceeds; each party being at liberty to terminate the arrangement at any time. The testimony of the father and son to that effect is harmonious, and was not materially affected, so far as we perceive, by other testimony, or by the proof of other facts, such as their returns of property for taxation, and the disposition made by them of wool which had not been levied upon. The court in its charge stated the arrangement as follows:

"Mr. Lewis Hatch was then approaching his seventieth year, according to the testimony, and desired to retire from active work. He says to his son: 'Now, here is the farm [in effect; I am not attempting to quote the language, but in effect]. Now, here is this farm of 700 acres, and here is all of this stock, farming implements, and property on the farm. I want you to take it. I want you to do well by it. You shall receive all of the income or revenue which is derived out of it,—in other words, all the benefits which accrue from the use of the farming property; subject, however, to the payment of all taxes, to the keeping up of repairs, and the property itself, both farm and personal property, shall be kept up, so that at the termination, whenever that shall be, there shall be left here as much of personal property, stock, etc., as I turn over to you.'"

The farm was conducted under this arrangement, the son living with the father, until 1886 or 1887, when, having married, Frank removed to Texas, but after some months returned, at the request of his father, and resumed control, upon the same terms and conditions as before, except that he lived in a separate house built on the farm for his use. In November, 1892, he went away again, going to the state of Washington, where he incurred the liability for which the judgment was taken, for the satisfaction of which the property in question was seized on execution; but whether in that instance there was a complete and intended abandonment of the farm and property thereon, as when he went to Texas, is not clear, but, in the view we take of the case, the question is not important. The natural and reasonable construction of the arrangement, in our judgment, is a bailment, which did not vest the title of any of the property, or of the proceeds of the farm, in Frank Hatch, though, while the arrangement lasted, he had power to sell to others without further authority from his father. Certainly the jury would have been justified in so finding, if, indeed, the court ought not to have so instructed. And, this being the arrangement, it was not necessary that Lewis Hatch, in order to protect his rights in the property, should assert dominion, or in any way interfere with Frank's visible possession and control. The relation between them was not that of landlord and tenant, but was more like that of master and servant. The father, desiring his farm cared for and kept up, and at the same time wishing to afford an opportunity to his son, employed him to take the control and management, as stated; and the possession given the son, being necessary to the performance of the service contemplated and determinable at any time at the will of either party, was not a tenancy, but the possession of a servant. See cases cited in *Châtard v. O'Donovan*, 80 Ind. 20. The son's possession of the farm, and also of the products thereof and of other property, was the posses-

sion of the father. The same is true, also, of property, implements, or live stock bought and brought on the place, in pursuance of the agreement, as a part of the farm equipment.

It follows that the proposition (for which Story, Bailm. § 439, and *Loneragan v. Stewart*, 55 Ill. 49, are cited) that when one man turns over personal property to another, under an arrangement by which the latter is not obliged to return the specific articles, but may deliver other property of like kind and value, the receiver becomes the owner of the property delivered to him, is not applicable, and the court erred when, after stating the arrangement, it proceeded to say to the jury:

"Now, then, that is their story of the arrangement. In that there is no word of suggestion by Lewis Hatch that he reserves a control as to how he was to conduct it [the farm], as to whom he would sell this or that produce from the farm, or this or that piece of stock; no suggestion of that is in the agreement as stated. Look over the conduct of the parties subsequently, and see if you can find from that any such understanding."

This is objectionable, because it implies what was afterwards distinctly affirmed in the charge, that, if Lewis Hatch did not "retain the absolute dominion and control over all that property," "the effect of the arrangement was to put the title of the property in F. W. Hatch." This error was emphasized by other equivalent expressions in the charge, and especially by the statement that:

"No man has the right to put into the absolute control and possession of another personal property for a long period of time (in the state of Illinois for the period of five years or more) without taking the consequences which accrue therefrom, namely, that the title must be presumed to be in the person to whom it was given over, if the control is an absolute control. \* \* \* It requires a clear showing of a paramount control in Lewis Hatch; that is, a right to say what shall be done with reference to all this personal property or any of it. Unless that was retained by him, the title passed."

The possession for five years which, under the Illinois statute (2 Starr & C. Ann. St. 1896, p. 2020, § 7), establishes title, is an exclusive and undivided possession, and does not apply, and evidently was not intended to apply, to a case like this, where the possession, amounting only to custody, is held for the benefit of the owner, under circumstances which in no way suggest or could be promotive of fraud. The right of any one circumstanced as was Mr. Hatch to make such an arrangement with a son or with any other whom he should choose is an important right, inconsistent with no principle of public policy, and forbidden by no precept of the law; and if, instead of remaining upon the farm and exercising some measure of control, he had gone away, his right upon returning to assert title to the unsold property remaining upon the farm, whether the increase or bought to supply the place of that which was there when he put his son in control, would not be less clear.

The charge of the court seems also to be subject to the objection urged that the jury was not told that in respect to matters of fact the suggestions of the court were advisory only, and that the jury must finally exercise an independent judgment.

The judgment below is reversed, with instructions to grant a new trial.

## CARTER-CRUME CO. v. PEURRUNG.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1898.)

No. 528.

## 1. REVIEW ON ERROR—SUFFICIENCY OF EVIDENCE.

If there is any substantial evidence upon which the jury could reasonably have based their verdict, it will not be disturbed on appeal, though there may have been a motion for a verdict or a motion for a new trial which was overruled.

## 2. SAME—CONTRACT IN RESTRAINT OF TRADE—WAIVER OF DEFENSE.

While the court may possibly reverse a judgment involving the enforcement of a contract contravening public policy in the absence of an objection on that ground in the trial court, it will only do so when such illegality appears as matter of law upon the face of the pleadings, the face of the contract, or from the admitted facts.

## 3. CONTRACTS IN RESTRAINT OF TRADE.

A contract with an independent manufacturer for the entire product of his plant is not in itself a contract in illegal restraint of trade.

## 4. SAME.

If an independent manufacturer contracts to sell his entire product, without knowledge of similar contracts made by the buyer with other manufacturers, and without any knowledge of the fact that such contract was intended by the buyer as one step in a general scheme for monopolizing the trade in that article and controlling prices, such independent manufacturer cannot be held to have conspired against the freedom of commerce, or to have made a contract in illegal restraint of trade.

## 5. APPEAL AND ERROR—JURISDICTION OF FEDERAL COURTS—OBJECTION NOT RAISED BELOW.

The objection that the suit was not brought in the district of the residence of either party does not affect the general jurisdiction of the court, and cannot be raised for the first time on appeal.

In Error to the Circuit Court of the United States for the Western Division of the Southern District of Ohio.

Oscar M. Gottschal, for plaintiff in error.

Charles W. Baker, for defendant in error.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

LURTON, Circuit Judge. This is an action at law. The suit was brought upon a written contract made August 14, 1894, between Peurrung Bros. & Co., a firm then engaged in the business of jobbing wooden ware in Cincinnati, Ohio, composed of Joseph P. and Charles J. Peurrung, and the Carter-Crume Company, a corporation of West Virginia. By this contract, for consideration therein recited, which will be hereafter referred to, the Carter-Crume Company became obliged to pay to Peurrung Bros. & Co. \$250 on the 15th of each month for the next ensuing 3 years, 6 months, and 15 days, unless the contract should be sooner terminated under a provision contained therein. The installments which became due prior to September 15, 1895, were duly paid. The suit was for installments thereafter falling due, which had not been paid. The petition alleged that the firm of Peurrung Bros. & Co. had been dissolved, and the interest of Charles J. Peurrung in the contract had

been assigned to the plaintiff, Joseph P. Peurrung, who therefore sued in his own name, as he might under the law of Ohio. There was a judgment in favor of the plaintiff for the amount due on the first day of the trial term. The errors relied upon to reverse this judgment as presented by the brief and argument of counsel will be considered in the order in which they have been argued.

1. It is said that the evidence did not show that the plaintiff was the sole owner of the claim in suit; that for this reason the court erred in not instructing for the plaintiff in error as requested at the close of the evidence for the defendant in error; and that for the same reason it was error to refuse a new trial at the close of all the evidence. It is only by the strongest stretch of liberality that we can discover that there was a request for a direction at the close of the evidence for the plaintiff below. But that motion was waived by the subsequent introduction of evidence, and was not renewed at the close of all the evidence. *Railway Co. v. Lowry*, 43 U. S. App. 408, 20 C. C. A. 596, and 74 Fed. 463. There was evidence tending to show that Charles J. Peurrung, in a settlement of the partnership affairs with his brother, Joseph P. Peurrung, assigned this contract, and all due or to become due thereunder, to the said Joseph P. Peurrung. The witness to this was Charles J. Peurrung himself. That this assignment occurred before this suit was brought is also fairly made out. The circuit judge instructed the jury that the plaintiff must show, in order to recover, that he was the real owner of this claim; and that, if the assignment was fictitious, or unproven, the case of the plaintiff must fail. It is not for this court to weigh the evidence. That is the province of the jury, and, where there is any substantial evidence upon which a jury could reasonably find, this court will not disturb the verdict, although there may have been a motion for a verdict, or a motion for a new trial, which was overruled. This is too long and well settled to need other authority than *Railway Co. v. Lowry*, cited heretofore.

2. But it is said that the contract in question is one in restraint of trade, and therefore void. This defense is here made for the first time. No suggestion as to its illegality is found in the pleadings. No reference thereto occurs in the charge, nor was any exception taken to any instruction given or refused. If it be true that this contract is one which, for reasons of public policy, is void, the defense in the court below would not be waived by failure to plead properly. It was said in *Coppell v. Hall*, reported in 7 Wall. 542, and repeated in *Oscanyan v. Arms Co.*, 103 U. S. 261-268, that:

"In such cases there can be no waiver. The defense is allowed, not for the sake of the defendant, but of the law itself. The principle is indispensable to the purity of its administration. It will not enforce what it has forbidden and denounced. The maxim, '*Ex dolo malo non oritur actio*,' is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect. A stipulation in the most solemn form to waive the objection would be tainted with the vice of the original contract, and void for the same reasons. Wherever the contamination reaches, it

destroys. The principle to be extracted from all the cases is that the law will not lend its support to a claim founded upon its violation."

But the general rule is that a defense not presented to the court below cannot be considered on writ of error from a superior court. *Edwards v. Elliott*, 21 Wall. 532; *Wilson v. McNamee*, 102 U. S. 572; *Clark v. Fredericks*, 105 U. S. 4; *Drexel v. True*, 20 C. C. A. 265, 74 Fed. 12. Objections going to the jurisdiction are an exception to this rule, because made so by Act March 3, 1875, § 5.

Possibly, it would be the duty of this court to reverse and remand for dismissal a suit brought here on writ of error which appeared to involve the enforcement of an obligation contrary to good morals or in contravention of public policy, although no such objection had been made in the court below. But such action by an appellate court, as a tribunal for the review of the action of trial courts, would not be justifiable unless such illegality should appear as matter of law from the pleadings, the face of the contract in suit, or from the confessed facts of the case; otherwise the right to introduce evidence in rebuttal and of trial by jury, if the suit be one at law, would be cut off. The plaintiff below did not rely upon any contract which was in itself illegal or void as in contravention of public policy. Counsel for plaintiff in error say that the Carter-Crume Company were engaged in an illegal effort to suppress competition, and put up prices in the wooden butter-dish trade, and that as one step in this scheme they bought from Peurrung Bros. & Co. their contract with Tower & Matthews. Manifestly, Peurrung Bros. & Co. had been guilty of no conspiracy against the public in contracting for the entire output of the small factory of Tower & Matthews. Neither was it an illegal restraint of trade for the Carter-Crume Company to contract for the same product, if their trade demanded it. The prior contract with Peurrung Bros. & Co. alone stood in the way. They therefore bargained with them to release Tower & Matthews, and to supply them for a definite time with the same ware, at the market price, less a fixed trade discount. At the same time they contracted with Tower & Matthews for the entire product of their factory. These two contracts were concurrent in time, and were subject to be determined on same notice. There were some features about this last contract which indicate an intention to close the Tower & Matthews factory after the delivery of a certain quantity of ware for the term of the lease, if circumstances should make it desirable. William E. Crume, of the Carter-Crume Company, in the effort to make out a defense of misrepresentation as to the extent of the trade of Peurrung Bros. & Co. in such goods as one inducement to the contract, did say that his company were, by the contracts with Peurrung Bros. & Co. and Tower & Matthews, endeavoring to hold up the prices of such goods, and that Peurrung Bros. & Co. had been selling such ware at a less price than the Carter-Crume Company. The same witness also said that they at that time had other such contracts,—whether with factories or dealers he did not say. There is no evidence that Peurrung Bros.

& Co. were aware of any others contracts, or of the purpose of the Carter-Crume Company to control prices, or that they had any purpose of aiding and abetting that company in any such scheme. They did know of the contract with Tower & Matthews. But that of itself was not a contract in general restraint of trade. If one contracts with a manufacturer for his entire product, it will, of course, restrain the producer from selling to others. But such a contract, taken by itself, is ordinarily harmless. The public are not affected. Another question might arise if all or a large proportion of all the producers of a particular article should agree to sell their entire product to one buyer, who would thereby be enabled to monopolize the market. But, if each independent producer contract to sell his product, or to sell or lease his plant, without concert with others, or knowledge of or purpose to participate in the plans of the buyer, he cannot be said to have conspired against freedom of commerce, or to have made a contract in illegal restraint of trade. The transaction with Peurrung Bros. & Co. was, on its face, legitimate, and it cannot be impeached simply by evidence that the Carter-Crume Company understood and intended it as one step in a general illegal scheme for monopolizing the trade in wooden butter dishes, and controlling prices. The principle, if we admit that the purpose of the Carter-Crume Company was illegitimate, is that which is applied to so-called wagering contracts. The proof must show that the illegal purpose was mutual. *Roundtree v. Smith*, 108 U. S. 269, 2 Sup. Ct. 630; *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160; *Bibb v. Allen*, 149 U. S. 481, 13 Sup. Ct. 950. This defense, not being one which appears either upon the face of the contract in suit or from the admitted purposes of both parties, cannot be urged as an objection here, the objection not having been made in the court below.

3. The next and last ground urged for a reversal is that this suit was not brought in the district of the residence of either the plaintiff or the defendant. This objection was fatal to the jurisdiction if it had been taken in time. The plaintiff was a citizen of Indiana, and the defendant a corporation of West Virginia. Diversity of citizenship, therefore, existed, and the case was one of which the court could take jurisdiction. The act of congress which prescribes the particular district in which a defendant may be sued is not one affecting the general jurisdiction of the court. The exemption from being sued out of the district of the domicile of either of the parties was a privilege which the Carter-Crume Company could and did waive by pleading to the merits. *Railway Co. v. McBride*, 141 U. S. 127, 130, 132, 11 Sup. Ct. 982; *Railroad Co. v. Cox*, 145 U. S. 593, 603, 12 Sup. Ct. 905; *Trust Co. v. McGeorge*, 151 U. S. 129, 14 Sup. Ct. 286. The judgment is accordingly affirmed.

## INTERNATIONAL BANK OF ST. LOUIS v. FABER.

(Circuit Court of Appeals, Second Circuit. March 3, 1898.)

No. 66.

**1. CORPORATIONS—REPORTS TO STATE OFFICERS—JURAT.**

When the report filed by a corporation, pursuant to section 30 of the New York stock corporation law, is signed by the proper officers, and verified by their oath, the fact that the jurat itself is not signed by them does not make the report defective, so as to make the officers and directors personally liable for corporate debts. 79 Fed. 919, affirmed.

**2. SAME—NUMBER OF DIRECTORS SIGNING.**

Where the number of directors has been reduced by a change in the by-laws, the signing of the report by a majority of the reduced number is sufficient, though no certificate of the change has been filed in the proper office.

**3. SAME—VACANCY IN OFFICES.**

Where there is a bona fide temporary vacancy in the offices of secretary and treasurer, it is sufficient that a report, complete in all other respects, is verified only by the president, who is also discharging the duties of secretary and treasurer. 79 Fed. 919, affirmed.

**4. SAME—RESIGNATION OF OFFICER.**

In the absence of statutory regulations, the resignation of an officer of a corporation takes effect on his delivery of his written resignation to the president, and before acceptance thereof by the board of directors.

**In Error to the Circuit Court of the United States for the Eastern District of New York.**

This is a writ of error from a judgment of the circuit court for the Eastern district of New York. The action was tried and the facts were specially found by the court, a jury having been waived by written stipulation signed by the attorneys for the respective parties. The F. J. Kaldenberg Company, a corporation organized under the laws of the state of New York, and located in the county of Westchester, made five notes in December, 1892, and in January, 1893, amounting in all to \$9,500, and each one of which matured in four months from its date. These notes were discounted for the benefit of the maker by the plaintiff, the International Bank of St. Louis, a banking corporation located at St. Louis, in the state of Missouri, and nothing has been paid thereon except a part of the first note. The Kaldenberg Company was dissolved by decree of the proper state court on September 21, 1893. At its incorporation it had 11 directors, but in the year 1890 the number was reduced to 7 by a change in the by-laws. It did not appear whether a certificate of this change was filed either in the office of the clerk of Westchester or in the office of the secretary of state. During the years 1892 and 1893 the defendant, Eberhard Faber, was a director of the company. In April, 1891, he was chosen by the board of directors secretary and treasurer, and in October, 1891, both orally and by a written resignation delivered to the president of the company, he resigned both offices, and thereafter ceased to act in either capacity. After his resignation no meetings of the board or of the executive committee were held until February 29, 1892, during which time the duties of secretary and treasurer, so far as they were performed, were carried on by F. J. Kaldenberg, the president of the company. His resignation was formally accepted by the company at the meeting of the board of directors held on the 29th day of February, 1892, at which meeting a quorum was present, and a new treasurer was appointed. Four directors constituted a quorum, and by the by-laws it was provided that the acts of the executive committee, of which two constituted a quorum, should have the same power and effect as the proceedings of the board of directors, when it was not in session. Three of the directors and of the executive committee were habitually present in the factory during business hours, and the defendant was habitually at his office in the city of New York. On January 29, 1892, the company duly made and filed in the offices of the secretary of state of New York and the clerk



of the county of Westchester annual reports, as required by law, which said reports complied with the statutes in all respects as to the contents thereof, and contained all the information required to be contained therein. These reports were signed by F. J. Kaldenberg, as president of the company, and by five of its directors, and were duly verified by the oath of the said Kaldenberg, president. The verification of the report filed in the office of the secretary of state was not signed by said Kaldenberg. No other reports were made or filed by the company during the month of January, 1892, or during the year 1892, or until the 31st day of January, 1893, when reports were filed by it complying in all respects with the law. The reports filed on January 29, 1892, were made and filed by the company in good faith, and in an honest endeavor to comply with the law as it understood it, and in verifying said reports Kaldenberg believed that the law only required a verification by the president. The resignation of the defendant as secretary and treasurer of the company was made in good faith, and was not made with reference to, or in contemplation of, the making and filing of reports or of the creation of the company's indebtedness to this plaintiff. By a statute of the state of New York, amended on January 14, 1892, every stock corporation, except moneyed and railroad corporations, is required to make a report annually in January, or, if doing business without the United States, before the 1st day of May, which shall state the facts designated by the statute. "Such report shall be signed by a majority of its directors, and verified by the oath of the president or the vice president and treasurer or secretary, and filed in the office of the secretary of state, and in the office of the county clerk of the county where its principal business office may be located. If such report is not so made and filed, all the directors of the corporation shall jointly and severally be personally liable for all the debts of the corporation then existing, and for all contracted before such report shall be made." The suit was brought to compel Faber to pay the amount due upon the notes, upon the ground that the report required by the statute in 1892 had not been made and filed. The circuit court entered judgment for the defendant.

Robert D. Murray, for plaintiff in error.

Benjamin F. Tracy, Francis Forbes, and Charles T. Haviland, for defendant in error.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts). The plaintiff bases the allegation that the company did not make the report required by the statute upon three alleged defects:

1. Because the verification of the paper was not signed by the president. It is not denied that he took the oath, and that the magistrate certified to that fact, but it is said that he should have signed an oath. This criticism is frivolous. *Millius v. Shafer*, 3 Denio, 60; *Jackson v. Virgil*, 3 Johns. 540; *Bonnell v. Griswold*, 80 N. Y. 128.

2. Because the report was not signed by six directors. The company originally had 11 directors, but in 1890 reduced the number to 7 by a change in the by-laws, and thereafter chose only that number. Whether a certificate of the change was filed in the appropriate offices in Westchester county and at Albany is not known, but the actual number of directors who constituted the board was 7. The technical objection to the validity of a corporation's report, which was filed under a similar statute, was treated by Chief Justice Ruger in *Wallace v. Walsh*, 125 N. Y. 26, 25 N. E. 1076, at length, and with more patient deliberation than one would now think it was entitled to receive. He said:

"Where a board of trustees, in part authorized by the corporation, and having possession of its property and franchises and undisputed control in the management of its affairs, has filed and published within the time limited the report re-

quired by the statute, certified by a majority of such board, and verified by the president, it has, we think, complied with the letter and spirit of the law."

No argument is needed in support of this conclusion.

3. Because the papers were not verified by the separate oath of a treasurer or secretary in addition to verification by the president. To the obvious suggestion that there was no secretary by actual appointment, it is said that Faber was still secretary because his resignation had not been accepted, and his verification was therefore necessary. His term of office was not regulated by statute, and the manner by which a resignation must take effect had not been prescribed. Under such a state of facts, that his resignation was effective, though not accepted by the board, has been sufficiently established by the authorities. *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924; *Olmsted v. Dennis*, 77 N. Y. 378; *Bruce v. Platt*, 80 N. Y. 379; *Van Amburgh v. Baker*, 81 N. Y. 46.

The remaining point in the case is this: Was the report, containing all the information required by the statute, signed and verified by the president, who also acted, though not by vote of the board, as secretary and treasurer, and signed by a majority of the board of directors, all acting in good faith, a substantial compliance with the statute, there being, temporarily, no secretary or treasurer? The uniform course of decisions of the highest court of the state of New York has been not to give a harsh construction of this statute against persons who are sought to be brought within its penal provisions. *Chase v. Curtis*, 113 U. S. 452, 5 Sup. Ct. 554. To say that directors are liable for a part or all of the debts of an insolvent corporation, because, at the time of signing the report, an existing vacancy in the offices of secretary and treasurer had not been filled, when the report was signed by the other requisite officers and was verified by the president, who was also the acting treasurer, savors of harshness. The main and strongest reason which is given by the plaintiff in favor of the defendant's liability is as follows: The statute requires that the report should be verified by a secretary or treasurer. The directors should therefore have elected some one to the vacant office. Not having done so, they are guilty of laches, and must suffer the consequences of their neglect.

It is true, in our opinion, that the existing statute did require verification by a member of two classes of officers, if such classes existed. The president supposed that if he, as president, verified the report, the statute did not require an additional verification by another officer,—a construction which, while it may have been presented to him as of authority, is not well founded. The next step in the argument is that the directors are bound to know the law, and are guilty of negligence in not having provided the corporation with an officer who was qualified to verify the report, and cannot take advantage of the neglect to escape from liability. The circuit court did not find negligence. It found nonaction for about four months, and also found sundry facts from which it is said that laches or neglect must be inferred. It found that three of the directors and of the executive committee, two of them being the president and the vice president, were constantly at the factory during business hours. They were probably the managers of

the company's business. It found that the president discharged the duties of secretary and treasurer, so far as they were performed, and believed that it was not necessary for such an officer to verify a report. It found that in February, 1892, a new treasurer was appointed. These facts are certain, but the necessary inferences are not so certain, and different sets of conclusions may be drawn from them. It is as easy to infer that the executive officers decided to do all the work themselves for a time, or that they were unable to find a person who was disposed to accept these offices, as that they were guilty of neglect in not more promptly filling the vacancy. The inference of blameworthy neglect stands before this court as it left the circuit court,—with an absence of finding upon the subject,—and the mere fact of temporary nonaction, when the president believed that there was no necessity to act, is not sufficient to entail upon the directors the consequences of noncompliance with the statutory requirements. We have, then, a report duly made and signed in all respects, except that it was verified only by the president, who also acted as secretary and treasurer during the temporary vacancy in those offices, and the question is whether such a report was a substantial compliance with the statute. The officers seem to have followed its terms as closely as they were able to do at the time, and when in January, 1893, soon after the debt originated, they had power to do more, and to verify by the oath of a treasurer, they complied literally with the statute. Their action in January, 1892, was a substantial compliance under the existing circumstances at that time. There are two conflicting opinions in the supreme court of the state of New York upon a corresponding state of facts. The case of *Shultz v. Chatfield*, 17 Misc. Rep. 264, 40 N. Y. Supp. 1081, affirmed in 12 App. Div. 625, 43 N. Y. Supp. 1164, holds that the directors were liable, while in the case of *Noble v. Euler*, 47 N. Y. Supp. 302, 20 App. Div. 548, upon the same state of facts which exists in this case, the decision is in favor of the directors.

The judgment of the circuit court is affirmed, with costs of this court.

**WALLACE**, Circuit Judge. There is some room for a construction of the statute by which it is satisfied by the filing of a report verified by the president alone, or by the vice president and the treasurer, or by the secretary; but, read in the light of the previous legislation, it should probably be construed as requiring the verification to be by the president or vice president and the treasurer or secretary. Upon this construction, were it not for the decision of the state court, I should be of the opinion that there should have been a judgment for the defendant. These decisions should be followed by this court. They adopt such a liberal view of the statute as to authorize the conclusion that a verification made by the president alone, when the corporation does not have a treasurer or secretary, is a sufficient compliance with its requirements. *Jones v. Butler*, 146 N. Y. 55, 41 N. E. 633; *Wallace v. Walsh*, 125 N. Y. 26, 25 N. E. 1076; *Gold v. Clyne*, 134 N. Y. 262, 31 N. E. 980; *Noble v. Euler*, 20 App. Div. 548, 47 N. Y. Supp. 302.

## CLARK et al. v. GEER.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

Nos. 972 and 973.

**1. CARRIERS—SPECIAL PASSENGER CONTRACT.**

Where a cattle dealer purchases a ticket to ride on a freight train on condition that the company shall not be liable to him in any manner as a passenger, or for any accident resulting to him, or liable to him for injury to person or property, unless caused by the gross negligence of the company, the liability in no case to exceed \$1,000, such agreement shows that he was contracting solely with reference to a liability to himself, and not with reference to the statutory liability of the carrier to others in case of his death through the wrongful act of the carrier.

**2. SAME—NEGLIGENCE—DEATH.**

Where the trains of one company, in charge of its own employes, run over the track of another company, under contract that they shall obey the orders of the train dispatcher of the latter company, such contract does not release the company so using the track from liability for injuries caused by the negligence of its employes.

**3. RESPONDEAT SUPERIOR.**

A master cannot claim exemption from liability for damages occasioned by the negligent act of his servant committed while in his immediate service, and doing his work, merely because he has empowered a third party to give that servant directions relative to certain matters connected with the doing of the work.

**In Error to the Circuit Court of the United States for the District of Kansas.**

Arthur C. Geer, as administrator of William A. Geer, deceased, the defendant in error, sued the receivers of the Union Pacific Railway Company, hereafter termed the "U. P. Company," and the Chicago, Rock Island & Pacific Railway Company, hereafter termed the "R. I. Company," they being the respective plaintiffs in error, on account of the death of his intestate, who was killed in a railway collision which occurred on January 2, 1894, at Linwood, on the line of the U. P. Company, between Kansas City and Topeka, Kan. The deceased was, at the time of the collision, a passenger on a freight train of the U. P. Company, which was run into at the rear end by a freight train of the R. I. Company. Both trains between which the collision occurred were at the time traveling east over the same track. Both companies operated their freight and passenger trains between Topeka and Kansas City, Kan., over the track of the U. P. Company, under an arrangement existing between them which is hereafter referred to. The petition in the case averred that the death of the deceased was occasioned by acts of negligence on the part of both railway companies, and that the negligence of the R. I. Company consisted, in part, in the failure of its engineer in charge of its freight train to keep a proper lookout ahead, and a failure on his part to discover at an earlier moment, as he ought to have done in the exercise of ordinary care, the red lights of the rear end of the U. P. train, which was run into, and on which the deceased was riding when he was killed. There was considerable evidence tending to support this charge of negligence against the R. I. Company. There was a verdict and judgment against both companies for the sum of \$6,000. To reverse that judgment each company, for reasons which will hereafter appear, sued out a separate writ of error, but both cases are before us on a single record.

N. H. Loomis (A. L. Williams and R. W. Blair, on the brief), for the receivers.

M. A. Low (W. F. Evans, on the brief), for Chicago, Rock Island & Pacific Railway Company.

Waters & Waters and H. G. Laing filed brief for administrator.

Before SANBORN and THAYER, Circuit Judges.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

At the time of his death the deceased, who was a dealer in live stock, was traveling in the caboose of the freight train, in charge of two car loads of cattle which he intended to sell at Kansas City. He was a passenger on said train under the terms of a special contract, which contained, among others, the following provisions:

"In consideration of the special contract under which this ticket is issued it is hereby understood and agreed by the holder that: (1) This ticket is not issued to the holder hereof as a passenger, but is issued at his special instance and request, in order to enable him to accompany a stock shipment on a freight or stock train in order to care for the stock en route; and the holder hereof agrees that the company shall not be liable to *him* in any manner as a passenger, or for any accident resulting to him from the operation of the train on which he rides, or from the manner of handling the same by the employes of the company; and he further agrees that the company shall not be liable to *him* for injury to the person or property of the person using this ticket, unless the same is caused by the gross negligence of the company; and he further agrees that in no case shall the liability of the company exceed the sum of \$1,000."

The italics are our own.

Both railway companies join in the contention that, under the terms of the aforesaid contract, the recovery, even if they are liable for the death of the deceased, should have been limited to \$1,000, and in this behalf they invoke the decision in the case of *Hart v. Railroad Co.*, 112 U. S. 331, 5 Sup. Ct. 151, wherein it was held, in substance, that an agreement between a shipper and carrier limiting the amount to be paid for the loss of goods intrusted to the carrier, even if they were lost or damaged by the negligence of the carrier, was lawful, and not contrary to public policy. We are asked to extend that doctrine to contracts for the carriage of passengers. We must decline to do so, or to express an opinion on that question, deeming it unnecessary to decide it on the present occasion. The contract involved in the case at bar, as we view it, was one in which the deceased placed a limit upon the amount of damage that would be claimed by himself in case he sustained an injury and sought to recover compensation. Even if it was competent for the deceased to have done so, the contract in question will not bear the construction that he attempted to place a limit upon the amount which might be recovered by his personal representative, suing for the sole benefit of his widow, children, or next of kin, in case he received a fatal injury for which his personal representative could alone sue. The right of action which was sued upon in this case was created by a statute of the state of Kansas (2 Gen. St. Kan. 1897, p. 213) which allows the plaintiffs to recover, for the injuries complained of, any sum not exceeding \$10,000. It is a right of action which did not exist at common law, and, without the clearest evidence of such a purpose, we will not presume that the deceased intended to make a contract that would alter the rights of his widow and children or next of kin, as defined by the statute. It is sufficient to say that the agreement upon which the defendant companies rely to limit the damages that may be recovered shows, as we think, that the deceased was contracting solely with reference to a liability of the carrier to himself,

and not with reference to the statutory liability of the carrier to others, in case of his death through the wrongful act, neglect, or default of the carrier.

The principal controversy in the case is between the two railroad companies, and it arises from the contention of the R. I. Company that the other company is alone liable for the death of the deceased. This claim is based on the ground that the agreement under which the trains of the R. I. Company were operated between Topeka and Kansas City (the material parts of which agreement are quoted below in a footnote)<sup>1</sup> placed train operatives of the latter

<sup>1</sup> "Article 1. The party of the first part [the U. P. Company] covenants, promises, and agrees to and with the party of the second part as follows: It hereby lets, leases, and demises to the party of the second part, for a term of nine hundred and ninety-nine (999) years, commencing on the first day of September, A. D. one thousand eight hundred and eighty-seven (1887), the right and privilege to connect the tracks of its railway with the tracks of the party of the first part at North Topeka and Kansas City and Armstrong, and to run, operate, and manage its engines, cars, freight, and passenger trains in both directions over the railway of the party of the first part between said point of connection at North Topeka and the western boundary of the town of Armstrong. \* \* \* The engines, cars, and trains of the party of the second part, when on said leased and demised premises, shall have all the rights and privileges accorded by the party of the first part to its own engines, cars, and trains on that portion of its lines. The party of the second part shall have the right to use, in common with the party of the first part, in the operation of its engines, cars, and trains, all the said tracks, telegraph offices, and water stations of the party of the first part, between said points herein specified and demised.

"Art. 2. The party of the second part covenants \* \* \* that it will pay to said party of the first part for the use of said railway and its appurtenances herein demised an annual rental as follows: (1) A sum equal to five per centum upon seven hundred and eighteen thousand and four and seventy-five hundredths dollars. (2) A sum equal to one-half of all taxes which shall be legally assessed and levied upon the property described as follows: \* \* \* (3) A sum equal to a proportional share of expenses actually incurred in repairing, renewing, and maintaining the roadbed, tracks, and bridges, station buildings, water stations, and side tracks between North Topeka and Kansas City, which shall bear the same proportion to the whole amount expended for such purposes as the number of wheels run over said portion of said railway by the party of the second part shall bear to the whole number of wheels operated thereon. (4) A sum equal to a proportional share of the expenses actually incurred in paying reasonable salaries to switchmen, telegraph operators, train dispatchers, and such other employes as may be employed in the performance of the duties incident to the joint use and occupation of said railway, as well as a like share of expenses for water supply, the proportion of each share to be ascertained in the manner provided in the last paragraph. (5) If the party of the first part lets, leases, or demises to any other railway company any right or privilege to operate trains on or over the railway between North Topeka and Kansas City, one-half of all rentals reserved or received shall be applied by the party of the first part in payment of rentals which shall accrue to said party of the first part from the party of the second part under this lease. \* \* \*

"Art. 3. (1) The party of the second part will do no business as a carrier of persons or property to or from points between North Topeka and Kansas City. \* \* \* (2) Joint schedules for the movement of engines and trains shall, when necessary, be made by the joint action of the proper officers of both parties, to have application to such portion of the railway of the party of the first part as is embraced in this lease. Such schedules shall, as nearly as may be practicable, accord equality of right, privilege, and advantage to trains of the same class operated by both parties hereto; and to trains of a superior class operated by either party, a preference over trains of an inferior class operated by the

company under the orders of the superintendent or train dispatcher of the U. P. Company, and that the U. P. Company, for that reason, became solely liable to its own passengers for injuries by them sustained between the two cities, in consequence of any negligent act on the part of employes of the R. I. Company. In other words, it is claimed, broadly, that, by virtue of the provisions of the agreement, the rule of respondeat superior is not applicable, as between the R. I. Company and its own employes while operating its trains between North Topeka and Kansas City, in so far as persons are concerned who happen to sustain injuries from the negligence of such employes, except persons who are passengers on trains of the R. I. Company. It is conceded that the rule of respondeat superior would apply in favor of passengers of the R. I. Company suing that company. It will be observed, from the nature of the agreement quoted below, that it contemplated a joint use and occupation of the track between Kansas City and North Topeka by the two companies; that equality of right as to the movement of trains on the joint track was accorded to each company; that, when necessary, schedules for the movement of trains were to be arranged by the joint action of both companies; that the trains of each company were to be handled by its own employes; and that, in so far as that result could be accomplished by contract, each company was to assume responsibility to the other and to third parties for injuries occasioned by the negligence or misconduct of its own employes. The evidence shows that, while acting under this contract, the trains of the R. I. Company, whether freight or passenger, when they entered upon the track of the U. P. Company, either at Topeka or Kansas City, remained, as before, in charge of its own operatives. It was not the practice of the R. I. Company to turn over its trains to the U. P. Company, to be hauled by engines of the latter company; neither was it the practice of the U. P. Company to place any of its own employes on such trains, either to operate them or to direct their operation. When a Rock Island train entered upon the joint track, the employes of the R. I. Company in charge of such train retained the same control as before over the actual manipulation of the train. The passengers and freight on board thereof remained in the custody of the R. I. Company, and the latter company received the compensation which was paid for their carriage. Rock Island trainmen, however, while upon said track, were required to conform to joint schedules which had been prepared for the movement of trains, and to obey the orders that might be given

other. (3) The party of the first part shall make rules and regulations for the operation of that portion of its railway to be used by the parties jointly, which shall have like application to all engines and trains which may be moved over said railway. All trains shall move under and in accordance with the orders of the superintendent or train dispatcher of the party of the first part, who shall, as nearly as may be practicable, secure equality of right and privilege to all trains of the same class. \* \* \* (5) Each party shall be liable as well to the other as to all third persons for all injury and damage done by the running of its trains or by the misconduct, carelessness, or neglect of its own employes, and, in the case of collision between the trains of the two parties, the one in fault shall sustain and pay all damages, or, if neither is at fault, each shall bear its own loss and damage."

from time to time by the superintendent or train dispatcher of the U. P. Company. This latter provision furnishes the sole basis for the contention that the R. I. Company is not liable in the present suit, although it be true that the death of the deceased was occasioned or contributed to by the negligence of its own engineer.

It must be observed at the outset that no attempt is made in the present case to hold the R. I. Company responsible because an improper order was given to its engineer by the train dispatcher of the U. P. Company, or because there was a failure to give him necessary orders, or to make reasonable regulations for the movement of trains over the track which was used jointly. The charge is, as against the R. I. Company, and it must be presumed that the jury found the accusation to be true, that its engineer was negligent in not discovering the freight train on which the deceased was riding in time to stop his own train and prevent the collision, or that he was negligent in failing to make proper efforts to arrest the motion of his own train after he had discovered the presence of the other train.

Can it be said, then, that the R. I. Company can claim exemption from liability for negligent acts of such a character, which were in no way attributable to the conduct of the train dispatcher of the U. P. Company, subject to whose orders the R. I. Company had, for the time being, placed its engineer? We are constrained to hold that this question should be answered in the negative.

It may be conceded that a servant may at the same time be in the general employ of one master and in the special service of another, and that if, while in such special service and under the exclusive control of the special master and doing his work, he is guilty of a negligent act, the special master is alone responsible therefor. Cases which illustrate this doctrine are those where a master lends or hires his servant or his servants, together with his tools and appliances, to another, to do some work in which the latter is engaged. And in such cases the rule of liability last stated is not altered by the fact that the servant is paid by the general master, nor by the fact that the work in hand is being done at the instance of and for the ultimate benefit of the general master, provided the special master has full charge and control of the work and of the persons employed therein, being with respect thereto an independent contractor. *Miller v. Railway Co.*, 76 Iowa, 655, 39 N. W. 188; *Hitte v. Railroad Co.*, 19 Neb. 620, 28 N. W. 284; *Nason's Adm'r v. Railroad Co.*, 22 U. S. App. 220, 9 C. C. A. 666, 61 Fed. 605; *Donovan v. Laing, Wharton & Down Construction Syndicate* [1893] 1 Q. B. 629; *Railroad Co. v. Grant*, 46 Ga. 417; *Cunningham v. Railroad Co.*, 51 Tex. 503; *Rourke v. Colliery Co.*, 2 C. P. Div. 205; *Powell v. Construction Co.*, 88 Tenn. 692, 13 S. W. 691. In the case of *Smith v. Railway Co.*, 85 Mo. 418, it appeared that the defendant company had a contract with another railroad company to haul its trains some 30 miles from the end of its own line into the city of St. Louis over the track of the other company. The company which engaged to do the hauling furnished the locomotive and crew thereof, and the train was run pursuant to its rules and regulations. It was



held that a passenger who boarded the train between the two points above named, and was injured because the train did not halt long enough at a station where the passenger wished to alight to enable him to get off in safety, could not hold the defendant company liable, but must look to the company which had engaged to haul the defendant's train and had full charge of its movement.

Most of the foregoing cases have been cited in support of the contention of the R. I. Company, but none of them, we think, can be regarded as decisive of the case at bar. In all of them where a master was held exempt from liability for the wrongful acts of a person who was in his general service, such person, at the time of the commission of the negligent act, was not only acting under the direction and control of some special master, but he was doing that master's work, or work which that master had undertaken to perform, as an independent contractor. In the case now in hand it appears that the persons who were in charge of the Rock Island train at the time of the collision were not engaged in the performance of any service for and in behalf of the U. P. Company, or in aiding that company in the performance of any service, but were doing the work of the Rock Island Company to the same extent as if the train in their charge had been at the time on the track of the latter company. We fail, therefore, to perceive any sufficient reason for exempting the Rock Island Company from liability for the negligent acts of its servants which are charged in the complaint, especially as the acts in question were not done by direction of the U. P. Company, or in consequence of the failure of its train dispatcher to give any information or orders which he ought to have given. A master ought not to be allowed to escape liability for damage occasioned by the negligent acts of his servants committed while in his immediate service and doing his work, merely because he has empowered a third party to give that servant directions relative to certain matters connected with the doing of such work. In the case of *Railway Company v. Groves*, 56 Kan. 601, 44 Pac. 628, which is a case in most respects similar to the one at bar, the injury complained of having been occasioned by a collision between trains of the U. P. Company and the R. I. Company on the track between Kansas City and Topeka, the supreme court of Kansas reached a conclusion which is substantially in accord with the foregoing views. See, also, *Hurlbut v. Railroad Co.* (Mo. Sup.) 31 S. W. 1051. As no other questions besides those already considered were discussed on the argument, the judgment of the lower court is hereby affirmed.

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PAINE v. GRIFFITHS et al.

(Circuit Court of Appeals, Third Circuit. April 4, 1898.)

No. 19.

1. CONTRACT—GRANT OF MINING LANDS—ABANDONMENT OF PART.

The plaintiff's grantor, for the purpose of developing the mineral wealth in his vicinity, conveyed to the plaintiff all the mineral, coal, iron ore, petroleum oil, and salines in, upon, and under a certain tract of land, with the

right to mine and remove the same, and construct necessary buildings thereon, the plaintiff agreeing to develop the mines, and pay his grantor a stipulated sum annually. The grant to plaintiff contained a clause permitting him "to abandon the said lands and mining at any time, and remove buildings and fixtures." *Held* that, if the plaintiff abandoned the lands and mining, his title to the minerals, and all other rights conferred by the contract, terminated.

2. SAME.

The grantee, having done nothing under the contract for a period of more than 20 years after its execution, must be considered as abandoning it, and his claim to the minerals nothing more than a cloud on the title of his grantor or assignees.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

A. Leo Weil, for plaintiff in error.

M. F. Elliott, for defendants in error.

Before DALLAS, Circuit Judge, and BUTLER and BRADFORD, District Judges.

BUTLER, District Judge. The plaintiff's title rests upon the following agreement:

"Made and concluded this 3d day of May in the year of our Lord one thousand eight hundred and sixty-seven. Between George Whitesell, of Hampton township in the county of Allegheny in the state of Pennsylvania, party of the first part and Almon Rainey and O. D. Paine of Youngstown, in the county of Mahoning in the state of Ohio, party of the second part, as follows:

"The said party of the first part for the consideration of one dollar to him in hand paid as well as the agreements hereinafter mentioned does hereby bargain, sell and convey to the party of the second part, his heirs and assigns, all the mineral, coal, iron ore and other minerals and all rock or petroleum oil and salines in, upon and under the farm or tract of land in the township of Hampton in the county of Allegheny in the state of Pennsylvania bounded and described as follows:

"On the north by land of A. Watson & Mury heirs, on the east by land of Mury heirs, on the south by land of A. Watson, on the west by land of Joseph Moon. Containing two hundred and seventy (270) acres of land, granting to the party of the second part or his assigns, as well as his and their laborers and workmen, the exclusive right to enter upon said lands at any time hereafter and search for coal, iron ore and all other minerals, oils and salines and when found to remove the same from said lands, together with all the rights and privileges incident to the mining and securing said coal, iron ore and other minerals, oils and salines including the right of ingress and egress and to dig, mine, explore and occupy with such construction and buildings as may be necessary and useful for the full enjoyment of the advantages of said coal, iron ore and other minerals, oils and salines and with the refuse from said mines and also the right to mine and remove the coal, iron ore and other minerals, oils and salines from other lands, through, over or under said lands.

"And the party of the second part agrees by himself, his assigns and workmen to make search for coal, iron ore and other minerals, oils and salines upon the lands above described, and should he find coal, iron ore or other minerals or oils or salines in said lands and other lands of sufficient thickness, quantity and quality to justify him, the party of the second part, in his opinion to open and work said mines or oils or salines then he or his representatives or assigns shall pay to the party of the first part, his heirs or assigns, within three years after the completion of a railroad built in connection with any leading railroad by which said minerals or oils can be taken to any large markets the sum of twenty dollars a year, and the party of the second part shall have the right to abandon said lands and mining at any time and remove all his buildings and fixtures from said lands. And it is further agreed upon by the parties to this

contract that if the party of the second part shall fail to construct or cause to be constructed the railroad herein contemplated within five years from the date of this contract the party of the second part shall pay to the party of the first part the above-named sum of twenty dollars a year thereafter until said railroad is completed or mining is commenced on said premises. And a further consideration of this contract is to induce capitalists to develop the mineral wealth of this section in the county of Allegheny and state of Pennsylvania. And the said party of the second part by himself or assigns agrees to pay to the party of the first part, his heirs, legal representatives, or assigns the sum of ten (10) cents for each ton (of 2,240 pounds) of screen coal mined and removed from said lands herein described, and the price or rent of the iron ore and limestone mined and removed from said lands for such gross ton of 2,240 pounds shall be ten cents for screened or cleaned ore and limestone and the price or rent for rock or petroleum oil shall be —, and saline —. But it is understood and agreed that any advance payments that shall be made to the party of the first part are to apply to the payment of rents of coal, iron ore or other minerals or oils first named thereafter, the payment of rent per ton on coal, iron ore and other minerals, oils and salines mined and removed shall be made half yearly and all payments required by this agreement shall be made and accepted in bankable funds of the state of Pennsylvania. It is mutually understood by the parties that the coal and ore under any dwelling house or other permanent buildings now upon the premises shall not be mined out and as little injury to the surface of said land shall be done as possible in the mining, removing and transportation of said coal and ore, oils and all other minerals as herein contemplated.

"It is further understood and agreed upon as a part of this contract that the party of the first part hereby grants and gives to the party of the second part all the land necessary in the above-described premises for location, construction and occupancy of a public railroad as above contemplated together with lateral branches. It is also mutually understood that the stipulation herein contained shall apply to and bind the heirs, executors, administrators and assigns of the parties respectively.

"In witness whereof the parties has hereunto set their hands and seals, the day and year first above written.

George Whitesell. [Seal.]  
 "Almon Rainey. [Seal.]  
 "O. D. Paine. [Seal.]

"Signed, sealed and delivered in the presence of

"Robert Hardy.  
 "Martha A. Orr."

The main question is: how should this contract be interpreted? The court below, without determining whether it created a grant of the minerals, or a lease of them, held that the provision for abandonment related to the entire interest transferred to Rainey and Paine, and instructed the jury to find for the defendant if it appeared that Rainey and Paine and their assigns, had abandoned the property. To this view of the contract, and the manner of submitting the question of abandonment, the plaintiffs excepted.

It may not be important to determine whether the contract constituted a grant, or merely a lease; as the result would probably be the same in either case, under the laws of Pennsylvania. If a lease, it would not be terminable at the will of the lessor, as the defendant urges. *Lewis v. Effinger*, 30 Pa. St. 281; *Id.*, 32 Pa. St. 367. It seems clear however, that the interest transferred was a grant of the minerals; not absolute, but conditional. The grantees were expressly authorized to abandon the property and thus terminate their obligations, as well as their interest. The provision was not inserted for their benefit alone, but as well for the grantor's. This is too manifest to justify discussion. His object was the development and utilization of his land. If therefore the grantees abandoned the property the grantor was to be remitted to his

former condition. The plaintiffs' interpretation of the clause, and of the agreement generally, is inadmissible. It divorces the grant from the obligations on which it rests, and thus makes the former absolute, and the latter independent covenants; thus allowing the grantees to retain the minerals while disregarding and abandoning the obligations on which the right to them depends. The terms of the clause itself—which are that “the party of the second part shall have the right to abandon the said lands and mining at any time and remove buildings and fixtures”—forbids this interpretation. If it were possible to construe the language so as to make it relate to the mining operations alone, and thus allow the grantees to withdraw from them and still retain the minerals, the court would be reluctant to do it, and thus defeat the manifest object of the grantor. But it is not possible. The term “land” accurately describes the mineral right granted. *Kier v. Peterson*, 41 Pa. St. 357; *Union Petroleum Co. v. Bliven Petroleum Co.*, 72 Pa. St. 173; *Glasgow v. Gas Co.*, 152 Pa. St. 148 [25 Atl. 232]. It is not merely the mining operations therefore, that are subject to abandonment, but the mining right as well. Consequently if the grantees elect to take advantage of the clause their act terminates not only their right to operate mines upon the premises, but all other rights conferred by the contract. The court's interpretation cannot therefore be complained of.

Is its submission of the question of abandonment liable to just criticism? It is unnecessary to notice the numerous assignments of error separately. Those relating to the construction of the contract, and the answer to points touching that subject, are covered by what has been said. The first, fifth, sixth, seventh, twelfth and fifteenth, relate to the question now under consideration. A careful examination of these assignments has not convinced us that any error was committed, calculated to prejudice the defendant. It is easy in most cases to render a charge subject to adverse criticism by cutting it in pieces and considering the parts separately. The question however is whether the charge, taken as a whole, and as the jury should have understood it, was unjust to the plaintiff. Here the inquiry whether the evidence proves the alleged abandonment, was fairly submitted, and the jury's attention called to the main features of the testimony on which its decision rests. It is probable the court would have been justified in saying that if the jury should find that the grantees and their assigns did, substantially, nothing under the agreement, for the period which elapsed between its date and the subsequent lease to Griffiths—more than 20 years—it should find an abandonment. While the question is one of intention mainly, its decision does not depend upon an intention to abandon or retain the mineral right alone, divorced from the obligations which adhere to it under the contract, but intention to abandon the contemplated enterprise. Evidence therefore of transfer, or attempts to transfer, this right, as matter of mere speculation, was entitled to no weight in the presence of proof that nothing further was done or intended to be done; and that the obligations on which the grant rests were disregarded and abandoned. Surely the transaction between Griffiths and Allen was entitled to no con-

sideration. More than 20 years had then elapsed since the grant to Rainey and Paine, and nothing whatever, of consequence, had been done under the agreement. Griffiths had recently obtained an oil right in the land, and was about to commence work. Hearing accidentally of this agreement he went to Allen, who held a supposed interest under it, and paid him something, to avoid danger thereafter. The court referred to the claim of Allen as a mere cloud on Griffiths' title. Certainly it was no more. The evidence of abandonment at that time was ample to justify and require a jury to find the fact. Neither Allen, nor anybody else claiming under the agreement, could breathe the new life into the grant; it was dead and could not be resurrected. Nevertheless he was in a position to demand something, and Griffiths in a situation that justified the payment of something, to insure peace. The plaintiffs say however, the court was inconsistent with itself, that while undertaking to submit the question it decided it. We do not think the criticism is just when the entire charge is considered. The court doubtless meant to be understood as saying that Griffiths regarded Allen's claim as a mere cloud. If the court had said this transaction is of no consequence, in case abandonment had previously occurred, that Allen's claim under such circumstances, was a mere cloud on Griffiths' title, the statement would have been strictly accurate. The expressions complained of however could do no harm; not only because they were unlikely to be understood as the plaintiffs construe them, but also because the facts on which the question of abandonment depends are free from question, and fully warranted the court in leading the jury to the conclusion reached, if they did not even call for binding instruction, as before indicated. In *Atchison v. McCulloch*, 5 Watts, 13, the court said:

"Abandonment is not always a question of intention exclusively for the jury, without a controlling instruction from the court. Under a certain uncontradicted state of facts the law will pronounce the conduct of a party to be an abandonment, whatever may have been his intention."

For these reasons the judgment must be affirmed.

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#### ENDLEMAN et al. v. UNITED STATES.

(Circuit Court of Appeals, Ninth Circuit. February 28, 1898.)

No. 357.

1. CRIMINAL LAW—MOTION TO QUASH INDICTMENT—REVIEW.

A motion to quash an indictment is ordinarily addressed to the discretion of the court, and the overruling thereof is not ordinarily assignable as error.

2. CONSTITUTIONAL LAW—TERRITORIES—AUTHORITY OF CONGRESS.

Congress has full legislative power over the territories, unrestricted by the limitations of the constitution.

3. INTOXICATING LIQUORS—UNLAWFUL SALES IN ALASKA.

The act of May 17, 1884, prohibiting the sale of liquors in Alaska except under certain regulations, is valid, being within the plenary legislative power possessed by congress over the territories.

4. SAME—INDICTMENT.

Under the Oregon Criminal Code, in force in Alaska, which dispenses with technicalities in pleading an indictment charging that defendant, on or about

a certain date, and at other times before, did sell "to John Doe and Richard Roe, and to divers other persons," whose real names are unknown "an intoxicating liquor, called 'whisky,' to wit, one glass, pint, quart, gallon, of said liquor (the real quantity is to the grand jurors unknown)," etc., is not bad as charging more than one offense.

5. SAME—PAYMENT OF TAX.

The payment of the special tax levied by the general government on the business of retailing liquors is no defense to a prosecution for illegally selling liquors in Alaska.

6. CRIMINAL LAW—INSTRUCTIONS—OPINION OF JUDGE.

A statement of a federal judge that he does not see any way in which the defendants can be acquitted, while not to be approved, is no ground for reversal where he states the rules of law correctly, and expressly leaves the matters of fact to the jury.

In Error to the District Court of the United States for the District of Alaska.

Crews & Hannum and C. S. Blackett (W. E. Crews, of counsel), for plaintiffs in error.

Burton E. Bennett (H. S. Foote, of counsel), U. S. Dist. Atty.

Before GILBERT, ROSS, and MORROW, Circuit Judges.

MORROW, Circuit Judge. It is enacted, in section 14 of the act of May 17, 1884, providing a civil government for Alaska (23 Stat. 24, 28), that "the importation, manufacture, and sale of intoxicating liquors in said district except for medical, mechanical and scientific purposes is hereby prohibited under the penalties which are provided in section nineteen hundred and fifty five of the Revised Statutes for the wrongful importation of distilled spirits. And the president of the United States shall make such regulations as are necessary to carry out the provisions of this section." By section 1955 of the Revised Statutes the president is given "power to restrict and regulate, or to prohibit, the importation and use \* \* \* of distilled spirits into and within the territory of Alaska. \* \* \* And any person willfully violating such regulations shall be fined not more than \$500, or imprisoned not more than six months." By the executive order of May 4, 1887, the landing of intoxicating liquors at any port or place in the territory of Alaska is prohibited except upon a permit of the chief officer of the customs at such port or place, to be issued upon evidence satisfactory to such officer that the liquors are imported and are to be used solely for sacramental, medicinal, mechanical, or scientific purposes. By the executive order of March 12, 1892, the sale of intoxicating liquors for medicinal, mechanical, and scientific purposes can be made only by such persons in the territory as shall have obtained a special permit from the governor of the territory to sell intoxicating liquors therein upon certain specified conditions.

The appellant and one Edward Lord were indicted by the grand jury in the district court of the United States for the district of Alaska, in December, 1896, for selling intoxicating liquors within said district. The indictment charges that:

"The said Max Endleman and Edward Lord, at or near Juneau, within the said district of Alaska, \* \* \* on or about the 7th day of December, 1896, and at divers other times before, did unlawfully and willfully sell to John Doe

and Richard Roe and to divers other persons, whose real names are to the grand jurors unknown, an intoxicating liquor, called whisky, to wit, one glass, pint, quart, gallon, of said liquor (the real quantity is to the grand jurors unknown), without having first complied with the law concerning the sale of intoxicating liquors in the district of Alaska."

The defendants moved to quash this indictment upon the grounds (1) that two or more offenses were charged in the same count and same indictment; (2) that the indictment was fatally defective for duplicity; (3) that two or more offenses were charged in the same indictment in the same count against two defendants, without segregating the offenses committed by each defendant; (4) that the indictment was too vague, indefinite, and uncertain to afford the accused proper notice of the crime charged against them to enable them to properly plead or prepare their defense. The motion to quash the indictment was denied, and thereupon the defendants interposed a demurrer on the grounds: (1) That the court had no jurisdiction over the subject-matter of the action; (2) that more than one crime is charged in the indictment against the defendants in the same count; (3) that the facts stated in the indictment do not constitute a crime, or any crime, against the defendants, or either of them. The demurrer was overruled, and the defendants plead not guilty. At the trial the defendants moved the court to require the district attorney to elect upon what particular sale set forth in the indictment he would rely for a conviction, which motion was denied. Upon the first trial the jury was unable to agree. Upon the second trial the jury found the defendant Max Endleman guilty as charged in the indictment, and Edward Lord not guilty. The defendant Endleman moved in arrest of judgment and for a new trial, and these motions were denied.

The errors assigned, 16 in number, relate to the sufficiency of the indictment as against the objections that were raised by the motion to quash, by the demurrer, and by the motion in arrest of judgment; errors occurring during the progress of the trial, to which exceptions were taken; and errors in the instructions of the court to the jury. The objections raised by the motion to quash the indictment may be dismissed with the observation that a motion to quash an indictment is ordinarily addressed to the discretion of the court, and therefore a refusal to quash cannot generally be assigned as error. *U. S. v. Rosenburgh*, 7 Wall. 580; *U. S. v. Hamilton*, 109 U. S. 63, 3 Sup. Ct. 9; *Logan v. U. S.*, 144 U. S. 263, 12 Sup. Ct. 617; *Durland v. U. S.*, 161 U. S. 306, 16 Sup. Ct. 508.

In support of the first ground of demurrer, it is contended that the law upon which the prosecution is based is unconstitutional, because, among other things, the government of the United States can exercise only those specific powers conferred upon it by the constitution; that the constitution guaranties to the citizens the right to own, hold, and acquire property, and makes no distinction as to the character of the property; that intoxicating liquors are property, and are subjects of exchange, barter, and traffic like any other commodity in which a right of property exists; that, inasmuch as the power to regulate commerce was committed to congress to relieve it from all restrictions, congress cannot itself impose restrictions upon com-

merce by prohibiting the sale of a particular commodity; that, if congress has the power to regulate the sale of intoxicating liquors within the territories as a police regulation, it can only enact laws applicable to all the territories alike. The answer to these and other like objections urged in the brief of counsel for defendant is found in the now well-established doctrine that the territories of the United States are entirely subject to the legislative authority of congress. They are not organized under the constitution, nor subject to its complex distribution of the powers of government as the organic law, but are the creation, exclusively, of the legislative department, and subject to its supervision and control. *Benner v. Porter*, 9 How. 235, 242. The United States, having rightfully acquired the territory, and being the only government which can impose laws upon them, has the entire dominion and sovereignty, national and municipal, federal and state. *Insurance Co. v. Canter*, 1 Pet. 511, 542; *Cross v. Harrison*, 16 How. 164, 193; *National Bank v. Yankton Co.*, 101 U. S. 129, 133; *Murphy v. Ramsey*, 114 U. S. 15, 44, 5 Sup. Ct. 747; *Late Corporation of Church of Jesus Christ of Latter-Day Saints v. U. S.*, 136 U. S. 1, 42, 43, 10 Sup. Ct. 792; *McAllister v. U. S.*, 141 U. S. 174, 181, 11 Sup. Ct. 949; *Shively v. Bowlby*, 152 U. S. 1, 48, 14 Sup. Ct. 548. Under this full and comprehensive authority, congress has unquestionably the power to exclude intoxicating liquors from any or all of its territories, or limit their sale under such regulations as it may prescribe. It may legislate in accordance with the special needs of each locality, and vary its regulations to meet the conditions and circumstances of the people. Whether the subject elsewhere would be a matter of local police regulation, or within state control under some other power, it is immaterial to consider. In a territory all the functions of government are within the legislative jurisdiction of congress, and may be exercised through a local government, or directly by such legislation as we have now under consideration.

The contention that the law is in restraint of trade and commerce, and therefore in conflict with the doctrine declared by the supreme court in *Leisy v. Hardin*, 135 U. S. 100, 10 Sup. Ct. 681, is also without merit. It was determined in that case that the law of a state prohibiting the sale of intoxicating liquors except for pharmaceutical, medical, chemical, or sacramental purposes, and under a license from a county court of the state, was, as applied to a sale by the importer, and in the original packages or kegs, of liquors manufactured and brought from another state, unconstitutional and void, as repugnant to the clause of the constitution granting to congress the power to regulate commerce with foreign nations and among the several states. In pursuance of this decision, and in recognition of the conditions in certain localities, congress provided, in the act of August 8, 1890 (26 Stat. 313):

"That all fermented, distilled, or other intoxicating liquors or liquids transported into any state or territory or remaining for use, consumption, sale or storage therein, shall upon arrival in such state or territory be subject to the operation and effect of the laws of such state or territory enacted in the exercise of its police powers to the same extent and in the same manner as though such liquids or liquors had been produced in such state or territory, and shall not be exempt therefrom by reason of being introduced therein in original packages or otherwise."



This law was declared in *Re Rahrer*, 140 U. S. 545, 11 Sup. Ct. 865, to be a valid and constitutional exercise of the legislative power conferred upon congress; and a provision of the constitution of Kansas, which provided that the manufacture and sale of intoxicating liquors should be forever prohibited in that state except for medical, scientific, and mechanical purposes, and an act passed in enforcement thereof, were sustained, on the ground, substantially, that congress had determined that it would interpose no obstacle to such legislation; that, in the regulation of commerce, no reason was perceived why congress might not provide that certain designated articles of interstate commerce should be governed by a rule that would devalue them of that character at an earlier period of time than would otherwise be the case. In other words, there was no reason why the law of a state or territory, prohibiting the sale of intoxicating liquors, should not take effect immediately on the arrival of the article within its territorial jurisdiction.

The second ground of demurrer is that more than one crime is charged in the indictment against the defendant in the same count. Section 7 of the act providing for a civil government for Alaska (23 Stat. 24, 25) declares that the general laws of the state of Oregon then in force are to be the law of said district. The Criminal Code of Oregon dispenses with all technical requirements in criminal pleading, and provides that the indictment is sufficient if it can be understood therefrom that the crime was committed at some time prior to the finding of the indictment, and within the time limited by law for the commencement of an action therefor; that the act or omission charged as the crime is clearly and distinctly set forth, in ordinary and concise language, without repetition, and in such manner as to enable a person of common understanding to know what is intended; that the act or omission charged as the crime is stated with such a degree of certainty as to enable the court to pronounce judgment upon a conviction, according to the right of the case, and no indictment is insufficient, nor can the trial, judgment, or other proceedings therein be affected, by reason of a defect or imperfection in matter of form, which does not tend to the prejudice of the substantial rights of the defendants upon the merits. Cr. Code, § 80.

Have the substantial rights of the defendant been prejudiced by any defect or imperfection in either the matter or form of the charge contained in the indictment? We think not. In *Stors v. State*, 3 Mo. 9, the indictment charged the defendant with selling spirituous liquors without a license to two persons named, and to divers other citizens to the jurors unknown. The defendant demurred to the indictment, on the ground that it contained only one count, and that several distinct offenses were charged in that count. The court held that there was no force in the objection, and that it was to the interest of the defendant to consider the several acts as constituting but one offense, whether they were or were not committed at the same instant of time, which might well have been. It was also held that, as the charge did not amount to a felony, the prosecutor could not be called upon at the trial to elect upon which charge he would proceed. In *People v. Adams*, 17 Wend. 475, the indictment was for selling liquors without a license, and charged that the defendant,

on the 1st day of June, 1836, and on divers other days and times between that day and the day of finding the indictment, sold by retail, to divers citizens of the state, and to divers persons to the jurors unknown, spirituous liquors and wines, to wit, three gills of brandy, three gills of wine, three gills of gin, three gills of whisky, three gills of cordial, three gills of bitters, three gills of rum. It was objected that more than one offense was charged in one count. The court held that the objection was not true in point of fact. The whole charge was deemed to be but one transaction, and the allegation that the offense was committed on a particular day, and also on divers other days, was good as to the day certain, and the residue was rejected as surplusage. In *Osgood v. People*, 39 N. Y. 449, an indictment charged the defendant with unlawfully selling liquor to different persons on different days. The defendant was convicted of one offense. It was objected that the defendant was charged with several distinct offenses, and that the indictment was bad for uncertainty and duplicity. The indictment was upheld, and the conviction sustained, on the authority of *People v. Adams*, *supra*. It was further said that the verdict was conclusive evidence that neither at that time nor at any other time had the defendant been proved to have committed more than one offense for which he was on trial. In *State v. Anderson*, 3 Rich. Law, 172, the indictment charged in one count various acts of retailing liquors without a license as constituting a single offense. "In this," said the court, "there is no duplicity or misjoinder, but rather a favor to the defendant in enumerating, as aggravations or characteristic repetitions of the principal act, other acts, each of which might have been alleged as a separate offense." In *Nelson v. U. S.*, 30 Fed. 112, the act constituting the offense was, as in the present case, the sale of intoxicating liquors in Alaska, and involved the construction of the same statute. The indictment charged that the defendant did "at the town of Sitka, within said district, sell one pint of brandy, one pint of wine, one pint of whisky, one pint of beer, contrary to the statute," etc. The name of the purchaser was not given, and the omission was one of the grounds of objection to the indictment. The case was taken on a writ of error to the district court of the United States for the district of Oregon, and that court held that the name of the purchaser was not a necessary ingredient of the offense, particularly where the prohibition to sell is general, irrespective of persons, and that the omission could not be alleged as error. See, also, opinion of the court in *State v. Hodgson*, 66 Vt. 134, 28 Atl. 1089, adopted as the views of the supreme court of the United States in *Hodgson v. State of Vermont* (recently decided) 18 Sup. Ct. 80. It is clear, from these authorities, that the defendant, having been convicted of but one offense, has no substantial ground of objection to the indictment on the ground that it charges more than one offense in the same count. These authorities also dispose of the objection that the court refused to require the district attorney to elect upon what particular sale set forth in the indictment he would rely for conviction.

It is assigned as error that the court refused to allow the defendant to introduce in evidence a special tax receipt issued to the defendant by the collector of internal revenue for the district of Oregon, for

\$25, on the business of retail liquor dealer at Juneau, Alaska, for the year commencing July 1, 1896, and ending June 30, 1897. The receipt contained the following printed indorsement:

"This stamp is simply a receipt for a tax due the government, and does not exempt the holder from any penalty or punishment provided for by the law of any state for carrying on the said business within such state, and does not authorize the commencement nor the continuance of such business contrary to the laws of such state, or in places prohibited by municipal law. See section 3243, Rev. St. U. S."

The section of the Revised Statutes to which reference is made by the printed indorsement declares specifically that the payment of the tax does not authorize the commencement or continuance of any trade or business contrary to the laws of the state or in places prohibited by municipal law. This was also determined by the supreme court in *McGuire v. Com.*, 3 Wall. 387, and *License Tax Cases*, 5 Wall. 462. The defendant in this case was being prosecuted for violating the local or municipal law of the territory, and the circumstance that the local law for Alaska and the national revenue law were both enacted by congress is immaterial in view of the provision in the latter that the local law must prevail in determining whether a business for which a special tax is required may or may not be carried on in a given locality. In answering this charge, the payment of the special tax required by the general government for carrying on the business of a retail liquor dealer was therefore clearly irrelevant and immaterial.

In charging the jury, the court said:

"The federal courts allow the judges sometimes to give an opinion on the evidence. I gave my judgment to the other jury, and I will give it to you. I do not see any way that these defendants can be acquitted. Notwithstanding, I charge you that you are the judges of the evidence, and from that evidence it is for you to say whether or not they, or either of them, are guilty."

It is objected that the court had no right to express an opinion as to the guilt or innocence of the defendant. The language used by the court, as to the guilt of the defendant, is certainly not to be commended. While it is true that the federal judges have the right, in criminal cases, to express to the jury their opinion as to the guilt or innocence of one accused of crime and on trial, and advise them as to the facts of the case, still the supreme court has repeatedly admonished the trial courts that this should be done with great care and circumspection.

In the case of *Starr v. U. S.*, 153 U. S. 614, 627, 14 Sup. Ct. 919, 924, the supreme court, in expressing in unmistakable terms its disapprobation of the language used by the trial judge in his charge to the jury, said:

"Whatever special necessity for enforcing the law in all its rigor there may be in a particular quarter of the country, the rules by which and the manner in which the administration of justice should be conducted are the same everywhere, and argumentative matter \* \* \* should not be thrown into the scales by the judicial officer who holds them."

While the remarks of the learned judge are subject to criticism, and we are compelled to express our disapproval of it, still as no rule of law was incorrectly stated to the jury, and the matters of fact were ultimately submitted to the determination of the jury, we do

not consider that it was reversible error. *Rucker v. Wheeler*, 127 U. S. 85, 93, 8 Sup. Ct. 1142; *Lovejoy v. U. S.*, 128 U. S. 171, 173, 9 Sup. Ct. 57.

The other errors assigned are so obviously without merit as not to require discussion. The judgment of the district court is affirmed.

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FULLER-WARREN CO. v. MICHIGAN STOVE CO.<sup>1</sup>

(Circuit Court of Appeals, Seventh Circuit. April 1, 1898.)

No. 441.

1. PATENTS—NOVELTY AND INVENTION.

The patent law was not intended to foster attempts to appropriate and monopolize things of commonplace character and of familiar use, on the ground that, though frequently employed even in patented devices, they have not been claimed as inventions, and their uses and benefits exploited.

2. SAME—IMPROVEMENT IN STOVES.

The Keep patent, No. 368,770, for an improvement in stoves, the essential features consisting of an inturned, mica-filled section over the fire pot, a reflector above the inturned section, and mica interposed between the fire and reflector, arranged to spread light and heat, covers results rather than the means of producing them, and is void for want of patentable invention. 81 Fed. 376, reversed.

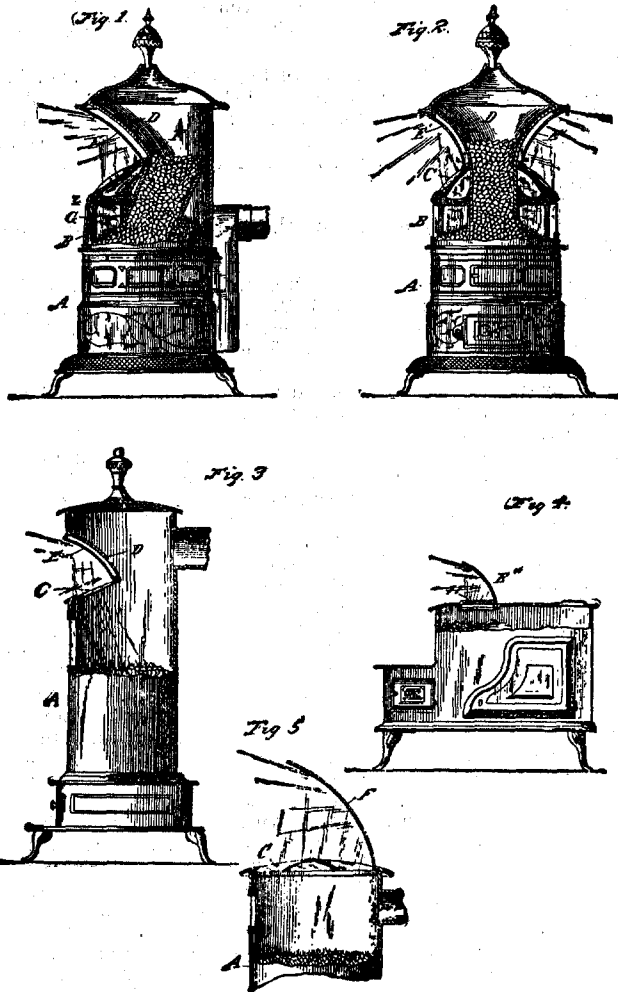
Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

By the decree below, the second and fifth claims of letters patent of the United States, No. 368,770, issued on August 3, 1887, to William J. Keep, assignor to the appellee, for an improvement in stoves, were declared valid, and to have been infringed by the plaintiff in error. The specification of the patent contains the following statements: "This improvement relates more particularly to that class of stoves provided with reflectors to deflect light and heat; and the invention consists mainly in the attachment to stoves of a reflector in such a position that the heat or light will first pass through the walls of a stove to a reflector or reflectors, and in certain details of construction and arrangement of parts, whereby the before-said main feature is carried out. \* \* \* In carrying out my invention, I prefer to use a stove such as is shown in Fig. 1. The lower part, A, of this stove, up to the point marked 'z,' may be of any approved pattern, as it is only above this point that my invention begins. \* \* \* Above the part A, I have the usual mica doors, as shown at B, and above that again is an inturned section, C, preferably slightly convex, although it may be flat if desired, and either inclined or horizontal, and having openings filled with mica. Above this inturned section is an overhanging section, D, in front of which is a reflector, E, preferably set a slight distance away from the same, so as to leave an air space between the two, to prevent the reflector becoming heated and discolored. \* \* \* I prefer to extend the inturned section, C, nearly or quite to the center of the stove, so as to obtain as large an amount of aperture for the mica lights as possible. \* \* \* In some cases, in addition to the reflector in front, as shown in Fig. 1, I extend the inturned section, C, around on each side, as shown in Fig. 2, and place reflectors, E', at the sides, as shown, which may be arranged in two, three, or all four sides as preferred. I do not limit myself to magazine stoves, such as are shown in Figs. 1 and 2; but the reflecting principle may be carried out in many other ways, which will be obvious to stove manufacturers. For instance, in an ordinary cylinder stove the door may or may not be filled with mica at all, but may be an ordinary metal door and a mica cover, C, run in over the fire, as shown in Fig. 3, and the curved overhanging plate, D, extended forward to connect with the front wall of the stove; or I may provide a stove of cylindrical or other form with a top having openings for mica extending nearly or entirely over the top, and set a reflector on the back of said top as shown in Fig. 5. The same feature may be applied

<sup>1</sup> Rehearing denied June 10, 1898.

to a cook stove by providing in lieu of the ordinary covers others provided with mica-filled openings, as shown at H, and securing thereto a reflector, E". Instead of the face of the section C being curved, it is obvious that it may be made with a plane surface, if desired. It is also obvious that transparent or translucent materials other than mica may sometimes be used in lieu thereof. \* \* \* I deem it important that the mica be placed between the reflector and the fire. \* \* \* Having thus described what I at present consider the preferable ways of carrying out my invention, but without intending to limit myself thereto, I claim as new: (2) The combination, in a stove, of a vertical section, as A, B, inclosing the fire pot, an inturned section, C, arranged over the fire pot, a reflector, E, arranged above said inturned section, and mica interposed between the fire and reflector, substantially as described. \* \* \* (5) The combination, in a stove, of a vertical section, an inturned section, C, having openings filled with mica, and multiple reflectors as E', E', arranged to diffuse and spread the rays of light and heat in various directions, substantially as described."

The following are the drawings of the patent:



E. H. Bottum, for appellant.  
Ephraim Banning, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after stating the case as above, delivered the opinion of the court.

If valid, this patent must be held to embrace any form of construction which, in respect to the elements of the claims, shall be substantially like or equivalent to any of the forms shown in the drawings. "The reflecting principle," says the specification, "may be carried out in many other ways which will be obvious to stove manufacturers." As illustrated in Figs. 1, 2, and 3, the invention will include any stove so constructed that the light passing through a door or window of mica will strike upon and be reflected into the room from a polished surface upon any part of the stove, or from a reflector attached to the stove. As illustrated by Figs. 4 and 5, it will include any stove with a reflector so adjusted with reference to an opening filled with mica as to turn into the room the transmitted light. The claims contemplate that the mica shall be located above or over the fire pot, but that is accidental merely, and constitutes no essential feature of the mechanism; no more than does "the vertical section" inclosing the fire pot, which in other claims is described as "substantially vertical." If good for anything, the claims are the same as if for a stove with an opening filled with mica or other translucent material, so placed that light from the interior of the stove passing through the opening will strike upon a reflector attached to the stove or upon a polished part of the stove, and be reflected into the surrounding space. The patent is for a mechanism, and not for a design; and whether the location of the opening be on the top or side or bottom of the stove, if only light from the interior pass through it, the difference of location cannot affect the character of the mechanism, which, manifestly, will embody the invention as much when found in one part of the stove as another. Practically, the patent covers results rather than the means of producing them. It is not pretended that the manufacturers of stoves, of whatever form, old or new, have not the right to polish them outside and inside if they please, and also have the right to put in them ad libitum openings filled with mica. There could be no invention in doing so; but, if this patent is good, it will be infringed if, by chance or design, a stove of any pattern be so constructed that a ray of light through a piece of mica will strike upon a reflecting surface attached to or constituting a part of the stove. For instance, the laundry stove of Green, as shown in design patent No. 101, has two inturned surfaces related to each other as the parts of an hourglass. For the purpose of utilizing the light in the stove to illuminate the room, the owner or maker of that stove may rightfully insert in the lower inturned surface a piece of mica; but, once he does it, he is an infringer of this patent, because the light will strike upon the opposite surface above, and be reflected. In other words, in that form of stove a plate of mica cannot be used in the part next over the fire pot, unless, by the use of dead black paint or otherwise, the upper opposite surface be made and kept nonreflecting. The same is true of the many varieties of stoves on the project-

ing or overhanging parts of which, whether polished for the purpose or not, the light passing through mica plates may strike and be reflected. Without going further into the details of the discussion, it is enough to refer to the fireplace heater of James Spear, as illustrated in a catalogue published in 1884 at Philadelphia. Around that heater is a frame, of which the catalogue says: "The frame is large and full nickel plated, has a concaved surface, and extends back some distance, catching the light from the mica windows, and acts as a reflector, casting the light and heat into the room." In this device the inturning is on horizontal instead of vertical lines, and the reflection, of course, is from that part of the frame which is adjacent to the side of the heater; but the mica is placed between the reflector and the fire, and the objection that "there is no provision of an inturned mica section and reflector serving in any manner to reflect the rays of light and heat from the upper surface of the fire pot" is without force upon the question of patentability. Nothing was lacking to the Spear device to fulfill that condition but to put a mica window in the upper part, which was already inturned and capped with a reflector in proper place. To do that certainly could not have been invention. It may be remarked that the "reflecting principle" and the mechanism involved in this patent have long been exemplified in the ordinary forms of lamps and glass chimneys, and the reflectors and shades used in connection therewith.

There is a degree of credit due to one who explores out of the way or hidden places, and brings to the light and to the uses of civilization, as "abandoned experiments," the discoveries of others, whose genius was itself a disqualification for the achievement of practical success; but it is certainly no part of the intention of the patent law to foster attempts to appropriate and monopolize things of commonplace character, and of familiar use, on the ground that, though frequently employed even in patented devices, they have not been claimed as inventions, and their uses and benefits exploited. The obvious need not be explained. The decree below is reversed, with costs, and with direction to dismiss the bill.

### SHAW ELECTRIC CRANE CO. v. SHRIVER.

(Circuit Court of Appeals, Second Circuit. March 2, 1898.)

No. 26.

#### 1. PATENTS—INVENTION—ELECTRIC CRANES.

There was no invention in the employment of three independent electric motors controlled from a common point to move the several parts of the old overhead trolley frame, which had previously been operated by three independent engines moved by steam power.

#### 2. SAME.

The Shaw patent, No. 430,487, for improvement in electric cranes, held invalid as to claims 1 and 2, for want of patentable invention.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This cause comes here upon an appeal by complainant from a decree of the circuit court, Southern district of New York, entered March 16, 1897, dismissing

the bill. The suit was brought for infringement of letters patent of the United States, No. 430,487, granted to Alton J. Shaw, June 17, 1890, for an electric crane. The patent came first before Judge Acheson, sitting in the district of New Jersey, in a suit by the same complainant against Henry B. Worthington, incorporated, charging infringement of the first, second, and tenth claims of the patent. It was held void for want of invention, in an opinion which will be found in 77 Fed. 992. The suit in the Southern district of New York charged infringement of the first and third claims. The judge who heard the cause followed Judge Acheson's decision, and wrote no opinion.

Frederick H. Betts, for appellant.

John R. Bennett, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. The record is a most voluminous one, covering 1,700 printed pages. Six experts of unquestioned ability have been examined, three on a side. The briefs are able, ingenious, and exhaustive; and yet, when the record has been read, the briefs studied, and the testimony of the experts analyzed, it is apparent that the question presented is, after all, a single one, which may be answered without any extended discussion. Indeed, it seems unnecessary to add anything to the brief opinion of the court in the district of New Jersey.

The claims in question are:

"(1) In combination with a supporting track, a bridge mounted and movable thereon, a trolley or car mounted and movable upon the bridge, a hoisting drum or pulley carried by the trolley, and three independent electric motors, each in communication with a source of electricity, one of said motors being carried by and serving to propel the bridge, and the other two being carried by the trolley, and serving, respectively, to propel the trolley, and to actuate the drum or pulley."

"(3) In a traveling crane, the combination of a bridge, an electric motor carried by and serving to propel the same, a trolley mounted upon the bridge, and an electric motor carried by the trolley, wholly independent of the first, and serving to propel the trolley over the bridge."

An overhead traveling crane is one where there is a movable traveling bridge, a traveling carriage or trolley on the bridge, and a hoist on the trolley, having its various movements actuated by power. The moving bridge imparts, to the body to be acted upon, motion forward or backward; the trolley imparts motion to one side or the other; and the hoist imparts motion up or down. It is manifest that, by the combination of these motions, every conceivable path within range of the crane's capacity may be given to the body sought to be moved. The more harmoniously these three movements are combined, the more quickly one or other of them may be changed, the more variety there may be in the speed of one or all of them, the more efficient will be the crane. Flexibility and smoothness of operation are important elements in such a combination. Overhead traveling cranes, driven by steam power and by hydraulic power, existed before the patentee began to experiment, and in these the three lines of motion were combined, under direction of the operator, to give to the weight moved such a path as he might select. It is conceded that the patent cannot be sustained upon the theory that Shaw substituted electric power instead of steam or hydraulic power in such machines; nor is there any contention



that he devised some new and useful variety of electric motor. The entire invention claimed for Shaw is thus stated:

"Shaw's invention consists essentially, not only in the utilization of independent electric motors, as the moving power for the several traveling parts of his crane, but also in the adaptation of the motors and the crane each to the other by the location of one motor for moving the bridge directly upon the bridge itself, and the location of another motor for moving the trolley directly upon the trolley itself."

The prior art shows traveling cranes operated by steam power, in which the three motions are imparted by three independent engines,—one for each motion,—so arranged that each engine can act as its own brake, and all can be worked at once if desirable. The prior art shows cranes in which these three independent motors were located upon the trolley, and other cranes in which they were located upon the bridge; and, of course, when so placed, a more or less complicated arrangement of clutches, pinions, and gearings was required to transmit the power of the independent motor to the place where it was to act. This was a drawback, but was apparently deemed by the inventors of those earlier cranes less of a drawback than it would have been to furnish each independent motor with its independent boiler, or to supply steam from the single boiler through flexible pipes to motors whose position relative to that boiler was constantly changing. With electric motors, however, it is not essential to locate the motor so near to the source of power, and at a fixed distance from it. On the contrary, the motor may be placed in any position, and the power sent to it over a wire. It was the teaching of the electric art to attach the motor to the driven mechanism much more directly than other kinds of motor, and that, by reason of such direct application, much intermediate shafting and gearing could be dispensed with. It would seem that, given the three independent steam motors, and given the suggestion that electric motors be used to do the work, the locating of each directly on the part it was to move would suggest itself to those familiar with the art. We concur, therefore, with the conclusion expressed in *Crane Co. v. Worthington*, *supra*, that:

"The differences between the cranes of Force and Newton and the crane of the patent in suit are simply such as would naturally be made in changing the motive power, and whatever of superiority over previously used traveling cranes is to be found in the crane of the patent is due altogether to the recognized advantages inherent in the electric motor."

The decree of the circuit court is affirmed, with costs.

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#### AMERICAN GRAPHOPHONE CO. v. WALCUTT et al.

(Circuit Court, S. D. New York. March 28, 1898.)

#### INJUNCTION—CONTEMPT—INFRINGEMENT OF PATENT.

Where the officers of a corporation, adjudged guilty of contempt for the violation of an injunction against the infringement of a patent, claim that they were misled by the wording of the decree, they are entitled to the benefit of any fair doubt in that respect, and are not punished beyond making good the injury by paying over the profits and damages of the violation, with costs.

This was a suit in equity by the American Graphophone Company against Cleveland Walcutt and Edward F. Leeds, for infringement of a patent.

Philip Mauro, for plaintiff.

Albertus H. West, for defendants.

WHEELER, District Judge. The claims of this patent that have been sustained cover sound records, as manufactures. The defendants have phonographs acquired from the American Phonograph Company, which that company had a right, acquired from owners of this patent, to use for making such sound records, and this right came with the phonographs to the defendants. When the decree for an injunction was settled, in order that the defendants might not be restrained from doing anything that they had a lawful right to do, the decree for the injunction was not left to be for an injunction against making, using, and selling such sound records absolutely, but only against such as were not, or should not be, "made on machines not procured from the plaintiff, or under this patent." All such sound records so made by the use of the phonographs so procured in subordination to the patent, and to the rights of those owning it, were left free to the defendants. All other such sound records were prohibited to them. They appear to have continued making original and duplicate sound records since the injunction as they did before. There does not appear to be any difference between the originals and duplicates when made. The former are understood to be made by the operation of sound waves of speech, or music, in the air, upon the phonographs, which are made thereby to record them. The latter are understood to be copied by machines from the former, and not to be made by sound waves in the air. The latter cannot be made by using the phonographs which the defendants have the right to use alone. Other means are, and necessarily must be, employed in making them. The defendants are strictly limited to what their phonographs so procured are actually made to do; the use of those existing things only being what is free from the monopoly of the patent to the defendants. The right to make sound records by the use of certain phonographs does not include a right to make like sound records by other means, or by the use of the phonographs and other means necessary to accomplish the making of them. This latter the defendants appear to have done; and, by doing it, they have gone outside of the license implied from the ownership of, and right to use, the specific phonographs procured from the American Graphophone Company, and have thereby violated the injunction. They have done this as officers of a corporation organized while the case was under advisement, but that does not make their own acts any less a violation of the injunction. They must therefore be adjudged guilty of contempt.

They claim to have been misled by the wording of this part of the decree; and as this proceeding is in its nature criminal, although for the protection of a civil right, they are entitled to the benefit of any fair doubt in that respect. The words do not seem to be ambiguous in this direction, but may have appeared so to others; and, to give the

defendants the full benefit of all possible doubt of intent arising from ambiguity, they will not be punished beyond making good the injury to the party, by paying over, upon ascertainment, the profits and damages of the violation, with costs of this proceeding, and, in default thereof, to stand committed. The respondents are adjudged guilty of contempt, and let an account be taken by the master of the profits and damages of the violation of the injunction order, to be paid in some short time after the coming in of the report, with costs; and, in default thereof, defendants to stand committed till the same are paid.

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### THE WASP.

#### DONOGHUE-KELLOGG MILL CO. v. THE WASP.

(District Court, D. Washington, N. D. April 4, 1898.)

##### 1. TOWING RAFT—GUARANTY OF SAFE DELIVERY—BREACH.

Where the lessees of a steam tug entered into a contract to tow a raft of cedar logs, and guaranteed their safe delivery, they are liable under the guaranty for logs lost by them, and, under the statute of the state of Washington (2 Ballinger's Codes & St. Wash. § 5953), the libelants have a lien on the tug for the amount of damages.

##### 2. SAME—NEGLIGENCE.

Where the master and lessees of a tug, towing a raft, finding that they cannot enter a bay until the next flood tide, leave the raft unsecured except by a single line tied to an insecure stake in the beach, and remain absent until the next flood tide, they are guilty of gross negligence and liable for the value of the logs lost.

T. B. Hardin, for libelants.

Allen & Powell, for claimant.

HANFORD, District Judge. The lessees of the steam tug Wasp entered into a contract with the libelants to tow a raft of cedar logs from Utsalady to the libelants' shingle mill at Ballard, and, in consideration of the price for towing, agreed to be paid, guaranteed the safe delivery of the logs. At the entrance to Salmon Bay, the tug, with her tow, encountered difficulties, and was delayed, and, when the raft was delivered at the mill a large number of the logs had been lost, for which loss the libelants have sued to recover damages. The contract by which the lessees guaranteed the safe delivery of the logs has been broken, and, without proof of additional facts, the libelants are entitled to recover damages, and, by force of a statute of this state, the libelants have a lien upon the steam tug for the amount of damages. 2 Ballinger's Codes & St. Wash. § 5953. Without the guaranty, the tug would not be liable, unless there was negligence in handling the raft, amounting to a failure to exercise ordinary care and skill, and the libelants would have the burden of proof to show a breach of the contract by failure on the part of the tug's captain to exercise ordinary care and skill. The A. R. Robinson, 57 Fed. 667. But, even under this rule, the libelants have made a good case. It is clearly established by the evidence that there was gross negligence on the part of the master and the lessees of the tug in handling this raft. I

will not criticise their conduct previous to the grounding of the raft on the sand spit at the entrance to Salmon Bay. It is sufficient to say that, when they found that they would be unable to enter until the next flood tide, they were negligent and foolish in leaving the raft unsecured except by a single line tied to an insecure and weak stake or post in the beach, and remaining absent until the next tide had come in sufficiently to float the raft. No person could doubt that it would be negligence for the tug to have left her tow for 10 or 12 hours, afloat in mid channel, and yet it would have been less liable to have been lost or damaged than in the position in which the tug did leave this raft. I find the value of the logs which were lost to be \$814.80, and this amount, with interest at the rate of 7 per cent. per annum from January 1, 1897, is the amount which, with costs, will be decreed to the libelants as their damages. The evidence fails to show that the libelants were damaged by loss of profits. They did lose \$7 per day for a period of 10 days, during which the mill was shut down, which they would be entitled to recover in addition to the value of the logs, but this damage only equals the amount of the towage bill, which should be deducted.

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THE JOSEPH JOHN.

LIMITED LIABILITY CO. v. STARSTROM et al.

(Circuit Court of Appeals, Fifth Circuit. March 1, 1898.)

No. 605.

SHIPPING—INJURY TO STEVEDORE.

Where a stevedore's employé was injured by the falling into the hold of bags of freight from the sling, and the evidence showed that the accident was due to the combined carelessness of the employés on the barge from which the freight was being taken, of other employés of the stevedore, and of a seaman employed at the winch, together with some negligence on the part of the injured person himself, *held*, that the ship was not liable, especially in the absence of any evidence of want of care by the master or owners in selecting the winch man.

Appeal from the District Court of the United States for the Eastern District of Texas.

W. B. Lockhart, for appellant.

John D. Fearhake and M. H. Royston, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PARDEE, Circuit Judge. This is an appeal from a final decree of the district court in favor of John Starstrom, libelant, against the Limited Liability Company, claimant of the steamship Joseph John, awarding the said Starstrom the sum of \$1,000, with interest and costs, as damages for personal injuries suffered by him while employed

in receiving and stowing cargo on board the steamship Joseph John. The original libel propounded as follows:

"First. That on or about the 13th day of September, in the year 1894, this libelant was employed as a laborer by Dolson & Nelson, stevedores, on board the steamship Joseph John, for the purpose and in the capacity of assisting in receiving and stowing a cargo in said vessel, and while the said vessel was lying at the port of Galveston, and that the said vessel was being loaded under the supervision and direction of T. S. Tullock, the master of the said steamship Joseph John. Second. That while serving in the capacity aforesaid this libelant was stationed in the hold of said vessel, and that while so stationed and engaged in the discharge of his duties this libelant was, without any fault on his part, knocked down by the falling into said hold of certain bags, filled with cotton seed oil cake; that the said bags of oil cake were of great weight, and the force of the blows was so strong as to render this libelant unconscious, causing blood to flow from his ears and eyes, and greatly bruising and lacerating his arm and leg, rendering the use of said arm of little or no value to him, and making him a cripple for life; that the injury to the leg was near or at the ankle, and resulted in straining the ankle to such an extent as to greatly impede this libelant in the future use of said leg and ankle; that by reason of the severe injuries hereinbefore set forth this libelant was confined in the hospital for a space of four weeks, and his capacity for earning a livelihood greatly diminished. Third. This libelant alleges that the duty of loading said steamship was upon the said T. S. Tullock, the master as aforesaid, and was conducted under his direction, and that the said master had placed in charge of the steam winch used for lowering the freight into the hold an ignorant and careless seaman, one of the crew of the said steamship, and that through the negligence and carelessness of the said seaman in allowing the sling in which the freight was hoisted from the wharf to swing over the hatchway, and strike against the side thereof, the said bags of oil cake became displaced and loosened, and fell through said hatchway upon this libelant; and that no warning was given in any manner whatsoever. Fourth. That this libelant was an able-bodied laborer at the time of the injury aforesaid, and in that capacity was earning the sum of four and no-100 dollars per day, and that by reason of the injury as alleged he has been unable to earn that sum or any other sum, and the suffering consequent upon the said injury has been both a physical and mental strain, and this libelant alleges that he has consequently been damaged in the sum of six thousand dollars. Fifth. That all and singular the premises are true, and within the admiralty and maritime jurisdiction of the United States and of this honorable court."

Exceptions were filed to this libel to the effect that the same was not sufficient to entitle the libelant to recover, because the allegations therein show that the libelant and the winch man, through whose negligence and carelessness the alleged accident was caused, were fellow servants engaged in common employment under the same control. This exception was sustained, whereupon, on leave, an amended libel was filed in which the third article of the original libel was enlarged so as to read:

"Third. This libelant alleges that the duty of loading said steamship was upon the said T. S. Tullock, the master, as aforesaid, and was conducted under his direction, and that the said master had placed in charge of the steam winch used for lowering the freight into the hold an ignorant, incompetent, and careless seaman, one of the crew of said steamship, and that the said master knew of said seaman's incompetency, ignorance, and carelessness, or by the exercise of ordinary care and diligence might have known thereof; and your libelant had no way of knowing and determining the ignorance and incompetency of the said seaman, said member of the crew being in the employ of the master of the said vessel, receiving his pay from said master, and being at all times under the direction and control of the said master; that through the negligence and carelessness of the said seaman in allowing the sling in which the freight was hoisted from

the wharf, to swing over the hatchway, and strike against the side thereof, the said bags of oil cake became displaced and loosened and fell through said hatchway upon this libellant, and that no warning was given in any manner whatever,"

—But otherwise the amended libel was substantially like the original.

The amended libel was answered by exceptions of no cause of action, laches, the general issue, and the special defenses that the libellant was injured, if at all, through the negligence of a fellow servant, and that he was guilty of contributory negligence. There were other pleadings in the nature of exceptions, amendments, and calls in warranty and for contribution, not necessary to be set forth. The material facts of the case, briefly stated, were as follows: The steamship Joseph John was being loaded with cotton seed oil meal in the port of Galveston by charterers under a charter party which provided that charterers' stevedore was to be employed under the direction of the master. Bags of cotton seed oil cake were taken from a barge of the Houston Direct Navigation Company lying alongside, hoisted in slings by means of a swinging derrick operated by a steam winch furnished by the ship. The swinging derrick was controlled by guys regulated by the stevedores' men, and the steam winch was operated by a seaman furnished by the ship. The cotton seed meal was being stowed in the afterhold, at the bottom of which, and running along through the middle of the hold lengthwise, and directly under the hatch, was a tunnel about six feet high and four or five feet wide, containing the propeller shaft. The manner of work was that the slings would be filled by the employes of the barge, then hoisted by means of the derrick and steam winch, and, when at a sufficient height, be swung over the hatch, when, under orders from a gangway man employed by the stevedores, they would be lowered into the hatch, where four men—two on each side of the tunnel—were stationed to receive and stow the meal, sling loads being alternately deposited on each side of the tunnel. There was evidence tending to show that the guy regulating the swing of the derrick on the side towards the barge, and which was managed by a stevedores' man, was a little too slack, sometimes allowing the sling load to swing too far over the hatch before lowering. The libellant was one of the gang of four men employed to stow the cargo, and with one companion taking care of each alternate sling load as it was deposited on his side of the tunnel. The work was carried on in as rapid a manner as its nature would permit, and had been so carried on for about four hours, when a sling was improperly loaded on board of the barge, the employes of the barge leaving the two parts of the sling close together instead of well separated, which load was hoisted by the machinery to the proper height, and then swung over the hatch so far that in lowering it the load struck the combing of the hatch, and the bags, being slippery, fell out of the sling into the hold, striking the libellant, and injuring him substantially as set forth in the libel. The gangway man, as usual, called out to "stand from under," he says, several times, and the evidence tends to show that, at the time the sling load swung over, the gangway man ordered the winch man to hold the load without lowering, and probably for the purpose of letting it swing back to the middle of the hatch, though, if such orders were

given, the winch man did not understand them. The libelant admits hearing the gangway man's warning of the coming sling load, but insists that he got out of the way, and over into the wing of the ship, as soon and as far as he could, and that his injury came from the falling meal striking the tunnel, and glancing off into the wing of the ship; but it is more likely, from the entire evidence, that, as the expected load was, in order, due to be loaded on the other side of the tunnel, the libelant did not attempt to stand from under until too late to avoid injury. The winch man was not only an able seaman, but had previously operated the winch successfully, and with the usual care. Ordinarily, the winch would have been operated by a direct employé of the stevedore, but on the occasion in question the master of the ship furnished the winch man at the special request of the managing stevedores. The ship's appliances furnished for the business of loading were all properly rigged, and usually safe, and they in no wise, from any defect, contributed to the libelant's injury.

The consideration of the whole evidence leads us to the conclusion that the libelant's injuries were caused by the carelessness of the employés on the barge, of the stevedores' direct employés on the deck of the ship, of the seaman running the winch, and of the libelant himself, all combined and tending to the resulting accident. Under this state of the facts, it is difficult to see wherein the ship was in any wise liable for the libelant's injuries. No foresight or precaution required of the master and owners of the ship would have prevented the accident. If the work was carried on too rapidly, or if the guys to the derrick were too slack, allowing sling loads to swing too far over the hatch, and either contributed in any way to the accident, they were both matters not under the control of the master and owners, but directly under the control of the stevedores and their employés. It is contended that the seaman in charge of the winch was negligent in managing and operating the winch, and, if this is conceded,—though by no means fully proved,—still, as there is no evidence to show that the master and owners did not use due precaution and care in selecting him for the work, and as he was for the time being in the service of and under the control of the stevedores, the master and owners cannot be held responsible for his negligence. As a matter of fact, all the persons employed in taking aboard, lowering, and stowing cargo were in the direct service of the stevedores, no matter by whom eventually their wages were to be paid. If, however, it should be considered that the loading was being carried on for and in the interest and service of the ship, then all the employés engaged in such loading were indirectly the servants of the ship, engaged in a common employment, using the master's appliances at the same time and under such circumstances that the negligence of one might result in injury to another; and in that view of the case, assuming that the libelant was injured by the negligence of the winch man, it is perfectly clear that the winch man was a fellow servant, and his negligence was one of the risks of the employment assumed by the libelant when he entered upon the services. The decree of the district court should be reversed, and the libel should be dismissed. This conclusion rendered it unnecessary to pass upon the varied ques-

tions presented with reference to the liability of the stevedores to contribute in case the ship should be condemned, and also as to libellant's right to recover in admiralty, although himself guilty of contributory negligence.

The costs in this case have been very largely enhanced by the calls in warranty, and the libellant ought not be condemned to pay all the costs of the district court nor all the costs of this court. It is therefore ordered and adjudged that the decree of the district court be reversed, and this cause remanded, with instructions to dismiss the libel, and that all the costs of this and the lower court be equally divided between the libellant and the claimant.

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## LA BOURGOGNE

### THE AILSA.

ATLAS S. S. CO., Limited, v. LA CAMPAGNIE GENERALE TRANSATLANTIQUE. WHEELER v. ATLAS S. S. CO., Limited, et al.

WESTERN ASSUR. CO. OF TORONTO et al. v. SAME.

(Circuit Court of Appeals, Second Circuit. April 7, 1898.)

Nos. 21-23.

#### 1. COLLISION—FOG—ANCHORING IN CHANNEL.

Where a vessel in a dense fog anchors in New York Harbor outside of anchorage limits, and in the track of vessels seeking anchorage, and, while there, has means of knowledge, by reason of the passing of other vessels, that she is in the channel, she is in fault if another vessel, acting in a prudent manner, seeking anchorage in the customary and appropriate ground, runs into her.

#### 2. SAME.

Where a vessel outward bound from New York encounters a fog before reaching the Narrows, and decides to anchor, but, instead of anchoring above the Narrows, goes on through to find anchorage in Gravesend Bay, a natural, wide, and favorite anchorage ground (a course followed by other vessels about the same time during the same fog), and on leaving the Narrows to go to anchorage in the bay, while acting with the usual precautions, runs into another vessel anchored in the channel, she is not at fault.

These three appeals are from the decrees of the district court for the Southern district of New York, which dismissed three libels against the steamship *Bourgogne*, for damages arising from a collision. The first libel was by the owner of the injured vessel; the second was by one of her passengers; and the third was by the insurers and owners of her cargo.

The general facts in regard to the collision are accurately stated by Judge Brown, as follows (76 Fed. 868):

The above libels were filed to recover damages for injuries arising from a collision between the steamships *Bourgogne* and *Ailsa* at a little after 2 o'clock in the afternoon of February 29, 1896, during a dense fog for about half a mile below the Narrows, in New York Harbor. Both steamers were outward bound. The *Ailsa*, 1,330 tons register, 297 feet long, had left her pier in North river about noon, and, finding thick fog at the Narrows, came to anchor. The *Bourgogne*, a much larger steamer, 475 feet long, left her pier in the North river at 1:13 p. m. The tide was strong ebb. She was backed out of the pier, and turned with the aid of tugs, and got straightened on her course down river at 1:37.



On starting, the weather was somewhat misty or rainy, but without fog, until near Robbins' Reef, where fog was seen mostly on the west shore, the easterly shore being much clearer. Off Quarantine only the masts of vessels could be seen, and the high ground above. Ft. Lafayette was shrouded in fog, but the cliff above Ft. Hamilton and the houses around it were clearly visible. Before reaching Ft. Lafayette, the pilot had determined to anchor in Gravesend Bay, just below the fort. From the time occupied, it is evident that the Bourgogne must have proceeded nearly to Ft. Lafayette at almost her full speed, or about 16 knots. On encountering the thicker fog there, or a little above, she slowed, and soon stopped her engines. She was then nearly in mid-channel, and soon after starboarded her wheel, in order to go towards Gravesend Bay for anchorage. Soon afterwards the masts of the Ailsa were seen nearly directly ahead, but a little on the port bow, and only a short distance away, probably not over one or two lengths away. The Bourgogne's wheel was immediately put to port, and her engines reversed. Her stem, however, struck the port bow of the Ailsa at an angle, as the evidence indicates, of about two points; and made a hole in the Ailsa about 6 feet inboard, and about 16 feet in length, fore and aft. The Bourgogne almost immediately backed away under the influence of her reverse engines, and, in the fog and ebb tide, was carried down about half a mile below, where she anchored. The wound in the Ailsa extended below the water line. Her officers, almost immediately perceiving that she was making water rapidly, hove anchor, and started ahead, under the full speed of her engines, for the purpose of beaching the ship on the land in a northeasterly direction. Soon after she got under way, the steamer Advance coming down upon a course S. by E. made it necessary for the Ailsa to stop and back her engines to allow the Advance to pass ahead of her, after which the Ailsa continued on, passing astern of the Advance, but soon sinking, bow first. The point where she sank was afterwards located as 1,800 feet S. by E.,  $\frac{1}{2}$  E., from the easterly side of Ft. Lafayette. The witnesses on the part of each steamer testify that their own steamer gave the statutory signals, but neither heard any signals of the other until seen very near. On the part of the Ailsa it is claimed that the collision arose by the fault of the Bourgogne (1) in not anchoring before passing Ft. Lafayette, and in unnecessarily going below the fort in thick fog; (2) for excessive speed in fog; (3) for not having a proper lookout, and not giving proper signals. For the Bourgogne it is claimed (1) that the Ailsa is alone to blame for having anchored unnecessarily in the channel way where vessels seeking anchorage must be expected to pass, instead of going further to the eastward within the anchorage limits of Gravesend Bay, as required by the regulations of the secretary of the treasury; (2) for not giving the statutory signals; (3) for not letting out her chain when the approach of the Bourgogne was seen.

Everett P. Wheeler, for Atlas S. S. Co.

Wilhelmus Mynderse, for Western Assur. Co.

Lamb & Johnson, for Charles B. Wheeler.

Robert D. Benedict and Edw. K. Jones, for La Bourgogne.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). The questions in regard to the Bourgogne's excessive speed, and her not having a proper lookout, and her not giving proper signals, and in regard to the Ailsa's not giving the statutory signals, may be laid out of the case. The evidence is that each vessel did her duty, and complied with the statutes in these particulars. The two important questions in the case are whether the Ailsa was anchored in the channel way to the westward of the prescribed anchorage limits, and was, under the circumstances of the case, in an improper place, and whether the Bourgogne was guilty of negligence in not having sooner understood the importance of coming to anchor, and in not anchoring above Ft. Lafay-

ette. Judge Brown has given with great care the testimony in regard to the navigation of the Ailsa, and the deductions from it which assisted him to a result which freed the Bourgogne from liability. As we have reached the same result in regard to the two vital questions, we do not deem it necessary to review with minuteness the items of the testimony in that part of the case, for there are other facts which seem to us also important upon the question of her location after she was anchored, which can be stated briefly.

The libel, after stating the facts in regard to the weather, and that it was imprudent for the vessel to continue any further, averred that she "thereupon left the mid-channel, and was anchored as close to the Ft. Hamilton shore as was deemed prudent in order to be out of the way of vessels proceeding through the Narrows," and that the collision was caused solely by the negligence and want of proper care on the part of the Bourgogne. Inasmuch as the moving steamship had collided with a vessel at anchor, and therefore powerless to help herself, it was incumbent upon the ship in motion to take the burden of freeing herself from this charge of negligence, for the presumptions were *prima facie* against her; and, if the vessel was anchored in an improper place, the colliding vessel should show that she could not be avoided by the use of due care. The *Annot Lyle*, 11 Prob. Div. 114; The *Bothnia*, Lush. 52; The *Batavier*, 2 W. Rob. 407; The *Lochlibo*, 3 W. Rob. 310. The claimant denied in its answer that the Ailsa was anchored as close to the Ft. Hamilton shore as was deemed prudent, and denied that the collision was caused solely by the fault of the Bourgogne, but charged that it was caused by several faults of the Ailsa, among which was anchorage in an improper and unsafe place. The Bourgogne, having admitted that she, a steam vessel in motion, had collided with a vessel at anchor, must clearly show a sufficient excuse for such conduct; and one part of her excuse was the alleged fact that the place of anchorage was so much westward of the anchorage line, which had been designated by the secretary of the treasury, as to be in the way of vessels who were also trying to anchor. When the Bourgogne had clearly shown this, and the misconduct of the Ailsa was "fully made out by the proof" (*Strout v. Foster*, 1 How. 89), the Bourgogne had partially freed herself from the strong presumptions of faulty conduct which would otherwise have rested upon her. The duty, however, remained upon her of showing that she could not see and did not hear that the Ailsa was in front of her, because, to use Dr. Lushington's illustration, it does not follow that, because a motionless carriage is on the wrong side of the road, it can be injured with impunity by the driver of a moving carriage, who sees and can avoid the obstruction. The *Batavier*, *supra*; The *Clarita*, 23 Wall. 1.

In this case, as will hereafter be more particularly noticed, although the Ailsa left New York pier about an hour before the Bourgogne, the two vessels were compelled to seek an anchorage under about the same circumstances. The Ailsa knew the importance of coming to anchor, and says that she left the mid-channel, and that she attempted to be out of the way of vessels proceeding through the Narrows. She did anchor about half a mile below Ft. Lafayette. The Bourgogne says that she left the mid-channel under the same necessity for the purpose

of anchoring in the bay below Ft. Lafayette. Each knew the importance of keeping out of the way of moving vessels, and each knew that, for the purpose of safety in the crowded harbor of New York, anchorage grounds had been provided, but that in the darkness it was difficult to know with certainty where they were, and therefore each knew the necessity of caution. In this position of affairs, it is of some significance that no one on board the Ailsa, and no one in her behalf, testified that she was on anchorage ground. Her pilot, who presumably was familiar with the anchorage lines, says:

"We were on the eastern side of the channel. I couldn't exactly state whether we were on the inside of the line or on the line, because there was a dense fog, but we were somewhere on the line or near the line."

There was an especial obligation upon him to exercise caution, and to try to have some certainty of belief upon this subject, because he was seeking for anchorage by reason of a fog on the afternoon of Saturday, when outgoing ocean steamers are always numerous, when the harbor was full of vessels of all kinds, and when he was hearing abundant signals of warning. After the calamity, and after daylight and litigation had come, he apparently obtained no additional opinion on the subject. A circumstance which is conceded, and which is significant, is the fact that after the collision, and after the Ailsa had left her anchorage to seek the eastern shore, she was obliged to check her speed to permit the outward-bound steamship Advance, which was also going into Gravesend Bay, and was eastward of the Ailsa, to cross her bow. The district judge says:

"The testimony of her master is that the Advance was then upon a course south by east, which she had after passing within 300 feet of Ft. Lafayette. If this is correct, the Ailsa must have anchored to the westward of that south by east course, and hence considerably to the westward of the anchorage limits."

Another circumstance of the same character is that it appears by the Ailsa's testimony that, after she anchored, two steamships, both going down on the eastward side of her, passed very near her. A third vessel, the Bourgogne, ran into her. This shows that she was in the pathway of similarly situated vessels, who were also seeking anchorage, and that she had stopped in their way, and not outside of it. Another steamer going up on the westward side of her passed near her, from which it would seem that, although she had anchored, she was in the channel way of an upward-bound vessel, which was not seeking anchorage ground in that vicinity. After the collision, the Ailsa found that she was badly wounded, and that her hope of partial safety lay in an endeavor to reach the eastward shore promptly. The attempt was a hurried one. It was manifestly made under considerable excitement, for lives were in danger. It was impeded by the necessity of raising the anchor, and of reversing when the Advance appeared, and by the sluggish motion of a ship rapidly filling with water. The time during which she was making headway cannot be ascertained with satisfactory accuracy, but it is certain that the place where she sank was about 200 feet eastward of and within the anchorage line. Allowing that she was only six minutes in forward motion, and making all proper allowances for the impossibility of rapid move-

ment in her disabled condition, she must have moved far more than that short distance from her anchorage ground.

The Bourgogne's testimony, if approximately accurate, places the Ailsa quite to the westward of the line, and in the traveled part of the channel. The Bourgogne's pilot says that he was in mid-channel when he passed Ft. Lafayette, which would be 2,000 feet west of the fort; that he maintained a course south by east until he starboarded to go to anchor; that, shortly after, the Ailsa was seen, and a head and head collision immediately followed. The uncertain part of this account consists in the difficulty of her pilot knowing whereabouts in the channel he was when he starboarded, for the estimates of interested witnesses in regard to their position in the channel in a concededly dense fog cannot be relied upon. The testimony of the superintendent of the Ailsa in regard to the amount of water at her place of anchorage, as shown by the amount of chain which he estimates to have been in the water, is an opinion of importance in favor of her location; but all the well-ascertained circumstances point with great certainty to the conclusion that she was not only outside, but was much outside, of anchorage limits, and in the track of vessels who, like herself, were seeking anchorage. If she had been only technically in the channel, a different question would have arisen, but she was substantially within it. This conclusion fixes upon her the charge of inexcusably faulty conduct, because there was no difficulty and no serious danger in her going at least a quarter of a mile further eastward.

The next question is in regard to the negligence of the Bourgogne. In a dense fog it is the duty of a steam vessel to anchor, where anchorage is permissible, as soon as circumstances will permit, but she ought not to anchor in a thoroughfare in the very track of navigation. The Otter, L. R. 4 Adm. & Ecc. 203; The Clarita, 23 Wall. 1. The libelants confidently insist that the coming peril was perceived or ought to have been known by the pilot of the Bourgogne, and that he ought to have anchored above the Narrows, off Bay Ridge or Stapleton. It is true that he knew, when he turned the bell buoy at the end of the Mud Flats, that the vessels could not go to sea that afternoon, and that she must come to anchor; but the question for him to decide was whether to anchor forthwith, before going through the Narrows, or to go on to Gravesend Bay. At this time the fog was thick on the Staten Island side, and lighter on the Long Island side, and there was a reasonable prospect of a continuance of this state of the atmosphere until Ft. Lafayette was reached; and, immediately beyond, Gravesend Bay was a natural, wide, and favorite anchorage ground, which outgoing steamers were wont to seek in case of inability to go to sea. Although the Ailsa preceded the Bourgogne by a little more than an hour, the conditions which each vessel met in regard to fog were about the same. Capt. Morris, of the Ailsa, first perceived the fog when his vessel was at the Narrows, and, almost immediately after passing Ft. Lafayette, ran into thick fog. Cote, her second officer, says that she ran into the fog at the beginning of the Narrows; and as she got through the Narrows, and passed Ft. Lafayette, it got very thick. Capt. Poirot, of the Bourgogne, says that, after his vessel entered

the thick fog opposite Quarantine, he wanted to anchor; but the pilot said they were too much in the Narrows, and must go south of Ft. Lafayette; and, when they were about coming to anchor, they saw the Ailsa. Giquel, her second captain, says that he saw very well at Robbins Light, but a little afterwards the weather began to get thick, and a little before Quarantine the right-hand side commenced to get thicker, and, a little before arriving at Ft. Lafayette, the weather got completely thick, and they could see nothing.

In this state of facts, a decision to go on to Gravesend Bay, or to stop, must be made before entering the Narrows, for anchorage in the Narrows was impracticable. The thickness of the fog before or as the vessel reached the Narrows was not such as to make it imprudent to go forward until the bay was reached. Her act was not in violation of a statutory rule. Therefore, its negligence or its accord with prudence must be judged of by the aid of the considerations which naturally designate conduct in this respect; and a natural inquiry is: How do men of ordinary prudence, conversant with the necessities of the situation, and with the responsibilities which attach to a decision, act under like circumstances? The Galileo was apparently the only sea-going steamer which came to anchor above the Narrows. She anchored at Liberty Island, and afterwards at Stapleton. The pilot of the Ailsa went through the Narrows, attempted to take the Gravesend anchorage, and anchored one-quarter or one-half of a mile beyond Ft. Lafayette. The pilots of at least four other steamers came to the same decision, and acted accordingly. Upon the assumption that they were men of average prudence, their concurrent action under like circumstances is very significant. The Ailsa's bell was not heard by the Bourgogne until she was seen, when all the usual precautions against collision were taken; and no fault can be charged against the moving vessel if she was not guilty of negligence in coming through the Narrows. The decrees of the district court are affirmed, with costs.

## LARE et al. v. HARPER &amp; BROS.

(Circuit Court of Appeals, Third Circuit. March 28, 1898.)

No. 16.

**UNFAIR COMPETITION—PRELIMINARY INJUNCTION.**

The complainant had published a book entitled "Farthest North. Nansen," composed mainly by Dr. Nansen. Afterwards the defendants commenced the publication of a book under the title "The Fram Expedition. Nansen in the Frozen World." The defendants' book contained a number of portraits and illustrations similar to those made use of by the complainant, and part of substantially the same literary matter. It contained accounts of sundry arctic expeditions prior to Dr. Nansen's polar voyage, to which reference is made in complainant's book. But the defendants' book differed from the complainant's in respect to style, price, number of volumes, and color, to such an extent that an ordinary customer possessing common intelligence would not mistake the one for the other. *Held*, that the complainant was not entitled to a preliminary injunction on the ground of unfair competition in trade.

Appeal from the Circuit Court of the United States for the Eastern District of Pennsylvania.

Hector T. Fenton, for appellants.

A. T. Gurlitz, for appellee.

Before ACHESON, Circuit Judge, and KIRKPATRICK and BRADFORD, District Judges.

BRADFORD, District Judge. This is an appeal from an interlocutory decree awarding a preliminary injunction restraining the defendants below, appellants, "from directly or indirectly advertising, offering to sell, selling or otherwise disposing of any books, either in the English language or in the Norwegian language, which are named, advertised, or offered for sale in such manner as to indicate that they are the books printed or published by the complainant; and also from printing upon or using in connection with any books the words 'The Fram Expedition. Nansen in the Frozen World;' or any similar title or combination of words, or any imitation of the name of the complainant's books; and from in these ways and in any other way, form or manner whatever, infringing upon or interfering with the rights and business of the complainant in the premises." The complainant's books referred to consist of an English translation of an account of the recent Norwegian polar expedition conducted by Dr. Fridtjof Nansen, composed by him mainly, if not wholly, in the Norwegian language, and an appendix containing an English translation of the report of Captain Otto Sverdrup relating to the drifting of the steamer Fram, composed by the latter in the Norwegian and translated into the English language. The complainant claims that it duly obtained copyright in and to the above work for the United States February 8, 1897, and that it was put on the market in March of the same year, all of the requirements of the law relating to copyright having been complied with. The cause of controversy between the parties was the publication, in both the Norwegian and English languages, and sale by A. J. Holman & Co., of which firm the appellants are survivors, during and after June, 1897, of a certain book, the composition of

which need not be here stated with any particularity of detail. It is sufficient to say that it contains part of the same, or of substantially the same, literary matter found in the complainant's book, also a number of portraits and pictorial illustrations similar to those made use of by the complainant in its book, and accounts of sundry arctic expeditions, prior to Dr. Nansen's polar voyage, to which reference is also made in the complainant's book.

Although the complainant in its bill deals largely with the question of infringement by the defendants of rights claimed to have been secured to the former by copyright, we, like the learned judge below, are not satisfied that the defendants were not at liberty to make use of the text, portraits and pictorial illustrations contained in their book by way of publication and sale; and, therefore, for the purpose of disposing of this appeal it must be assumed that the defendants possessed that right. The injunction was based upon supposed unfair competition in trade by the defendants in putting their book on the market. It is a wholesome doctrine that equity will restrain unfair competition in trade; but it should be applied with caution, lest, through possible misapplication, healthful and honorable competition be defeated. Particularly is this true with respect to literary, historical and scientific works. The complainant was not entitled to a monopoly in the subject of arctic explorations; nor had it an exclusive right to publish and sell books relating to Nansen's polar expedition. That subject was open to the world. Nor had the complainant an exclusive right, as against the defendants, to the use of the words "The Fram Expedition," "Nansen in the Frozen World," or of any of them. There can be little doubt that Nansen's exploits served to kindle popular interest in arctic explorations. In fact the record discloses that they were the proximate cause of the publication by the defendants of their book. But this circumstance does not in the least militate against good faith or fair dealing on their part. It appears that months before Nansen began to write an account of the expedition the defendants had determined to publish a book on that and kindred subjects. Nor does the appearance or title of the defendants' book disclose any intent to indulge in unfair competition with the complainant. Certainly the difference between the two books is obvious to any ordinary customer of such works. The complainant's book is in two volumes containing respectively 587 and 714 pages, and is bound in brown cloth. The defendants' book is in one volume, containing, in the English edition, 531 pages, and, in the Norwegian edition 524 pages, and is bound in blue cloth in both editions. The complainant's book contains on the outside cover a circular figure inclosing the words, "Farthest North. Nansen," and on the inside title page the words and figures: "Farthest North. Being the Record of a Voyage of Exploration of the Ship Fram 1893-96 and of a Fifteen Months' Sleigh Journey by Dr. Nansen and Lieut. Johansen. By Dr. Fridtjof Nansen, with an appendix by Otto Sverdrup, Captain of the Fram. About 120 full-page and Numerous Text Illustrations. 16 colored Plates in Fac Simile from Dr. Nansen's Own Sketches, etched Portrait, Photographures, and 4 Maps. In Two Volumes, Vol. 1. New York. Harper & Brothers Publishers. 1897." The second volume is like

the first both in the outside cover and title and inside title page, except that it is marked "Vol. 2" instead of "Vol. 1."

The defendants' book contains on the outside cover the picture of a ship in the ice with a flag on her foremast bearing the word "Fram," with a polar bear in the foreground, and the words, in the English edition, "The Fram Expedition. Nansen in the Frozen World. Including earlier Arctic explorations." On the inside title page of the English edition are the words and figures, "The Fram Expedition. Nansen in the Frozen World. Preceded by a Biography of the Great Explorer and copious Extracts from Nansen's 'First Crossing of Greenland.' Also an account by Eivind Astrup, of Life Among People near the Pole, and his Journey Across Northern Greenland with Lieut. R. E. Peary, U. S. N. Arranged and Edited by S. L. Berens, Cand. Phil. Followed by a Brief History of the Principal Earlier Arctic Explorations, from the Ninth Century to the Peary Expedition, including those of Cabot, Frobisher, Bering, Sir John Franklin, Kane, Hayes, Hall, Nordenskjold, Nares, Schwatka, DeLong, Greely and others. By John E. Read, Assistant Editor of the 'Columbian Encyclopedia.' Profusely illustrated. Philadelphia, Pa. A. J. Holman & Co. Publishers. 1897." The Norwegian edition of the defendants' book contains on its cover and inside title page words in that language corresponding with the words on the cover and inside title page of the English edition. The complainant's book in two volumes sells at \$10, and that of the defendants at \$2. It is evident that the two works are calculated respectively to meet the demands of different classes of purchasers. There is nothing deceptive in the cover, outside title or title page of the defendants' book. Those titles, taken in conjunction, are fairly descriptive of the subject matter of the volume. They radically differ from the outside title and title page of the complainant's book. Comparing the two works, we are unable to perceive that any ordinary customer of such books possessing common intelligence should, in the absence of actual fraud practiced upon him, mistake the one for the other, without gross carelessness on his part. The answer expressly denies fraud and unfair competition. It is a rule, subject to few exceptions, that a preliminary injunction should not be awarded on ex parte affidavits, unless in a clear case. This rule has full application in a case like the present, where, though the bill should ultimately be dismissed, great damage would result from such an injunction to the standing and business of a book publishing house. If there be any substantial doubt as to the right to a preliminary injunction in such a case, it should be refused. In the present state of the proofs the court below was not justified in holding that the defendants have been guilty of unfair competition in trade. Consequently the decree for a preliminary injunction must be reversed and the injunction dissolved. The decree of the circuit court is reversed.



**THRUSTON v. BIG STONE GAP IMP. CO. (MINERAL DEVELOPMENT CO., Petitioner).**

(Circuit Court, W. D. Virginia. April 2, 1898.)

No. 407.

**1. EQUITY PLEADING—CROSS BILL—NATURE.**

A cross bill is in the nature of a defense, may be filed only by a party to the suit, and may not introduce new matter or new parties.

**2. SAME—CROSS BILL AND INTERVENING PETITION—WHEN ENTERTAINED.**

Where, in a suit by a trustee to foreclose a trust deed, a bondholder under such trust deed, not a party to the suit, files a so-called "petition and cross bill," setting up misconduct of the trustee in his management of the trust, and asking relief against the trustee for the sole benefit of the petitioner, without controverting any issue of the original bill or resisting the prayer for foreclosure, *held*: (a) That such petition cannot be entertained as a cross bill, being filed by a stranger to the cause; (b) that it cannot be entertained as a petition for leave to be made a party and file a cross bill, since it states a cause of action which, although growing out of the same transactions, is virtually independent, and a cross bill embodying such matter could not be entertained, even if the intervening petition were granted.

St. John Boyle, for plaintiff.

R. A. Ayers, for defendant.

H. S. K. Morrison, for petitioner.

**SIMONTON**, Circuit Judge. This bill is filed by R. C. Ballard Thruston, a citizen and resident of the state of Kentucky, the trustee of a mortgage given by the Big Stone Gap Improvement Company, a corporation of the state of Virginia, to secure bonds in the aggregate \$1,000,000. The deed under which he holds authorizes the trustee to sell the mortgaged premises on default, but he prefers to come into this court. The prayer of the bill is for foreclosure and sale. To this bill the mortgagor is the sole defendant, and its answer on file admits the execution of and the default upon the mortgage. The cause being thus at issue, a petition is filed by the Mineral Development Company, a corporation of the state of Virginia, holder of bonds secured by the mortgage to the amount of \$40,000, with unpaid coupons to the amount of \$16,000. This petition sets out action on the part of the trustee of which it complains, maladministration of the trust, loss of trust funds, devastation in the management of them, the declaration of dividends, and the payment of them in a mode contravening the terms of the trust deed, the destruction by his acts of equality among the bondholders, a failure on his part to comply with the laws of Virginia, requiring him, as trustee, to settle his accounts with the commissioner of accounts of Wise county, where the land mortgaged is situate, and, above all, the right to an account from him as trustee. The prayer of the petition is that the petitioner be made a party to this suit; that he have leave to file a cross bill; and that this petition be taken as such cross bill. In fact, it has been filed as such cross bill, and process has been issued and served thereon. The trustee has been served under the act of 1875, as a resident and citizen of another district than this.

The complainant and defendant unite in a motion to dismiss the cross bill as improperly filed by a stranger to the cause. There can be no doubt that a cross bill is in the nature of a defense, and can only be filed by one a party to the cause. "A cross bill," says Mr. Daniell (Ch. Prac. [3d Am. Ed., Perkins] 1649), "is a mode of defense. The original bill and the cross bill are but one cause. It must be confined to the subject-matter of the original bill, and cannot introduce new and distinct matters not embraced in the original suit; and, if it do so, no decree can be founded on those matters." So, also, Story, Eq. Pl. § 389: "A cross bill *ex vi terminorum* implies a bill brought by a defendant against the plaintiff in the same suit, or against other defendants, or against both, touching the matters in question in the original bill." In *Shields v. Barrow*, 17 How. 145, the court say: "New parties cannot be introduced by a cross bill. If the plaintiff desires to make new parties, he amends his bill, and makes them. If the interest of a defendant requires their presence, he takes the objection of non-joinder, and the complainant is forced to amend or to have his bill dismissed. If, at the hearing, the court finds that an indispensable party is not on the record, it refuses to proceed. These remedies cover the whole subject, and a cross bill to make new parties is not only improper and irregular, but wholly unnecessary." As a cross bill, therefore, this paper would necessarily be dismissed. The service of process heretofore had upon it is void, and is vacated.

Can it be entertained as a petition for leave to intervene and be made a party with the object of filing thereupon a cross bill? The scope of the bill in the main cause is the foreclosure of mortgage upon realty. Its prayer is decree for sale upon such foreclosure. The execution of and the default upon the mortgage is admitted. The petition does not controvert any of these issues, nor does it resist the prayer for foreclosure. It sets up other facts and allegations looking to the conduct of the trustee. It seeks relief for itself against certain acts on the part of the trustee, alleged to be illegal, wasteful, and improper, and prays a decree against the trustee in its own behalf therefor. This is wholly an independent matter, growing, indeed, out of the mortgage transaction, but by no means an essential consideration in determining whether or not it should be foreclosed. It introduces into the case new facts, new charges, new allegations, new elements, and asks for totally different relief, in which the present defendant has no concern, and in which the petitioner alone under his proposed pleading will share. Even were it to be made a party, its allegations could not be considered, nor its relief be given under a cross bill. It would require an original and independent suit. The case of *Fidelity Trust & Safety-Vault Co. v. Mobile St. Ry. Co.*, 53 Fed. 852,—a persuasive authority, ably discussing this question,—reaches this conclusion.

It is urged with great force that, when a court of equity takes hold of a matter, it will decide the whole case, thus saving the necessity for several proceedings. Ordinarily, this is so. If an

original bill were filed by the petitioner against this trustee, and the court could take jurisdiction of him, then the present cause and the new cause might either be consolidated or heard together. But, inasmuch as the trustee is not a citizen of or resident of this district, he cannot be compelled to answer here. Such a suit would not be to enforce any legal or equitable claim against real or personal property within the district. Rev. St. U. S. § 738. It is an action for breach of trust, local in its nature, resulting, if it be successful, in a personal judgment against Thruston, payable out of his own property. Under these circumstances, this court could not acquire jurisdiction over him but by his own consent. The petition is dismissed.

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NEVADA NICKEL SYNDICATE, Limited, v. NATIONAL NICKEL CO. et al.

Circuit Court, D. Nevada. March 21, 1898.)

No. 641.

**1. EQUITY—PLEADING—SUPPLEMENTAL BILL.**

The fact that original and amended complaints and answers, and contracts, deeds, leases, and other documents, are set out in a supplemental bill in *hæc verba*, where a clear and concise statement of the facts as to their existence, character, and substance was sufficient, furnishes no substantial reason for expunging them from the record, when they contain relevant matter, and are pertinent to the issue raised.

**2. SAME—MULTIFARIOUSNESS.**

Where the same paper is set out at two or more places in a supplemental bill, such repetitions will be expunged, and the complainant given leave to amend by striking out all but one copy, and referring to the page in which it first appears.

**3. SAME—NEW PARTIES.**

Where the complainant had no knowledge of the entry of certain judgments, alleged to be fraudulent, until after the filing of the amended bill, a supplemental bill may be filed, setting up the facts and bringing in necessary parties, when the general character of the suit is not changed.

This was a suit in equity by the Nevada Nickel Syndicate, Limited, against the National Nickel Company and others. The cause was heard upon demurrers and exceptions of defendants to the supplemental bill.

W. E. F. Deal, for complainant.

George W. Baker, for defendants.

HAWLEY, District Judge (orally). The supplemental bill in this case covers 178 pages of typewritten matter. It sets forth the fact that the original bill of complaint was amended; that answers thereto were filed. Copies of all the pleadings, and of the agreements and contracts made between the parties, are copied in *hæc verba* in the supplemental bill. The subject-matter of the bill may, for the purpose of disposing of the present questions, be sufficiently gleaned by a brief reference to the prayer of the bill, which is, in substance, for a decree vacating and setting aside certain judgments alleged to have been fraudulently obtained in the state courts,—one by the National Nickel Company against complainant, and the other obtained

by Charles E. Brooks against complainant; that the premises described in the bill may be sold to satisfy the judgment of \$85,000, or thereabouts, which complainant asks be entered in its favor; that an order be made requiring defendants to deliver to complainant the possession of the property specified in the bill; that the lease and assignment thereof mentioned in the original bill be delivered up and canceled; and that defendant Pierce and his assignees be enjoined and restrained from asserting any right, title, or interest in the property, etc. To this supplemental bill nine specific exceptions have been filed, and motions made to expunge certain matters from the bill, as being impertinent. The objections are (1) that the various agreements, contracts, original complaint, and amended complaint are unnecessarily recited in *hæc verba* in the bill; (2) that certain parts of the bill contain no allegations of facts which were not within the knowledge of complainant at the time of the filing of the amended complaint; (3) that certain averments contained therein will, if allowed to remain, change the character of the suit set forth in the amended complaint. The demurrers interposed by the National Nickel Company and Charles E. Brooks set forth as grounds of demurrer (1) that the bill exhibits several distinct and independent matters and causes which have no relation to each other; that there is therein exhibited a cause of action wherein the complainant seeks to show a lien upon certain real property, and seeks relief to the end that such lien may be foreclosed; that there is therein further exhibited a cause of action wherein the complainant seeks to show that a certain judgment, concerning its rights in real property, had been given against it through fraud, and seeks relief to the end that it may escape said judgment, and that said judgment may be set aside and declared of no effect; and that there is therein exhibited a cause of action wherein the complainant seeks to show that a certain judgment for damages has been rendered against it through fraud, and seeks relief to the end that the said judgment may be set aside and declared of no effect; that said three causes of action are so mixed and intermingled, the one with the other, that it is impossible for defendant to demur or plead or answer each separately; (2) that it appears from the complainant's own showing that it is not entitled to any relief against Charles E. Brooks; (3) that, as to the cause of action which prays for the relief from the personal judgment obtained against complainant by the National Nickel Company, the other defendants in the bill have no interest or connection therewith, and are improperly joined as defendants herein.

A supplemental bill should state the original bill and the proceedings thereon, and, if it is occasioned by any event subsequent to the original complaint, it must state that event, and the consequent alteration with respect to the parties. There was no necessity to copy the original or amended complaint or answer in the supplemental bill; nor was it absolutely essential that the agreements, contracts, deeds, leases, and other documents should be copied in *hæc verba* in the bill. A plain, clear, and concise statement of the facts as to the existence, character, and substance of these documents would have been sufficient. By a strict observance of this rule, it is safe to say that all the necessary and essential facts could easily have been stated

with legal accuracy and precision in less than one-half the space covered by the present bill. But the fact that they are set out in *hæc verba* furnishes no substantial reason for expunging them from the record. They do not contain any irrelevant matter. They are all pertinent to the issues raised. Equity rule 58 was adopted in order to relieve the pleader from copying the formal pleadings and other documents in *hæc verba*. It provides:

"It shall not be necessary in any \* \* \* supplemental bill to set forth any of the statements in the original suit unless the special circumstances of the case may require it."

It may be that the special circumstances in this case justify the incorporation of all the documents in *hæc verba* in the bill; but, be that as it may, the defendants ought not to complain, because thereby they are fully advised as to their contents. The general exceptions touching these matters are purely technical, and would, if allowed, only tend to delay the trial of the case, without producing any substantial results in the interest of justice. It appears, however, that certain "articles of agreement" are copied at length in the bill at four different places (first, as an exhibit to the original bill; second, in the complaint of the National Nickel Company against the Nevada Nickel Syndicate; third, in the complaint of Charles E. Brooks against the Nevada Nickel Syndicate; and, fourth, as an exhibit in the answer of defendants to the amended bill); that the complaint of the National Nickel Company against the Nevada Nickel Syndicate is copied in toto in two different places; that a deed is copied twice, and a memorandum of agreement twice (once in the original bill, as an exhibit, and also as an exhibit in the answer of defendants). These repetitions are wholly unnecessary. It might, perhaps, be said that the impertinence in this respect is not in itself prejudicial to any one; that it is only a mere naked and harmless superfluity. But it cannot be sanctioned, permitted, or allowed, without violating every rule of practice or pleading with which I am familiar. It unnecessarily incumbers the record, adds unnecessary costs, and, if undisturbed, would establish a precedent which no court, in the interest of good pleading, could consistently follow. For these and other good and sufficient reasons, I decline to permit these useless repetitions to remain in the bill. In 1 *Fost. Fed. Prac.* § 68, the general rule upon this subject is clearly stated as follows:

"Every bill shall be expressed in as brief and succinct terms as it reasonably can be, and shall contain no unnecessary recitals of deeds, documents, contracts, or other instruments, in *hæc verba*, or any other impertinent matter, or any scandalous matter not relevant to the suit."

The bill can readily be amended, in open court, if so desired, by striking out all the different recitals of the copies but one, and making a reference to these pleadings and documents on the page or place in which they first appear.

The other grounds mentioned in the exceptions are also presented by the demurrers, and will be considered together.

It is contended by the defendants that the supplemental bill does not contain the recital of any event happening after the filing of the original bill, whereby the suit has become defective. This point is

urged because it appears that the judgments which are sought to be set aside were obtained prior to the commencement of this suit. On the other hand, the complainant avers that it had no notice or knowledge of the entry of said judgments, or either of them, until after the filing of the amended complaint; that the same were obtained fraudulently; that no summons was ever issued or served upon complainant as by law required. Equity rule 57 provides:

"Whenever any suit in equity shall become defective from any event happening after the filing of the bill (as, for example, by change of interest in the parties), or for any other reason, a supplemental bill or a bill in the nature of a supplemental bill may be necessary to be filed in the cause."

Under this rule, and the equity practice of this court, it must appear that the new matters which are designed to supply some defect in the structure of the bill happened or accrued after the filing of the amended complaint (*Kennedy v. Bank*, 8 How. 586, 610; *Jenkins v. Eldredge*, 3 Story, 299, Fed. Cas. No. 7,267), or matters of which complainant had no information at the time of the filing of the amended bill (*Caster v. Wood*, 1 Baldw. 289, Fed. Cas. No. 2,505). In a note to *Hughes*, Eq. Draftsm. p. 401, it is said:

"In order to file a supplemental bill, it must be shown that the matter relied on as supplemental has arisen since the commencement of the original suit, or that the facts have first become known to the plaintiff in such a way that he could make use of them since the cause passed the stage in which he might have leave to amend, or that he had been prevented by inadvertence, mistake, or some other cause satisfactorily shown, from availing himself of the matter proposed to be shown at an earlier stage of the cause; and the supplemental bill must be confined to such matter, and must be verified by affidavit, or other satisfactory proof. *Pedrick v. White*, 1 Metc. (Mass.) 76; *Bowie v. Minter*, 2 Ala. 406. See, also, *Hasbrouck v. Shuster*, 4 Barb. 285; *Collins v. Lavenberg*, 19 Ala. 682. The court will also permit other matters to be introduced into the supplemental bill which might have been incorporated in the original, by way of amendment; and this is especially proper where the matter which occurred prior is necessary to the proper elucidation of that which occurred subsequently to the filing of the original bill. *Graves v. Miles*, Har. (Mich.) 332. And, when properly before the court, it is an addition to the original bill, and becomes a part of it, so that the whole is to be taken as one supplemental bill. *Gillett v. Hall*, 13 Conn. 426; *Cunningham v. Rogers*, 14 Ala. 147; *Potter v. Barclay*, 15 Ala. 439; *Harrington v. Slade*, 22 Barb. 161."

In *Copen v. Flesher*, 1 Bond. 440, Fed. Cas. No. 3,211, the court said:

"The law seems well settled that in chancery no material fact which has occurred since filing the original bill can be introduced in an amended bill. The party can only avail himself of such fact by filing a supplemental bill."

If the frauds alleged in the bill were not discovered until after the filing of the amended bill, there is no substantial reason why complainant should not be allowed to set up the facts, and ask for additional relief on account thereof. The general character of the suit has not been changed. New parties may be added by a supplemental bill, notwithstanding the fact that it is generally done by an amendment. Especially is this true where, as in the present case, the facts in relation to such new party were not discovered within the time that an amendment could be made for that purpose. *Dow v. Jewell*, 18 N. H. 341, 359. The allegations in the bill against the defendant Brooks are quite lengthy. It is charged, among other things, that he, being a stockholder of the defendant corporation, fraudulently colluded

with other parties therein named to bring a suit against this complainant in some other county than that in which the property in controversy is situate, and in such a way and manner as to prevent complainant from obtaining any knowledge thereof, by procuring service of process upon the secretary of state, instead of upon the complainant corporation, with the intent, design, and purpose of defrauding complainant of its rights in the premises. I am of opinion that Brooks is a proper party to the bill, and that the averments herein referred to, with others, are sufficient to justify his being made a party in the supplemental bill. In *Fost. Fed. Prac.* (2d Ed.) § 186, the author says:

"If, after the institution of a suit in equity, a person who is a necessary party thereto comes into being, or any other event occurs, which, without abating the suit, occasions such an alteration in the interest of any of the original parties, or gives any person not a party such an interest therein, as makes it necessary that the change of interest shall be brought to the attention of the court, and the person not already a party brought before it, the suit is said to become defective."

The different kinds of relief asked for by complainant are all germane to the relief asked for in the amended complaint. The matters in question so relate to, and have a bearing upon, the general issues involved in the case, that, if known at the time of the commencement of this suit, they might have been all incorporated in one suit in order to determine all the rights of the respective parties in respect to the mining claims and property involved in the suit. The new matters do not make a new case, but bring into it new questions that are proper in order to enable the court upon final hearing to order such a decree as will prevent further litigation between the same parties concerning the same subject-matter. In *Allen v. Taylor*, 3 N. J. Eq. 435, where the complainant brought a suit simply for an injunction to stay waste on mortgaged premises, the defendants answered the bill. Thereafter the money secured by the mortgage became due, and the complainant filed a supplemental bill, setting out that fact, and prayed for a foreclosure and sale of the mortgaged property. The court, upon demurrer to the bill, held that the complainant, consistently with the principles and practice applicable to bills of this character, had the right to file the supplemental bill. Among other things, the court said:

"It is laid down as a rule in *Candler v. Pettit*, 1 Paige, 169, that if the complainant's original bill is sufficient to entitle him to one kind of relief, and facts subsequently occur which entitle him to other or more extensive relief, he may have such relief by setting out the new matter in the form of a supplemental bill. \* \* \*. It is said in *Eager v. Price*, 2 Paige, 333, that the court will not permit a party to file two original bills and carry on two suits at the same time against the defendant to satisfy the same debt. The expense of an original bill is much greater than of a supplemental bill, and the latter should be used whenever it can equally subserve the purposes of justice. In this case the party seeks two kinds of relief. They are different in character, but both grow out of the same instrument,—the mortgage,—and spring from the relation of mortgagor and mortgagee. They might have been asked for in one bill, if sufficient facts had existed at the filing of the bill to warrant it; but, that not being the case, it was necessary for the complainant to ask such relief as his case would warrant. Subsequent events have entitled him to more extensive and effectual aid, and I see nothing to prevent his obtaining it in the usual way, by bill of supplement."

See, also, Hughes, Eq. Draftsm. p. 401; *Stafford v. Howell*, 1 Paige, 200; *Railway Co. v. Newman*, 23 C. C. A. 459, 77 Fed. 787; Story, Eq. Pl. § 346; 1 Fost. Fed. Prac. § 187 et seq.

Moreover, it has been held that the granting of leave to file a supplemental bill is discretionary with the court. *Railway Co. v. Newman*, *supra*, and authorities there cited.

The exceptions, in so far as they apply to the repetitions in the bill of the copies of the documents in *hæc verba*, are allowed, and such repetitions are hereby ordered to be expunged from the bill. Complainant is given leave to amend the bill in this respect as herein suggested. The other exceptions to the bill are disallowed. The demurrers are overruled, and the defendants are given until rule day in April to answer the bill.

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SULLIVAN v. STUCKY et al.

(Circuit Court, D. Indiana. April 8, 1898.)

No. 9,485.

**BUILDING AND LOAN ASSOCIATIONS—RIGHTS OF BORROWING SHAREHOLDER.**

Where a building and loan association becomes insolvent, and a receiver is appointed to wind up its affairs, a borrowing shareholder is chargeable with the amount of money actually received by him, with interest from the time it was received, and is entitled to credit for all interest paid, and for so much of the premium as was unearned at the time the society passed into the possession of the receiver.

Lorin C. Collins, Jr., Wm. Meade Fletcher, and Floyd A. Woods, for complainant.

George E. Ross, for defendants.

BAKER, District Judge. This is a suit for the foreclosure of a mortgage executed August 30, 1890, by Jesse M. Stucky and Virginia A., his wife, to the American Building, Loan & Investment Society, a corporation created and existing under and by virtue of the laws of the state of Illinois. The corporation became insolvent, and the plaintiff on February 8, 1894, was appointed by the circuit court of the United States for the Northern district of Illinois the receiver thereof; and by the decree of that court he was duly authorized and empowered to sue upon any and all claims and demands due or to become due to the society, to institute and prosecute foreclosure proceedings upon all mortgages and trust deeds held by it, and to wind up its affairs, and make distribution of its assets among those entitled to participate therein. On May 25, 1894, the plaintiff, on ancillary proceedings, was duly appointed receiver of the society by this court, with like powers. The charter and by-laws of the society provided that every person desiring to become a shareholder therein should pay a membership fee of \$1 per share for each and every share taken by him. The shares were \$100 each. It was provided that the society might loan to its shareholders all money paid into, and belonging to, its loan fund, and that the loan should be made upon satisfactory notes secured by mortgage on real estate. For every \$100 of loan made to a shareholder.



he should, in addition to such note and mortgage, transfer to the society, as collateral security, one share of stock; and such shareholder should pay interest at the rate of 10 per cent. per annum upon all loans, and all interest and dues on stock should be paid on the last Saturday of each month during the continuance of the loan. Any shareholder who should make a loan by giving taxable property as security was required to pay all taxes and assessments thereon as they became due. It was further provided that all shareholders should pay a monthly installment of 75 cents on each share of stock held by him, until the same should be fully paid out, which installments were to be paid on the last Saturday of each month, without notice. On April 5, 1890, Stucky and wife purchased 15 shares of stock, and received a certificate for the same in the society. Subsequently thereto, Stucky and wife, having complied with the provisions of the charter and by-laws, made application for a loan of \$1,500, and bid and agreed to pay therefor a premium of 10 per cent., and also agreed to pay interest on that sum at the rate of 5 per cent., and a premium of 5 per cent. per annum; said interest and premium being equal to interest at 10 per cent. per annum, as provided for in the by-laws of the society. On August 1, 1890, Stucky and wife, being indebted to the society in the sum of \$1,852.50 for the principal, premium, and interest of the loan so made, executed 74 promissory notes for the sum of \$23.75 each, and four promissory notes for the sum of \$12.50 each, dated August 1, 1890. To secure the payment of these promissory notes, they executed the mortgage in suit; and at the same time they transferred to the society, as further security for the loan, the 15 shares of stock held by them. Since the making of the loan, Stucky and wife have paid to the society the sum of \$1,018.75. They had made four payments, of \$11.25 each, as dues on the stock, before the making of the loan. Of said sum of \$1,018.75, \$506.25 was paid for dues on the stock, and the remainder of said sum, amounting to \$512.50, was paid on account of interest and premium on said loan. Since January 1, 1894, Stucky and wife have paid the complainant the further sum of \$833.75. The total amount paid by Stucky and wife on account of the loan and dues on the stock is \$1,897.50.

The defendants have demurred to the complaint, and insist that, on the complainant's own showing, the debt secured by the mortgage has been fully paid and satisfied. Their contention is that the sum of \$506.25, paid as dues on the stock before the society was placed in the hands of the receiver, should be credited as a payment on the loan secured by the mortgage in suit, and that this sum, added to the other payments, which are admitted, is enough to satisfy and discharge the mortgage. All the authorities agree that on the premature abandonment of the enterprise, whether by voluntary dissolution, or by winding it up by judicial proceedings, the original contract between the society and the borrowing shareholders cannot be carried out, and that neither party is bound to its literal fulfillment.

Three views have been advanced in regard to the relative rights and obligations of the borrowing and the nonborrowing sharehold-

ers. The first view is that the relation between the society and the borrowing shareholder has been changed by the circumstances to one subsisting between an ordinary creditor and debtor, and that the borrowing shareholder is to be charged with the amount actually received by him, with interest at the legal rate, and credited with all payments made, whether by way of dues, interest, or premium, according to the rule governing partial payments. *Cook v. Kent*, 105 Mass. 246; *Association v. Zucker*, 48 Md. 448; *Association v. Buck*, 64 Md. 338, 1 Atl. 561; *Association v. Goodrich*, 48 Ga. 445; *Brownlie v. Russell*, 8 App. Cas. 235. This view throws all the loss on the nonborrowing shareholder, and for that reason it is unjust and inequitable. Both classes of shareholders ought equally and impartially to bear the burdens arising from the unexpected misfortunes of the enterprise. This can only be accomplished by requiring the borrowing shareholder to return the amount of the loan received by him, with interest, and then receive his pro rata share of the dividend paid upon the stock, equally with the nonborrowing shareholder. The second view is that the borrowing shareholder is entitled to credit upon his loan for the amount of interest and premium paid by him, but is not entitled to have the amount of the dues paid by him on account of stock applied upon his loan. *Towle v. Society*, 61 Fed. 446; *Strohen v. Association*, 115 Pa. St. 273, 8 Atl. 843; *Rogers v. Hargo*, 92 Tenn. 35, 20 S. W. 430; *Brown v. Archer*, 62 Mo. App. 277; *Knutson v. Association*, 69 N. W. 889; *People v. Lowe*, 117 N. Y. 175, 22 N. E. 1016; *End. Bldg. Ass'ns*, §§ 528, 531. The third view differs from the last one, in that, instead of crediting the borrowing shareholder with the whole premium, it credits him with only the part estimated as unearned. *Towle v. Society*, 61 Fed. 446. The court is of opinion that the defendants are chargeable with the amount of money actually received by them, with legal interest thereon from the time it was received, and are entitled to credit for all interest paid, and are to be charged with so much of the premium as was earned at the time the society passed into the possession of the receiver, estimating the life of the society at eight years. These views require that the demurrer should be overruled. So ordered.

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SEAMAN v. NORTHWESTERN MUT. LIFE INS. CO.<sup>1</sup>

(Circuit Court of Appeals, Eighth Circuit. April 11, 1898.)

No. 987.

1. FORECLOSURE SALE—NOTICE OF APPRAISEMENT.

Under Cobbey's Consol. St. Neb. 1891, §§ 5023-5025, no notice of the time and place of the appraisal of real estate to be sold on decree of foreclosure is required.

2. SETTING ASIDE—APPRAISEMENT—WEIGHT OF EVIDENCE.

An appraisal duly made by two disinterested, sworn freeholders, supported by the opinions of the trial judge and the master, by the affidavits of witnesses, and by the fact that the land has been twice offered for sale for less than the appraisal, and not sold, for want of bidders, will be upheld, although a greater number of witnesses regard it as too low, and a prior appraisal was higher.

<sup>1</sup> Rehearing denied May 26, 1898.

**8. MASTER IN CHANCERY—APPOINTMENT.**

It is not requisite to the validity of an appointment of a standing master that the order of appointment shall be recorded in any book of the court.

**4. SAME—BOND.**

There is no statute or other authority requiring a standing master to give a bond, and, if an order under which he makes a sale of property does not require a bond, the validity of the sale is not affected by the lack of one.

**5. SAME—NOTICE.**

It is no objection to the validity of a sale by a master that a party had no notice of his appointment. His authority to make the sale is derived, not from his appointment as an officer of the court, but from the decree of sale, of which the parties had notice.

**6. SAME—ELIGIBILITY—COLLATERAL ATTACK.**

An order appointing a standing master is impervious to collateral attack on the ground that he is ineligible because he was a clerk of the court or a son of one of the judges. That question can be presented only by a direct proceeding to set aside the order of appointment.

**7. SAME.**

Where a decree of foreclosure appoints a standing master, who is a clerk of the court and a son of the judge, to make a sale, and no appeal is taken from the decree, the authority of the master to make the sale cannot be successfully attacked by a motion to set aside the subsequent appraisement, or by objections to the confirmation of the sale, on the ground that he is ineligible to the appointment, because that would be a collateral attack upon the decree.

**8. JUDGMENT—COLLATERAL ATTACK.**

Jurisdiction to hear and determine a question is not limited to the power to make correct decisions, and the judgments and decisions of courts having jurisdiction are equally conclusive, whether right or wrong, unless challenged by writ of error or appeal, or impeached for fraud.

Phillips, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Nebraska.

William A. De Bord (Edmund M. Bartlett and Howard H. Baldridge, on brief), for appellant.

Howard Kennedy, Jr., for appellee.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge. This is an appeal from an order of confirmation of a sale made under a decree of foreclosure of a mortgage rendered on December 9, 1895, in favor of the Northwestern Mutual Life Insurance Company, the appellee, and against William T. Seaman, the appellant. The sale was made by E. S. Dundy, Jr., one of the masters in chancery of the court below, on March 20, 1897. On March 18, 1897, the appellant filed a motion to set aside the appraisement on which the sale was based. On May 3, 1897, an order was made denying this motion, and confirming the sale. Counsel for the appellant seek for a reversal of this order on several grounds, which will be considered seriatim:

1. They insist that the order was erroneous because no notice of the making of the appraisement was served on the appellant; but neither the decree, nor the statute under which the appraisement was made, required any such notice. The claim is not that the ap-

pellant had no notice of the suit, or that he had no hearing as to the terms of the decree, but simply that he received no notice of the time and place of the appraisalment. He answered the bill. He took no appeal from the decree. He applied for and obtained a stay of proceedings under it, and thereby waived all objections to its terms, and to the proceedings on which it was based. *Ecklund v. Willis*, 42 Neb. 737, 740, 60 N. W. 1026, and cases cited. In the absence of the statute, no appraisalment, and, of course, no notice of an appraisalment, would have been requisite to a valid sale. The statute was enacted by the legislature of Nebraska. *Cobbey's Consol. St. Neb.* 1891, §§ 5023-5025. In order to secure uniformity of decisions, this court implicitly follows the construction of the constitution and statutes of a state given by its highest judicial tribunal, where no question of general or commercial law, and no question of right under the constitution or laws of the United States, is involved. *Madden v. Lancaster Co.*, 27 U. S. App. 528, 536, 12 C. C. A. 566, 570, and 65 Fed. 188, 192. The statute of Nebraska does not in terms call for notice of the making of the appraisalment, and the supreme court of that state has decided that a proper construction of this statute requires no such notice. *Hamer v. McFeggan*, 51 Neb. 227, 70 N. W. 937.

2. It is contended that the appraisalment of February 15, 1897, on which the sale was based, and which was \$32,000, was too low. In support of this position, the record contains the affidavits of 12 witnesses, and an appraisalment at \$40,000 made by the master and two disinterested freeholders on September 22, 1896. The lower appraisalment stands supported, however, by the opinion of the trial court; by the opinion of the same master and the same freeholders on December 19, 1896, that the property was then worth only \$31,500; by the fact that this property was twice offered for sale for \$30,000, and no sale could be made, for want of bidders; by the opinion of the master and two other freeholders who made the appraisalment of February 15, 1897; and by the affidavits of eight witnesses, who testified that the property was worth less than \$32,000. This appraisalment was made by two disinterested freeholders, under oath. They were called upon to view the property, and to exercise their judgment impartially upon an important question of fact in this suit. Their determination of that question is entitled to every presumption which attaches to a judicial decision. It ought not to be disturbed unless it clearly appears that it was induced by fraud, or that it was the result of such a gross mistake that it would have the effect of a fraud. The opinion of sworn appraisers upon the question determined by them in the discharge of their duty outweighs the ex parte affidavits of many witnesses. The appraisalment was not too low. *Association v. Marshall* (Neb.) 71 N. W. 63, 65; *Vought v. Foxworthy*, 38 Neb. 790, 57 N. W. 538.

3. It is alleged that the court below erred by excluding from its consideration the evidence of the appellant relative to the value of the property. The allegation does not seem to be founded in fact (80 Fed. 360); and, if it is, the error was without prejudice, and would not warrant a reversal of the order, because the evidence

was clearly insufficient to warrant a disturbance of the appraisal.

4. The objection is strenuously urged that E. S. Dundy, Jr., had no authority to call the appraisers, or to make the sale. It rests upon these facts: On November 23, 1882, E. S. Dundy, Jr., was appointed clerk of the United States district court for the district of Nebraska, and he continued to hold that office until after this sale was made. He was the son of Hon. Elmer S. Dundy, who was the judge of that court until he died, at a date subsequent to the entry of the decree in this case. The act of congress approved on March 3, 1879 (20 Stat. 415, c. 183), provides:

"No clerk of the district or circuit courts of the United States or their deputies shall be appointed a receiver or a master in any case except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment."

On January 25, 1886, a number of the attorneys of the district of Nebraska presented a petition to the circuit court for the appointment of E. S. Dundy, Jr., as a standing master in chancery; and the following order was made and filed with the clerk of the court, but was never entered in any of its records:

"U. S. Circuit Court, District of Nebraska.

"On consideration of the annexed petition, it is ordered that E. S. Dundy, Jr., be appointed master in chancery of this court, and that he take and subscribe the oath of office, and file the same with the clerk of this court, within thirty days.

"Leavenworth, Jany. 25, 1886.

David J. Brewer, Circuit Judge.  
"Elmer S. Dundy, District Judge."

E. S. Dundy, Jr., took, subscribed, and filed his oath of office within the 30 days. By the act of congress approved on March 3, 1887, this provision was made:

"That no person related to any justice or judge of any court of the United States, by affinity or consanguinity, within the degree of first cousin, shall hereafter be appointed by such court or judge to or employed by such court or judge in any office or duty in any court of which such justice or judge may be a member." 24 Stat. 555, c. 373, § 7.

The decree in this case was rendered by Judge Shiras, and it provided that the mortgaged premises should "be sold at public auction by, or under the direction of, a master in chancery of this court." Counsel for the appellee filed a *præcipe* for a sale by Master Dundy, and the clerk thereupon delivered to him a certified copy of the decree, and he made the sale. It is said that the order appointing E. S. Dundy, Jr., a standing master in chancery, is void, because it was not recorded in any of the books of the court, and that for this reason, and because he gave no bond, he was without authority to sell the mortgaged premises. But his appointment as standing master in chancery was made under rule 82 in equity, which provides, "The circuit court may appoint standing masters in chancery in their respective districts, both the judges concurring in the appointment;" and there is no provision of law or rule of court which makes the recording of such an appointment in a book requisite to its validity. It was complete and effective when it was made and

signed by both the judges, and filed with the clerk. *Polleys v. Improvement Co.*, 113 U. S. 81, 5 Sup. Ct. 369; *Marbury v. Madison*, 1 Cranch, 137, 156, 161. Neither the statute, nor the decree under which the master sold this property, required him to give a bond, and one was not necessary to the legality of his action.

Another position of the counsel for appellant is that Dundy had no authority to act, because the appellant had no notice of his appointment to make this sale. No one is entitled to any notice of an appointment of a standing master. That appointment, like the appointment of a clerk or of a court commissioner, is to be made by the court, or by the judge or judges, as the case may be, without notice to any one. The master is an officer of the court, and no one but the court is entitled to notice or hearing upon the question of his selection. The appointment of Dundy as a standing master, however, did not of itself empower him to conduct the sale in this case. He derived that authority from the decree, and the appellant had notice of its rendition, and consented to its terms. The provision in the decree that the sale should be conducted by a master in chancery of the court empowered any master in whose hands the appellee should place a certified copy of the decree to proceed with the sale. If the appellant objected to the delegation of this power to Dundy, his day in court, his time and place for the hearing of this objection, was when the decree was rendered. He should then have presented his objections to Dundy, and should then have insisted either that the decree should provide that the sale should be conducted by any master except Dundy, or that it should name some other master to conduct the sale. The objection that the appellant had no notice of the appointment cannot be sustained, because he had notice of the entry of the decree which appointed him.

The chief ground of objection to Dundy's authority is, however, that he was ineligible to the position of a standing master in chancery, or of a master to conduct this sale, under the acts of congress which we have quoted, because he was the clerk of the United States district court, and because he was a son of the United States district judge. But that question is not in this case. He was appointed a standing master in chancery, under equity rule 82, in 1886, by judges in whom was vested the power, and upon whom was imposed the duty, of making the selection and appointment. He was appointed a master to make this sale in the decree in this suit by the court which had jurisdiction of the parties and of the subject-matter, and full authority to appoint an officer for that purpose. No motion has ever been made to set aside or modify the order of 1886, by which Dundy was appointed a standing master, or the decree of 1895, by which he was empowered to make this sale. No appeal was ever taken from that decree, and the time for appeal has long since passed. The objection that Dundy was ineligible to this position was first made in a motion to set aside the appraisement on March 18, 1897, and was renewed in objections to the confirmation of the sale on April 21, 1897. It was presented in no other way, and these were collateral, and not direct, attacks upon the order of 1886, and the decree of 1895. The only question which they presented was whether the

court which made that order and that decree had jurisdiction to hear and determine the questions whether or not Dundy was eligible to the position of standing master, and to the position of master to make this sale. That question is not debatable. The United States circuit court was the court, and the only court, which had original jurisdiction to hear and decide those questions. Its decision might have been reviewed by an appeal from it. Perhaps it might have been modified or set aside by that court on a direct motion for that purpose, but while it stood unchallenged by a direct attack it was conclusive. The question which the appellant now seeks to raise—the question whether or not this decision was erroneous—is not open in a collateral attack. Jurisdiction to hear and determine a question is not limited to the power to make correct decisions, and the judgments and decisions of courts having jurisdiction are equally conclusive, whether right or wrong, unless challenged by writ of error or appeal, or impeached for fraud. *Foltz v. Railway Co.*, 19 U. S. App. 576, 581, 8 C. C. A. 635, 637, and 60 Fed. 316, 318; *Board v. Platt*, 49 U. S. App. 216, 25 C. C. A. 87, and 79 Fed. 567, 570, and cases there cited. The order must be affirmed, with costs, and it is so ordered.

PHILIPS, District Judge (dissenting). It is conceded by the opinion herein that "the appointment of Dundy as standing master did not of itself empower him to conduct the sale in this case." But it is asserted that the authority of Dundy was derived from the decree of the court ordering the sale, and that the appellant had his day in court to object to this order, and, having failed to do so, he is concluded. The decree of the court was simply that the mortgaged premises should "be sold at public auction by, or under the direction of, a master in chancery of this court." It did not designate Dundy as such master, and therefore, according to my construction of what was the clear intent and purpose of congress in disqualifying the clerk of the court from acting as the master in such special case, the appellant had no reason to understand or believe that Dundy would be designated under the decree of the court as the party to execute the order and make the sale. It does not appear from this record that Dundy was the only master in chancery in that district, and, if it is competent for any master to make such sale without giving the required bond for the faithful performance of his duty, the statute, in my opinion, clearly disqualifies any person to conduct such sale, standing in the relation that the master did to the court. The act of March 3, 1879, declares emphatically that "no clerk of the district or circuit courts of the United States, or their deputies, shall be appointed a master in any case except where the judge of said court shall determine that special reasons exist therefor, to be assigned in the order of appointment." This master was appointed after the enactment of said statute. The order of appointment simply states, "On consideration of the annexed petition," and it is recited in the opinion that these petitioners were members of the bar of the city of Omaha. The act of congress contemplated that there might be special reasons why the interdiction in the preceding part of the act should not apply

to a particular case, and therefore it provided that it might be waived when special reasons, to the satisfaction of the judge, appeared to exist. But the statute, to put up a more specific safeguard against frivolous pretexts for evasion of the legislative intent, required that in such case the judge should assign in the order of appointment the reason therefor. The mere general order of appointment made in 1886 of Dundy as master, based on the petition of the members of the bar, had no reference to his designation to conduct a sale of this land without any assignment of reason then made therefor. The settled purpose of congress to repress what it conceived to be the public evil of favoritism and nepotism in public offices was again emphasized in the act of March 3, 1887, which prohibited the judge of the court from appointing or employing in any office or duty in the court over which the judge presides any person related to him by affinity or consanguinity, within the degree of first cousin. It seems to me that it would practically nullify the express provision of the statute, and wholly thwart its purpose, if the judges of the courts can, upon the mere petition of the members of the bar, without reference to the particular case in which the master is to act in conducting so important a matter as the sale of land, designate the clerk as general master in chancery, and then confer upon such master the important and profitable business of conducting sales of property under a decree which merely directs a master to make the sale. As already stated, congress intended to compel the observance of the statute by requiring the judge, when he does allow such benefits to go to his clerk, to assign in the order therefor a special reason for the designation; and, as already suggested, admitting that the appellant, by counsel, was present in court when the order was made, authorizing a master of the court to make the sale, it cannot be assumed that he understood that counsel for complainant in the decree would, without notice to any one, select the clerk of the court to execute the order. And, as the appellant cannot be assumed to have had notice of Dundy's acting in such capacity until he actually made the sale, the appellant, it seems to me, was in good time with his objection when he made it the ground for setting aside the sale. Until that sale was confirmed by the court, no possible injury could have come to the appellant, upon which he could predicate any complaint as the basis of his appeal. He objected to the sale because it was by a party not authorized by the statute. He objected to its confirmation for the same reason, and when his objection was overruled, and the sale was, notwithstanding, confirmed, he prosecuted his appeal, and asks this court to overrule the action of the circuit court because of this error. As the acts of congress stand for a sufficient reason, and are based upon sound public policy, the court should suffer no evasion of the legislative will.



**ELGUTTER et al. v. NORTHWESTERN MUT. LIFE INS. CO.**

(Circuit Court of Appeals, Eighth Circuit. April 11, 1898.)

No. 998.

**1. FORECLOSURE SALE—NOTICE OF APPRAISEMENT.**

No notice of the time and place of appraisement of real estate to be sold under decree of foreclosure is required by Cobbey's Consol. St. Neb. 1891, §§ 5023-5025.

**2. SAME—CERTIFICATES OF OFFICERS—OFFICIAL SEAL.**

Cobbey's Consol. St. Neb. 1891, § 5025, requiring the master to obtain from certain officers certificates of the liens on real estate to be sold, "under their respective hands and official seals," only requires seals from officers mentioned who have them.

**3. SAME—APPRAISEMENT AND SALE IN SOLIDO.**

Where two lots are, and have been for years, used as one tract, they may properly be appraised and sold together under a decree of foreclosure.

**4. SAME—POSTING NOTICES—PUBLICATION.**

Where the notice of sale is published in a newspaper printed in the county, notice need not be posted on the door of the court house, and in five other public places in the county, as directed by Cobbey's Consol. St. Neb. 1891, § 5031, in case of execution sales in counties where no newspaper is printed.

**5. SAME—INADEQUACY OF PRICE—TWO-THIRDS OF APPRAISEMENT.**

Where property is sold for two-thirds of its appraised value, which it is required to bring under the statute authorizing the sale, and there is no offer to pay more, the sale should not be set aside for inadequacy of price.

**6. SAME—STANDING MASTER IN CHANCERY—ADDITIONAL OATH AND BOND.**

A standing master in chancery, who has taken and filed his oath as such, need not take an additional oath or file a bond before making a sale in a case where it is not required by the decree, nor the state statute under which he acts.

**7. STANDING MASTER IN CHANCERY—COLLATERAL ATTACK.**

An order appointing a standing master is impervious to collateral attack on the ground that he is ineligible because he was a clerk of the court or a son of one of the judges. That question can be presented only by a direct proceeding to set aside the order of appointment.

**8. SAME—AUTHORITY OF MASTER—APPEAL FROM DECREE.**

Where a decree of foreclosure appoints a standing master, who is a clerk of the court and a son of the judge, to make a sale, and no appeal is taken from the decree, the authority of the master to make the sale cannot be successfully attacked by a motion to set aside the subsequent appraisement, or by objections to the confirmation of the sale, on the ground that he is ineligible to the appointment, because that would be a collateral attack upon the decree.

**9. JUDGMENT—COLLATERAL ATTACK.**

Jurisdiction to hear and determine a question is not limited to the power to make correct decisions, and the judgments and decisions of courts having jurisdiction are equally conclusive, whether right or wrong, unless challenged by writ of error or appeal, or impeached for fraud.

Phillips, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the District of Nebraska.

Charles S. Elgutter, for appellants.

Howard Kennedy, Jr., for appellee.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

\* Rehearing denied May 26, 1898.

SANBORN, Circuit Judge. This is an appeal from an order of confirmation of a sale under a decree of foreclosure rendered on May 8, 1896. On March 17, 1897, the appellants filed motions in the court below to strike out the certificates of the county and city treasurers, and to set aside the appraisement of the mortgaged premises on which the sale was based. The sale was made on March 20, 1897. On May 10, 1897, an order was made denying the motions of the appellants, and confirming the sale. The following objections to this order are urged in support of the appeal from it:

1. No notice of the time and place of making the appraisement was given to the appellants. No such notice, however, was required, either by the decree, or by the statutes of Nebraska under which the appraisement was made. *Cobbey's Consol. St. Neb. 1891, §§ 5023-5025; Hamer v. McFeggan, 51 Neb. 227, 70 N. W. 937; Seaman v. Insurance Co., 86 Fed. 493.*

2. The certificate of the city treasurer and the certificate of the county treasurer of the liens upon the property which the master was required to obtain were not given "under their respective hands and official seals," as prescribed in the statute (section 5025), but were given under their hands only. These officers, however, have no official seals, and it is evident that the meaning of the legislature was to require such seals only from the other officers mentioned in the section, who have them.

3. The mortgaged premises consisted of two adjacent lots in a city, and they were neither appraised nor sold separately. No statute is cited which requires them to be sold separately. The decree directed that the mortgaged premises, or so much thereof as should be sufficient to raise the amount due to the appellee, "and which may be sold separately without material injury to the parties," be sold at public auction, by, or under the direction of, the master. This provision required the master to ascertain and determine whether or not these lots could be sold separately without material injury to the parties. The fact that he sold them together shows that he determined that question in the negative, and the evidence in this record proves that his decision was right. The lots are 66 feet in width, and 132 feet in length. Their front is on Pacific street. Lot 1 is on the corner of Tenth street and Pacific street, and has six two-story frame dwellings upon it, which face upon Tenth street. The half of lot 2, adjacent to lot 1, has a brick pavement and driveway upon it, which long have been, and still are, used by the occupants of the dwellings on lot 1, and which were both convenient and necessary for their use. The other half of lot 2 has a cottage upon it, but the two lots constitute one tract of land, and have been so used for years. There was no error in appraising and selling them as such.

4. The notice of the sale of the property was not posted on the door of the court house, and in five other public places, as directed by the statute of Nebraska in the case of execution sales of property situated in counties in which no newspaper is printed. *Cobbey's Consol. St. Neb. 1891, § 5031; Parrat v. Neligh, 7 Neb. 456; Drew v. Kirkham, 8 Neb. 477; Jones v. Null, 9 Neb. 254, 2 N. W. 350.* But

there was a newspaper printed in the county in which this property was situated, and the notice was published in that newspaper, in compliance with the provisions of the statute of Nebraska and of the act of congress (27 Stat. 751, c. 225).

5. It is alleged that the property was sold at a grossly inadequate price. The evidence does not sustain the averment. The interest of the appellants was sold for more than two-thirds of its appraised value, which it is required to bring by the statutes of Nebraska, and no offer was presented to pay more for it.

6. It is insisted that the appraisal was too low, and there are eight affidavits to that effect in this record, and three to the effect that the property was not worth more than the appraisal. This evidence is insufficient to warrant a disturbance of the decision of this question by the master and the two sworn freeholders, whose duty it was to determine it, for the reasons stated in *Seaman v. Insurance Co.*, 86 Fed. 493.

7. While E. S. Dundy, Jr., the master who made the sale, had taken and filed his oath as a standing master in chancery, he took no additional oath and filed no bond in this case. But neither the statutes of Nebraska, nor the decree under which he acted, required him to do so.

8. It is contended that Dundy had no authority to call the appraisers, or to make the sale, because he was the clerk of the United States district court, and he was the son of the judge of that court. 20 Stat. 415, c. 183; 24 Stat. 555, c. 373, § 7. This contention rests upon facts substantially the same as those set forth to sustain a similar position in *Seaman v. Insurance Co.*, 86 Fed. 493, and it cannot be maintained, for the reasons stated in the opinion of this court in that case. The order below must be affirmed, with costs, and it is so ordered.

PHILIPS, District Judge. I dissent from the foregoing opinion for the same reasons assigned in the dissent in case of *Seaman v. Insurance Co.* (decided at this term) 86 Fed. 493.

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LEONARD & MONTGOMERY REAL-ESTATE & INVESTMENT CO. et al  
v. BANK OF AMERICA.

(Circuit Court of Appeals, Eighth Circuit. April 11, 1898.)

No. 1,010.

1. EXECUTION OF INSTRUMENT BY CORPORATION—ADMISSION BY PLEA—AUTHORITY OF OFFICERS.

An answer admitting the execution of a note and deed of trust by a corporation is an admission that the officers who executed such instruments, and affixed the corporate seal thereto, were duly authorized to take such action by the board of directors.

2. SAME—CONSIDERATION—BENEFIT OF OFFICERS—ULTRA VIRES.

A bank attached lands of L. and M., who were indebted to it by note. Subsequently a corporation was formed by L. and M., and the lands were conveyed to the corporation subject to the attachment. The corporation then executed to the bank its note, secured by a trust deed on the lands, for

the amount of the indebtedness of L. and M., and the attachment suit was dismissed. *Held*, that the note and trust deed were executed for a valuable consideration moving from the bank to the corporation, and that the act was not ultra vires.

Appeal from the Circuit Court of the United States for the District of Colorado.

This suit was brought by the Bank of America, the appellee, against the Leonard & Montgomery Real-Estate & Investment Company (hereafter termed the "Real-Estate Company"), and against James Leonard and John C. Montgomery, the appellants, to foreclose a deed of trust in the nature of a mortgage, which was executed by the real-estate company on November 21, 1893, to secure the payment of its note for the sum of \$5,449.23, and two interest coupons thereto attached in the sum of \$381.44 each. The note ran for three years from its date, and was payable to the Bank of America (hereafter termed the "Bank"). The material facts with reference to the transaction, as disclosed by the record, are as follows:

James Leonard and John C. Montgomery, prior to August 22, 1893, were indebted to said bank on a note in the sum of \$5,000, with accrued interest thereon, which they had executed in favor of William R. Mygatt. On this note, which had been sold and indorsed to the bank, the bank brought a suit by attachment on August 22, 1893, against Leonard and Montgomery, in the district court of Arapahoe county, Colo., and the writ of attachment issued in said cause was levied on much of the real estate covered by the aforesaid deed of trust, which real estate then belonged to Leonard and Montgomery. After the suit was brought and the attachment was levied, Leonard and Montgomery proposed to the bank to execute in its favor a new note for the amount of their indebtedness, to run for three years, with 7 per cent. interest, and to secure the payment of the same by a deed of trust on the property involved in the present controversy. It was proposed that the attachment suit should be dismissed, and the old note canceled, on the execution and delivery of the new securities. This proposition was accepted by the bank, but, before the new note and deed of trust were executed, Leonard and Montgomery caused a corporation to be formed, known as the "Leonard & Montgomery Real-Estate & Investment Company," to which corporation they conveyed the land in controversy and some other real property which they then owned, receiving in exchange for such conveyance the entire capital stock of the corporation, except four shares which were issued to H. P. Parmelee, who became the secretary of the company. Leonard became the president, and Montgomery the vice president and treasurer, of the company. To carry out the agreement existing between Leonard and Montgomery and the bank, the real-estate company thereafter executed the note and deed of trust on which the present suit is founded; but, before the delivery of the note, it was indorsed by Leonard and Montgomery in their individual capacity. On the execution and delivery of said note and deed of trust to the bank, it caused the aforesaid attachment suit to be dismissed, and the lien of the attachment to be duly discharged. The real-estate company, in its answer, admitted the execution of the aforesaid note and deed of trust, and the delivery thereof to the bank. It also admitted that the note was overdue, and had not been paid, but it resisted a decree of foreclosure on the ground that the real-estate company executed the note without consideration for the accommodation of Leonard and Montgomery, and that its action in that behalf was ultra vires. The circuit court granted a decree of foreclosure, and the case is before this court on appeal from such decree.

A. B. Seaman (Lucius Weinschenk, on brief), for appellants.

William B. Harrison, for appellee.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

It was contended on the oral argument of the case, and the point is also made in the brief of counsel for the real-estate company, that the latter company is not liable on the note and deed of trust in suit, because they were not executed in pursuance of a resolution of the board of directors formally proposed and passed at a directors' meeting. This question, however, is not open for consideration on this record, and the proposition is not tenable, for the following reason: The answer to the bill contains an express admission that both the note and the deed of trust were executed by the real-estate company at the date alleged in the complaint, which must be regarded as an admission that the officers who executed the note and the deed of trust, and affixed the corporate seal thereto, to wit, the president and secretary, were duly authorized to take such action by the board of directors or other governing body. Any other construction of the pleading would render the admission meaningless and of no effect. If it was the intention of the defendant company, when it filed its answer, to challenge the validity of the note and deed of trust on the ground that the officers who executed the same did so without the sanction or approval of the board of directors, it should have presented that defense either by plea or answer. Not having done so, the only question open for consideration is one which is raised by the answer, namely, whether the note in controversy was executed without any consideration moving from the bank to the real-estate company, and solely for the accommodation of its president and vice president. The answer contains an averment to the effect that the note in suit was an accommodation note made for the benefit of "certain other persons," meaning, we suppose, Leonard and Montgomery, and that the bank was well aware of that fact when it accepted it. This is the only substantial defense which we find stated in the answer. If these allegations were true, and were supported by the proof, we might well concede that the corporation exceeded its powers in attempting to become responsible for the individual debts of its officers, and that securities executed solely for that purpose are voidable, if not absolutely void. *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 11 Sup. Ct. 478; *Bank v. Kennedy*, 167 U. S. 362, 368, 17 Sup. Ct. 831.

We are not able to concede, however, that the evidence supports these allegations of the answer. The testimony discloses, as we think, without any substantial contradiction, that, when the note and deed of trust were executed, a large portion of the land which is embraced in the deed of trust was incumbered with an attachment lien that existed thereon when it was conveyed to the real-estate company. That company had acquired the land from its grantors subject to the lien, in exchange for its capital stock, and was interested in having the lien discharged, and would be benefited by its discharge, whether we regard an attachment lien when levied as a lien in the strict legal sense, or merely as a conditional charge, which may ripen into a lien upon the recovery of a judgment. By the execution of its note and deed of trust, the real-estate company did in fact procure a release of an attachment lien existing upon its land, which was undoubtedly

valid, and would probably have ripened into a judgment. All parties to the transaction understood that the note and deed were executed for that purpose. We are not able to understand, therefore, upon what ground it can be successfully maintained, on the evidence found in the present record, that the note in suit was executed without a valuable consideration moving from the bank to the real-estate company, and that Leonard and Montgomery were the only persons who were benefited by the transaction. This being the only substantial defense which was urged at the trial, and it being, in our judgment, wholly unsupported by the proof, the judgment below is hereby affirmed.

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COCKRILL v. ABELES et al.

(Circuit Court of Appeals, Eighth Circuit. April 11, 1898.)

No. 969.

**1. RECEIVER—INSOLVENT CORPORATION—SUIT AGAINST DIRECTORS.**

A receiver of an insolvent national bank has a right to maintain a suit in his own name against directors to charge them for losses that may have been sustained by the corporation and its creditors through their wrongful or fraudulent acts.

**2. NATIONAL BANKS—INCREASE OF CAPITAL STOCK—LIABILITY OF DIRECTORS.**

The increase of the capital stock of a bank based on a fictitious value of assets, and on notes given by the directors, with an understanding that they were not to be paid, is in violation of Rev. St. § 5142, and the directors of the bank participating are liable for all losses resulting to the creditors.

**3. SAME—ACQUIREMENT OF REAL ESTATE—SATISFACTION OF LIEN.**

Where a national bank has lawfully acquired an interest in real property, in satisfaction of a debt, it may purchase other undivided interests therein or incumbrances existing thereon, provided such action is necessary to enable it to manage or dispose of the property to better advantage.

**4. SAME—OPERATING MANUFACTURING PLANT.**

Where a national bank acquired certain mill property, in satisfaction of a debt, and the directors organized a corporation among themselves for the purpose of operating the mills as the bank's agent, using its funds, and operated them for the bank at a loss of \$23,000, the directors of the bank participating are liable to the creditors for the loss.

Appeal from the Circuit Court of the United States for the Eastern District of Arkansas.

J. M. Moore and Sterling R. Cockrill (Ashley Cockrill, on brief), for appellant.

John McClure and W. E. Hemingway (U. M. Rose, G. B. Rose, E. W. Kimball, and Morris M. Cohn, on brief), for appellees.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

THAYER, Circuit Judge. This case is similar in some respects to the case between the same parties, No. 968, which was recently decided. 86 Fed. 7. It involves the same questions, touching the one-year statute of limitations, and the right to sue in equity, which were considered and decided in the former case, and what was therein said with reference to those questions is applicable to the case in hand.

The features of difference which the two bills of complaint present are these:

In the case at bar, the receiver complains of the conduct of the directors in devising and carrying out a scheme which was concocted by them to increase the capital stock of the bank from \$250,000 to \$500,000, and of certain action which the directors took in endeavoring to secure an indebtedness which a corporation known as the "Quapaw Mills" owed to the bank. These two transactions on account of which, as it is claimed, the directors incurred a personal liability, were as follows: On June 23, 1890, the stockholders of the bank passed a resolution to increase the capital stock of the bank to the extent of \$250,000. For the purpose of creating a fund to authorize the increase, the directors placed a fictitious valuation on certain assets of the bank, some of which were of little or no value, thereby showing on the books of the bank that it had a surplus over and above its debts and its stock liability to the extent of \$125,949.82. On the strength of this pretended surplus, a stock dividend was declared by the directors in favor of the shareholders, to the amount of 50 per cent. of the stock which they then owned, the increase based on such dividend amounting to \$125,000. As a basis for a further issue of stock to the amount of \$125,000, certain directors of the bank executed their notes in its favor to the amount of \$162,500, it being agreed that such notes should not be paid by the directors at any time, but that the same should be retired by the sale of the new stock to outside parties, as and when the same should be sold. Representations were made, however, to the comptroller of the currency, that the full amount of said increased stock had been paid in; and, by means of such representations, the requisite certificate appears to have been obtained from the comptroller that the capital of the bank had been increased to \$500,000. When the bank failed, in January, 1893, it was found that it still held notes to the amount of \$62,730, which were signed, respectively, by Nick Kupferle, by the Press Printing Company, and by the Wilson & Webb Stationery Company. These notes had been received by the bank in exchange for the notes originally drawn by the directors to furnish a basis for an issuance of new stock to the amount of \$125,000, and represented the amount of such new stock that had not been sold. Prior to that time it seems that the bank had succeeded in selling to actual purchasers about 750 shares of the new stock, receiving therefor \$75,000. It had received nothing of value for the remaining shares, although they had been issued and were outstanding in the hands of third parties. The makers of the aforesaid notes, with the exception of the Wilson & Webb Stationery Company, were at the time insolvent, and so remain, and all of them deny their liability thereon. It was averred in the bill that the directors caused a report under oath to be made to the comptroller of the currency that all the new capital stock had been paid in, and that by this means the comptroller was deceived, the public was misled, and the bank was given a false credit. The new stock, amounting to \$125,000, which was based on the notes of the directors, was originally issued in lots of 250 shares each, to the five directors who executed their notes as a basis for the issue. Before the bank failed, however, most of

the unsold stock had been surrendered by the original holders, and re-issued to H. G. Allis, the president of the bank, who had either sold or hypothecated a large part thereof in his individual transactions, the result being that the bank had received nothing of value at the time of its failure for some five or six hundred shares of its capital stock which had thus been sold or hypothecated, except the notes of Nick Kupferle, the Press Printing Company, and the Wilson & Webb Stationery Company.

The Quapaw Mills transaction was of the following character, according to the averments of the bill: The Quapaw Mills property consisted of certain lots in the city of Little Rock, Ark., upon which a cotton mill had been erected. On June 12, 1891, the title to this property was vested in the defendant P. K. Roots, and in Oscar Davis, as trustees for the First National Bank of Little Rock, and the German National Bank, of the same place. On that day, the directors of the first-named bank, who are defendants to the present bill of complaint, purchased the interest of the German National Bank in said property for the sum of \$3,000, using for that purpose the money of the First National Bank. The directors of the latter bank then caused a corporation to be organized under the name of the Little Rock Cotton Mills, for the purpose of enabling the bank to operate the cotton mills. To this corporation the cotton mills property was conveyed by the trustees, Roots and Davis, on or about June 12, 1891, to be held by it in trust for the bank. Four of the directors of the First National Bank became directors of the cotton-mills company, and the mills were operated for the benefit of, and at the expense of, the bank, until about November 1, 1892, during which period the sum of \$23,000 of the bank's money was lost in an attempt to conduct the business successfully. In March, 1893, the directors of the Little Rock Cotton Mills caused that corporation to execute a mortgage on its property to secure notes in the sum of \$4,000 which the cotton-mills company had executed in favor of its directors for money claimed to be due to them. These notes were subsequently sold by the directors to third parties. A few days later, a second mortgage was executed on the cotton-mills property, to secure the sum of \$23,000 which the First National Bank had advanced as aforesaid in an attempt to operate the plant. That indebtedness, it seems, was represented at the time by notes of the cotton-mills company then outstanding, a portion of which, amounting to \$8,000, were held by the First National Bank when it failed, and the residue of which were held by third parties to whom the notes had been sold. The cotton-mills property was subsequently sold under a decree of the circuit court of the United States for the Eastern district of Arkansas for \$15,000; and, by the provisions of said decree, the sum of \$4,605.29 was paid to the receiver of the First National Bank on the notes held by him, which were secured by the second mortgage. The sum of \$1,314.44 was also paid out of the proceeds of the sale to redeem the cotton-mills property from taxes and other charges. The balance of the proceeds of the sale was paid to the holders of the other notes, the result being that the First National Bank and its receiver ultimately lost the sum of \$3,000 which was paid to the German National Bank for its interest in the Quapaw Mills prop-



erty; also the money which the bank had advanced to operate the mills, except the sum of \$4,605.29, above mentioned.

The bill in this case was dismissed by the circuit court solely on the ground that the cause of action was barred by the one-year statute of limitations of the state of Arkansas. This view of the case was erroneous, we think, for the reasons stated in our opinion in the former case between the same parties. It is urged, however, by the appellees that, even if the statute of limitations was not applicable to shield them from liability, the bill was properly dismissed for other reasons, the principal contention being that the transactions complained of, as described in the bill, do not show that any loss or damage was sustained which the receiver is entitled to recover. It becomes necessary, therefore, to consider this contention. In doing so, however, we shall not notice defects of averment which could be easily cured by amendment, such, for instance, as the failure to aver specifically that the directors acted in bad faith and negligently, but shall direct our attention to the more important inquiry whether it is shown with sufficient certainty that the two transactions resulted in a loss which is recoverable by the receiver.

It is well settled that the receiver of an insolvent national bank represents both the corporation and its creditors. He is a statutory assignee of all its property and effects, and is therefore entitled to sue in his own name to recover the same, and to enforce all the rights of the corporation without making the corporation or its creditors a party to such suits. *Kennedy v. Gibson*, 8 Wall. 498, 506; *Bank v. Kennedy*, 17 Wall. 19; Rev. St. U. S. § 5234. The receiver of an insolvent bank or other corporation, who has been duly appointed under the provisions of a statute to wind up its affairs and distribute its assets among creditors and stockholders, also has the right to maintain a suit in his own name against unfaithful directors, or other managing officers, to charge them with responsibility for losses that may have been sustained by the corporation and its creditors through their wrongful or fraudulent acts, or in consequence of a gross neglect of their official duties. *Briggs v. Spaulding*, 141 U. S. 132, 11 Sup. Ct. 924; *Gillet v. Moody*, 3 N. Y. 479; *Bank v. Johnson*, 8 Wend. 645; *Alexander v. Relfe*, 74 Mo. 495; *Movius v. Lee*, 30 Fed. 298; *Thomp. Corp.* §§ 4121, 6946, 6947, and cases there cited. It is also well settled that, when the capital stock of a national bank is increased, the law requires an amount of additional capital equal to the increased stock to be actually paid in or contributed. The provision to that effect found in section 5142 of the Revised Statutes was intended to prevent the watering of stock, and to give the creditors of a bank whose shares of stock are increased additional security to the full amount of the par value of the new stock. The national bank act does not sanction any shifts or devices whereby the stock of a bank is increased without a corresponding increase of actual capital. *Aspinwall v. Butler*, 133 U. S. 595, 608, 10 Sup. Ct. 417; *Delano v. Butler*, 118 U. S. 634, 7 Sup. Ct. 39. There can be no doubt, then, that the scheme devised by the appellees, who were the directors of the bank, to increase its stock, as the same is described in the bill, was wholly unauthorized by law; and if the acts done resulted in a loss to the bank,

and through it to the bank's creditors, considered as a body, the directors, or so many of them as participated in the scheme, are clearly liable for the loss.

With respect to the stock dividend of \$125,000 which was based on a fictitious valuation of certain property of the bank, it is said that it did no harm to the bank or its creditors, because the bank parted with none of its assets; and, with respect to the increase of stock based on the notes of its directors, it is said that the bank actually realized about \$75,000 in money from the sales of that stock, and was benefited to that extent, and that the disposition made of the residue of that stock did no harm. This contention, however, overlooks the fact that, after the resolution to increase the stock to the amount of \$250,000 had been adopted, the stock itself was an asset of the bank, which its depositors and creditors were entitled to have dealt with as the law directs. It was a trust fund which the directors had no right to issue except for money or something equivalent to money. *Sanger v. Upton*, 91 U. S. 56, 60; *Wood v. Dummer*, 3 Mason, 308, Fed. Cas. No. 17,944; *Foundry Co. v. Killian*, 99 N. C. 501, 6 S. E. 680; *Moses v. Bank*, 1 Lea, 398; *Thomp. Corp.* §§ 1562, 1606, 1608; *Mor. Priv. Corp.* §§ 780, 781. If the directors had treated the new stock as a trust fund, and had disposed of it for money or its equivalent, it is obvious that the capital of the bank would have been largely increased, and that such increase of capital would have afforded its creditors greater security. It is possible, of course, that purchasers could not have been found for an amount of stock in excess of the 750 shares actually sold, if payment of the par value thereof had been exacted in money. It is also possible that, if the stock had been sold in the manner provided by law, the money received therefor would have been wasted in reckless ventures, and would not have inured to the benefit of the present creditors of the bank. But we are not at liberty to assume, in the absence of any evidence to that effect, that such would have been the result, and, on the faith of that assumption, decide that no one was injured by the unauthorized acts of the directors. In the absence of proof to the contrary, it must be presumed that the new stock might have been sold for its par value; that a valuable asset was in fact lost by the wrongful conduct of the directors; and that the creditors of the bank thereby sustained a substantial injury.

The other transaction, whereby 1,250 shares of stock of the par value of \$125,000 were issued, based on the notes of the directors which they never intended to pay, seems to have been no less detrimental to the interests of the bank and its creditors. About five or six hundred shares of that stock, according to the averments of the bill, were ultimately issued to the president of the bank, who sold and hypothecated the same, probably to innocent holders, to discharge or secure his individual debts. For these shares the bank received nothing but fictitious and worthless notes, which the directors had agreed should never be enforced against the persons who had executed the same. An innocent purchaser of the stock in question could not be made to respond to the bank or its receiver for the amount unpaid thereon, but would be entitled to insist, as against the creditors of the bank and its other shareholders, that the stock was what it professed

to be on its face, namely, full-paid stock. The same would be true of the shares that were issued as a stock dividend to the old stockholders. Many of those shares have doubtless been sold to persons who, if sued for the amount due thereon which has not been paid, would be entitled to claim exemption from liability on the same ground, namely, that they bought them in good faith as full-paid stock, and that neither the bank nor its receiver should be heard to allege the contrary. *Foreman v. Bigelow*, 4 Cliff. 509, 9 Fed. Cas. 427; *Steady v. Railroad Co.*, 5 Dill. 348, Fed. Cas. No. 13,329; *McCraken v. McIntyre*, 1 Duv. (Can.) 479; *Bridge Co. v. McCluney*, 8 Mo. App. 496; *Burkinshaw v. Nicolls*, 3 App. Cas. 1004; *Thomp. Corp.* § 1680.

In view of these considerations, we are of opinion that the bill shows not only that the directors acted in open violation of the national bank act, and therefore unlawfully in the various proceedings taken by them to increase the stock of the bank, but that, by reason of the wrongful acts in question, a considerable amount of the stock has been dissipated and lost, from which the corporation should have realized its par value in money. In other words, the case made by the bill is not one in which the directors appear to be liable merely for nominal damages because of certain unlawful acts by them done and performed, but it is one in which it appears that such unlawful acts have resulted in the waste of a valuable asset, and in a substantial loss to the bank and its creditors. It may be, as we have heretofore suggested, that the directors will be able to show that the increased stock could not have been sold for money or its equivalent; that the stock would still be in the hands of the bank and unsold, if it had not been disposed of in the manner aforesaid; and that neither the bank nor its creditors have sustained any actual damage in consequence of the fraudulent and unlawful acts charged in the bill. We think, however, that we cannot indulge in such presumptions as these, and that it is incumbent on the directors to allege and prove such facts if they seek to avoid liability for their wrongful conduct on that ground.

It is further claimed by the appellees that they are not liable for the loss sustained in the Quapaw Mills transaction, because they acted in that matter not unlawfully, but in good faith, and with intent to benefit the bank. It is said, in substance, that the bank had been compelled to accept a little more than a four-fifths interest in the Quapaw Mills property, in satisfaction of a debt due to it from a former owner of the mills property; that the property was idle and unproductive; and that the directors, in the exercise of their best judgment, purchased the small interest of the German National Bank therein, and organized a corporation to repair and operate the cotton mills for the sole purpose of enhancing their value, and enabling the bank to ultimately dispose of the property to the best advantage. On the other hand, it is urged by the receiver that the bank, under its charter, had no power to purchase the interest of the German National Bank in the property in question, it being real estate, and that, because of such want of power, the directors are personally liable for the sum of \$3,000, which was expended in making the purchase, and was ultimately lost. It will be admitted, of course, that a national bank has no power to purchase real property, except such as may be necessary

for the convenient transaction of its business, or such as it may be compelled to take as security for, or in satisfaction of, debts previously contracted. Rev. St. § 5137. We think, however, that when a national bank, as in the present case, has lawfully acquired an undivided interest in real property in satisfaction of a debt, it may lawfully purchase other undivided interests in the property, and discharge liens or incumbrances existing thereon, provided such action is necessary to enable it to manage or dispose of the property to better advantage. The power conferred by the statute to acquire real estate in satisfaction of a debt is not exhausted by acquiring simply an undivided interest in such property, but it extends to the acquisition of all interests in the property, if an undivided control and ownership thereof is deemed necessary for the ultimate security of the bank. In many cases the right accorded to national banks to take real estate as security for debts previously contracted would prove a barren right if they were limited to such an interest as was first acquired, and were denied the right to purchase other outstanding titles and interests. Inasmuch as the power in question was conferred upon national banks for the sole purpose of enabling them to save as much as possible of bad or doubtful debts, it should be liberally construed so as to make it most effectual to that end. It results from this view that we are not able to assent to the proposition that the directors are liable for the sum of \$3,000 which was expended in purchasing the interest of the German National Bank in the mills property, because that act was in excess of the power of the corporation, and therefore a wrongful act on the part of the directors. We hold, on the contrary, that the directors had the power to make the purchase in question, if, in the exercise of their best judgment, they deemed it necessary to do so to protect the interest of the bank, and to save as much as possible of the money already invested in the mills property.

The receiver claims, however, that, according to the averments of the bill of complaint, the directors of the bank also embarked its funds in a manufacturing enterprise which resulted in a large loss, and that such conduct on their part was a breach of trust, which renders them personally liable for whatever damage was thereby sustained. This contention on the part of the receiver as to what the bill charges seems to be well founded. The bill does not aver that the cotton-mills company paid anything for the property which was conveyed to it by Roots and Davis, or that it agreed to pay anything therefor, or that the conveyance was in the nature of a lease; while it is expressly alleged that such conveyance was made to it "in trust for the bank," and that the mills were thereafter operated for and at the expense of the bank, resulting in a loss of \$23,000. In other words, it appears by averment, at least, that the cotton-mills company acted merely as an agent of the bank in the operation of the mills, and that whatever risk of loss was incurred by so doing was borne by the bank. If this be true, and it so appears on a further hearing of the case, it follows, we think, that the directors, or so many of them as assented to such use of the bank's funds, will be liable to respond for the loss which was incurred in operating the mill property. In the case of *Butler v. Cockrill*, 36 U. S. App. 702, 712, 20 C. C. A. 122, and 73 Fed.

945, which related to the same transaction now under investigation, this court said, in substance, that it would not be difficult to show that the bank did have the power to lease the mills property to a third party to be by him operated, or to convey the same to a third party under an agreement that he should operate it and sell it, and account to the bank for its proceeds. But we cannot concede that the bank itself had the right to operate the mill, either in its own name or in that of an agent, and incur the risks which are necessarily incident to a business venture of that nature. The present case shows the hazards which attend such ventures, and the necessity, on grounds of public policy, of denying to national banks the right to become interested therein. The most liberal view which may be fairly taken of the implied powers of national banks would not sustain their right to engage directly in a manufacturing or business enterprise under any circumstances; but, even if the power in question should be conceded to exist under certain conditions, the present case was not one which warranted its exercise. The directors of the bank had no right to employ its funds in an attempt to operate the cotton mills for the bank's account, in the manner alleged in the bill, and such action on their part was unauthorized and wrongful.

It is suggested by counsel for the directors that the cause of action against them, which is founded upon the declaration of the stock dividend in the year 1890, was barred by the laws of Arkansas (Sand. & H. Dig. 1894, § 4822) after the lapse of three years, which period had expired when the present suit was instituted by the receiver. Other derelictions of duty, however, which are charged in the bill, as heretofore shown, gave rise to a cause or to causes of action which are not barred, and, even if the point suggested is well taken, it would not follow that the decree dismissing the bill should be affirmed. Moreover, the complaint alleges, in substance, that at the time of the commission of the wrongful acts in question, and afterwards, until the appointment of a receiver, the defendants who were concerned therein constituted a majority of the directors, and that, in consequence of their having full control of the corporation, no suit could be brought to redress the alleged grievance, until a receiver was appointed. In view of these considerations, and because all the transactions relating to the increase of the stock must be fully investigated in the further progress of the case, it is deemed both unnecessary and inexpedient to express a decisive opinion upon the point last suggested. Our conclusion is, therefore, that the bill, considered as a whole, stated a good cause of action against the directors; that the general demurrer which was interposed should have been overruled; and that the defendants should have been required to answer its averments. The decree of the circuit court is accordingly reversed, and the case is remanded to that court for further proceedings therein not inconsistent with this opinion.

SANBORN, Circuit Judge. I concur in the order reversing the decree in this case, because the bill shows that the appellees unlawfully diverted some of the funds of the insolvent bank to the payment of unearned dividends to themselves and other stockholders (Hayden v. Thompson, 36 U. S. App. 361, 17 C. C. A. 592, and

71 Fed. 60); but I am unable to assent to the view that the bill sufficiently sets forth any cause of action against the appellees on account of the Quapaw Mills transaction (*Butler v. Cockrill*, 36 U. S. App. 702, 712, 20 C. C. A. 122, 127, 128, 73 Fed. 945, 951, and cases cited), or on account of the declaration and distribution of the stock dividend in 1890,—more than three years before the commencement of this suit (*Mansf. Dig. Ark. § 4478*); and I think the damages resulting from the disposition of the shares of stock for which the promissory notes for \$62,732 were finally obtained cannot exceed the difference between the market value of those shares and the value of the notes which were obtained for them at the time when the shares passed beyond the control of the bank. It was the duty of the directors to hold these shares for their par value; but no absolute duty to sell them for that value was ever imposed upon them, unless some one offered to purchase them at that price. Since the bill does not show that any one made such an offer, which they wrongfully rejected, the measure of damages for their disposition of these shares is not the difference between the par value of the shares and the value of the notes they obtained for them; but the extreme limit of those damages, in my opinion, is the difference between the market value of the shares and the market value of the notes obtained for them at the time the receivers permitted the shares to pass from their possession and control as directors of the bank.

PHILIPS, District Judge. I concur in the concurring opinion herein of Judge SANBORN in the following particulars: In respect of the cause of action based on the distribution of the stock dividend in 1890, I hold that the three-years statute of limitation applies, for the reason that the only trusts which are not reached or affected by the statute of limitations are such technical and continuing trusts as belong to the exclusive jurisdiction of courts of equity and are not cognizable at law. *Keeton's Heirs v. Keeton's Adm'r*, 20 Mo. 530. I also concur in the view of Judge SANBORN respecting the measure of damages resulting from the disposition of the shares of increased capital stock of the bank. I concur in the view expressed by Judge THAYER respecting the Quapaw Mills transaction, with the qualification that it is based on the averments of the bill, whereby it is made to appear that the directors of the bank acquired and conducted this property as an independent speculation rather than as a means, according to the best judgment of the directors, of securing an indebtedness to the bank. If this property in fact was taken by the directors solely for the purpose of enabling the bank ultimately to secure the debt owing to it, and in the progress of its operation and management it became necessary, in the honest judgment of the directors, to advance the money to enable the mill to be successfully operated, so as ultimately to work out the best interests of the bank in the property, I do not think the directors should be held liable for bad judgment in the transaction.

## CONTINENTAL NAT. BANK v. HEILMAN et al.

(Circuit Court of Appeals, Seventh Circuit. April 4, 1898.)

No. 451.

## 1. LACHES—LIMITATION OF ACTIONS.

The proviso in Rev. St. Ind. 1894, § 2597 (Rev. St. 1881, § 2442), permitting suits to be brought against heirs, devisees, and distributees of a decedent within two years after final settlement, by any creditor out of the state, does not prevent a federal court from applying the bar of laches resulting from delay within the statutory time. 81 Fed. 36, affirmed.

## SAME — FAILURE TO PRESENT CLAIM AGAINST ESTATE — DEPRECIATION OF COLLATERAL.

When one who claims to be a creditor of a deceased person neglects for more than three years to present his claim, or to bring suit upon the demand, of which the representatives of the decedent are ignorant, and in that time the collateral securities held for the claim depreciate from more than its amount to much less, and the joint maker of the note has become insolvent, the creditor is guilty of inexcusable laches, which bar him from proceeding in equity against the devisees of the decedent: 81 Fed. 36, affirmed.

Appeal from the Circuit Court of the United States for the District of Indiana.

Addison C. Harris, for appellant.

C. A. De Bruler and Chas. W. Smith, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The bill in this case was brought against the widow and children of William Heilman, deceased, to charge them, as legatees or devisees, with the amount due upon a promissory note for \$100,000 alleged to have been executed by the deceased, jointly with David J. Mackey, to the appellant, the Continental National Bank. Alfred W. Emory was made a party defendant because he holds property left by the deceased as the trustee for the other defendants. Mackey was also made a party, but was let out on his demurrer to the bill. Issue was joined upon voluminous answers, of which no statement is necessary. The equity of the case was found to be with the defendants, on different grounds stated in the opinion of the court (Bank v. Heilman, 81 Fed. 36), and a decree was entered dismissing the bill. Other questions aside, the last ground stated, that under the circumstances the failure to present a claim to the executor for allowance or rejection during the course of the administration of the estate was a bar to a suit in equity, commands our approval. The contention of the appellant is that the right to compel payment by heirs or devisees of a debt of the deceased is in Indiana a purely statutory right, which will be enforced by the federal courts in accordance with the terms of the statute which creates the right, and that by the statute a creditor out of the state for six months before the final settlement of the estate may bring suit within two years after such settlement. Rev. St. 1894, § 2597 (Rev. St. 1881, § 2442). The statute reads:

"The heirs, devisees and distributees of a decedent shall be liable to the extent of the property received by them from such decedent's estate to any creditor whose claim remains unpaid, who six months prior to such final settlement,

was insane, an infant, or out of the state, but such suit must be brought within one year after the disability is removed: provided that such suit upon the claim of any creditor out of the state must be brought within two years after such final settlement."

Whether the supreme court of Indiana has regarded this provision as creative, or simply declarative, of a right which existed in equity, and would be enforced by the courts of the state if there were no such enactment, is not left clear by the court's decisions and dicta touching the point. In *Stevens v. Tucker*, 87 Ind. 109, where the plaintiffs had not been "insane, an infant, or out of the state," the cause of action had arisen after, and, the possibility of its arising being unknown, it could not have been presented to the administrator before, the settlement of the estate. The court, after reviewing its earlier decisions, said:

"It is plain that their action is not founded upon any statute. \* \* \* But are they, though their claim is thus meritorious, without remedy? \* \* \* It need not be said that it is beyond the power of the legislature to deprive the appellees of all remedy, but it may well be presumed that it was not intended by the legislature, in the enactment of the statutory provisions under discussion, to deprive any one of a well-founded right by forbidding a remedy therefor."

In *Fisher v. Tuller*, 122 Ind. 31, 23 N. E. 523, the plaintiff had been "out of the state," but the suit was not brought within two years after the final settlement of the debtor's estate; and in disposing of the case the court said:

"The right of the appellant to prosecute an action against the appellee is statutory. \* \* \* We can see no escape from the plain language of this statute. \* \* \* The statute which gives the right contains its own limitations, and we can ingraft no exceptions upon it. \* \* \* If there were a common-law right to hold the heir liable for the debts of an ancestor, there might be some plausibility in appellant's argument, but there is no such common-law right. *Woerner, Adm'n*, § 574. The appellant must therefore take the statutory right as it is bestowed, for he has no other."

No reference was made to the earlier cases, and it is contended, with at least apparent plausibility, that what was said in respect to the right of action being purely statutory was unnecessary, since, whatever its character, the action was barred because not brought within the two years prescribed by the statute.

In *Stults v. Forst*, 135 Ind. 297-307, 34 N. E. 1125, is to be found this language:

"We do not say that there may not be cases where equity would interfere in favor of a claim brought after the settlement of an estate, even if the claimant were not authorized by the statute to bring suit against the heirs or devisees."

In the still later case of *Bank v. Culbertson* (Ind. Sup.) 45 N. E. 657, the right to enforce "the liability of the decedent against his property after his estate is settled" was again said not to exist except by statute; but it is stated in the brief for appellee that the question had not been argued, and in the opinion on a petition for rehearing (47 N. E. 13) the court said that, if in such cases the creditor had a right to sue in equity, "the right of appeal [which seems to have been the sole question in the case] would nevertheless be subject to the provisions of the statute."

In *Yoast v. Willis*, 9 Ind. 548, the statute under consideration was characterized as a "statute of limitations"; and if that had been con-



stantly recognized as its dominant characteristic, the first clause being regarded simply as a definition of a recognized right, upon the enforcement of which it was proposed by the following clauses to impose limitations, the apparent inconsistencies of expression in the opinions referred to would probably not have occurred. To say the least, it cannot be doubted, as suggested in *Stults v. Forst*, *supra*, that, if there were no statute in Indiana authorizing suits against heirs, the right to relief in equity, in proper cases, would be recognized by the courts of the state. "The law is well settled in this state," it was said in *Rinard v. West*, 92 Ind. 359, "that the creditor of a decedent's estate must proceed to enforce his claim against the estate through an executor or administrator, and cannot sue heirs, devisees, and legatees, where there has been no executor or administrator; nor can he maintain a suit against them, where there has been an executor or administrator, without showing a valid excuse for not proceeding against the decedent's estate before its final settlement." It is true, in a strict sense, that the right to sue the heir of a deceased debtor did not exist at common law; but the right in equity to enforce payment of the debt out of the personal property of the ancestor, which had come into possession of the heir, seems to have been recognized long before devisees were declared liable by the statute of 3 Wm. & M. Story, Eq. Pl. § 106; 1 Spence, Eq. Jur. 191; *Williams v. Gibbes*, 17 How. 238, and authorities there cited. In *People v. Brooks*, 123 Ill. 246, 14 N. E. 39, to which reference has been made, the action was one of debt, and the discussion necessarily was confined to liability at common law and by the statutes of Illinois. Whatever may be said of the origin of the jurisdiction in question, it is settled beyond dispute that the national courts of equity possess it, and the principles on which they exercise it have been well defined. *Williams v. Gibbes*, *supra*; *Board of Public Works v. Columbia College*, 17 Wall. 521; *Borer v. Chapman*, 119 U. S. 587, 7 Sup. Ct. 342; *Chewett v. Moran*, 17 Fed. 820; *Woerner, Adm'n*, p. 1269; *Beach*, Mod. Eq. Jur. §§ 1039, 1040. While in this as in other respects the jurisdiction of the federal courts, and the methods and principles upon which it is exercised, are not to be affected by the legislation of a state, the right of a state legislature to fix a time within which relief may be sought has been recognized. *Morgan v. Hamlet*, 113 U. S. 449, 5 Sup. Ct. 583. The provision of the Indiana statute that the suit of a creditor out of the state must be brought within two years after final settlement of the estate would therefore, like any other statute of limitation which allows reasonable time for the bringing of suit, be recognized by all courts as valid; but, like other such statutes, it will not be deemed to give a right to sue within the time limited, regardless of laches or other considerations which would make the suit, when brought, inequitable. This statute does not say that the suit may be, but that it must be, brought within the time specified; and it would not follow, even if the right to sue depended solely on the statute, that the doctrine of laches should not be applied to defeat a suit which had been needlessly delayed, to the injury of those against whom relief was sought. That the appellant in this case had been guilty of inexcusable laches, either in not presenting its claim to the executor during the course of administration

of the estate, or in not bringing suit upon the demand in the federal court, as it might have done pending administration, the evidence leaves no question. Besides the very great depreciation of the collaterals which the bank held, exceeding in original value more than the amount of the note, and the changes in their modes of living which the heirs and legatees may be presumed to have adopted in ignorance of so large a demand against the estate,—a consideration of great importance under supposable circumstances,—it is averred in the bill that Mackey, the joint maker of the note, had become totally insolvent, and, the contrary not being shown, the presumption is that the right to compel contribution by him, which but for the delay would have been valuable, had been made worthless. The decree of the circuit court is therefore affirmed.

CENTRAL TRUST CO. et al. v. CONTINENTAL TRUST CO. OF CITY  
OF NEW YORK et al.

(Circuit Court of Appeals, Eighth Circuit. April 4, 1898.)

No. 1,008.

**1. ASSIGNMENT OF ERRORS—INCORPORATING IN PETITION—SEPARATE FILING.**

Where plaintiff in error incorporates the errors complained of into the petition for appeal, and the petition is then filed with the clerk, the assignment of errors is "filed with his petition," as required by rule 11 (21 C. C. A. cxii., 78 Fed. cxii.).

**2. SAME—VARIOUS ERRORS—A SINGLE PROPOSITION—SEPARATE ASSIGNMENTS.**

Where various errors are complained of, presenting a single proposition of law common to all of them, they need not be separately stated as so many distinct propositions.

**3. PARTIES TO APPEAL—CORRECTING RECORD.**

One who joins in the petition for appeal, though not in the appeal bond, which is executed by his co-appellant, is a party to the appeal; and if, by oversight of the clerk, his name is omitted from the printed record, the error may be corrected by the clerk.

**4. APPEAL DURING TERM—CITATION.**

When an appeal is taken and perfected during the term at which the decree is rendered, no citation is necessary.

**5. RAILROAD RECEIVERSHIP—ADOPTION OF LEASE—LIABILITY FOR RENT.**

Where a railroad is in the hands of a receiver to be operated, if, after due investigation, the receiver decides that a lease of a portion of the line is indispensable to the successful operation of the road, and the court, on consideration, so determines, notifies the lessor, and continues the possession under the lease, such acts constitute an adoption of the lease, and carry with it the obligation to pay the rent therein stipulated.

**6. SAME—RENT AS OPERATING EXPENSE—PREFERENTIAL LIEN.**

When a lease of part of a line of railroad has been adopted by the receiver and court, the rent should be paid as an operating expense; and, where the receiver has been unable to procure money for its payment, it is proper, on final decree, to declare the unpaid rentals a first lien on the property, and direct that the same, with interest, be paid out of the proceeds of the sale, as a preferential lien.

**Appeal from the Circuit Court of the United States for the District of Colorado.**

The Colorado Midland Railway Company was organized under the statutes of Colorado in 1883. It constructed a railroad from Colorado Springs, Colo., running in a westerly direction, via Leadville, across the summit of the mountain known as "Hagerman Pass," to Glenwood Springs, Colo. From a station

known as "Busk," on the eastern side of the ascent to the pass, this road was constructed through the pass to a station on the western descent known as "Ivanhoe." The distance between these two points was 9.8 miles. This pass attained a very high elevation, and, on account of tunnels and trestleworks, was very difficult and expensive of operation. In 1888 the Aspen Short-Line Railway Company was constructed on the west side of this mountain slope, connecting with the Colorado Midland Railway, and running to the town of Aspen. In 1893 these two roads were consolidated as the Colorado Midland Railroad Company; the Midland road succeeding to all the rights and liabilities of the two companies. On account of the hazards and difficulties in operating the railroad over said pass from Busk to Ivanhoe, the practical owners of the railroad conceived the project of running a tunnel through the mountain from Busk to Ivanhoe, a distance of about 2.9 miles. To this end they organized a corporation, under the laws of Colorado, known as the Busk Tunnel Railway Company. In order to raise the necessary money for the construction of this tunnel, the Busk Tunnel Railway Company (hereinafter, for convenience, called the "Tunnel Company") gave a mortgage deed on the 17th day of June, 1890, to the appellee the Continental Trust Company of the City of New York (hereinafter called the "Continental Trust Company") to secure 1,500 of its bonds, of the par value of \$1,000 each, with interest at the rate of 7 per cent. per annum. Contemporaneously with the execution of this mortgage, the Tunnel Company, as party of the first part, the said Midland Railway Company, as party of the second part, and appellee the Continental Trust Company, as party of the third part, entered into a written contract respecting the use of the tunnel, when completed, by the said Midland Railroad Company. It stipulated, inter alia, that the Midland Company should use the tunnel on the payment monthly to the trustee, the Continental Trust Company, of 25 cents for each passenger transported through the tunnel, and 25 cents for each ton of freight so transported, which money the trustee was to apply to the payment of taxes, to interest upon said bonds, and the payment of such sums as might be necessary to enable the Tunnel Company to perform its covenants in said mortgage, and to the payment of a sum not exceeding \$5,000 in any one year to the board of directors of the Tunnel Company, and also to the payment of such sums as should be required to maintain the tunnel in good order and repair, and to provide a sinking fund for said bonds. The contract required that all passenger and freight cars over said railway company should pass through said tunnel. This was followed on the 19th of June, 1890, by a contract of lease between the Tunnel Company, as lessor, party of the first part, the Colorado Midland Railroad Company, as lessee, party of the second part, and appellee the Continental Trust Company, as party of the third part, running from July 1, 1892, to July, 1935, subject to the conditions of the mortgage and of the agreement of June 17, 1890. Among other things, the Midland Railway Company agreed to take possession of and operate said tunnel road, subject to the conditions of the lease, and to pay all the taxes upon the property, premiums of insurance upon the buildings, interest upon the bonds of the Tunnel Company secured by said mortgage, the amounts necessary for the creation of said sinking fund, and on or about the 1st of July in each year to pay to the Tunnel Company or the Continental Trust Company a sum not exceeding \$5,000 for meeting the administration expenses of the Tunnel Company; and the said Midland Railway Company further assumed the performance of the conditions of the said deed of trust, and agreed to maintain the tunnel in good order during the existence of the lease. The contract of lease gave to the Continental Trust Company the right to enforce the covenants of the lease, either by suit in equity or at law, or by entry upon the premises. It further provided that the trackage agreement of June 17, 1890, should not be deemed to be merged in the lease; and the railway company thereby assumed the observance and performance of the undertakings of the Tunnel Company in the agreement of June 17, 1890. Upon the completion of the tunnel, in the latter part of 1893, the Midland Railroad Company, under said agreement of lease, took possession of, and continued to use, said tunnel; abandoning the use of its track through said Hagerman Pass, between Busk and Ivanhoe.

In 1886 said Midland Railway Company executed to the appellant the Central Trust Company a mortgage to secure its first mortgage bonds to the amount

of \$6,250,000; and on January 2, 1890, it executed to said Central Trust Company a second mortgage on the consolidated road to secure its consolidated mortgage bonds to the amount of \$6,000,000. On the 2d day of February, 1894, the said Central Trust Company, as trustee, filed in the circuit court of the United States for the district of Colorado its bill of foreclosure on the second mortgage bonds, on default of the Midland Railway Company to pay its interest; praying for the appointment of receivers to take charge of and operate said road pendente lite. This bill asked that said receivers be appointed to take charge of said Midland Railroad Company, its rolling stock, franchises, and property, real, personal, and mixed, belonging to said company "either as owner, lessee, tenant, or otherwise." Thereupon the court appointed as such receivers Messrs. Reinhart, McCook, and Wilson, who were at that time the receivers of the Atchison, Topeka & Santa Fé Railroad Company, which was operating the Midland Railroad Company under a conventional arrangement between the two roads. The court made the customary order of injunction, restraining all persons from taking possession of or interfering with said property, and specifically directing the receivers to take possession of all the property described or referred to, "and to continue the operation of said railroad and system, and every part and portion thereof, and to run, manage, and operate the said railroads, and such other railroads as said defendant railway company holds, controls, or operates under lease, contract, arrangement, or otherwise, and as heretofore run and operated." And it further authorized the receivers to operate "said system of railroads so under lease, or operated or controlled by, or in the interest of, said Colorado Midland Railroad Company, \* \* \* in such a manner as will, in their judgment, produce the most satisfactory results," etc. On October 11, 1894, the receivers filed a petition in the foreclosure proceedings, which recited, in substance, that by using said tunnel railroad the Midland Railroad Company was enabled to avoid the heavy grades and severe curvatures through Hagerman Pass, and to escape the deep snows incident thereto, and that by using the tunnel they were "enabled to greatly reduce the expense of operating between said stations," and that in their judgment they should continue to use said tunnel. They also stated that that portion of the Midland Railroad running from the summit as aforesaid between Busk and Ivanhoe had "become wholly useless, and no longer necessary in the operation of the railroad; that in consequence of such disuse the portion abandoned as aforesaid was greatly out of repair, and by reason of the action of the elements would soon be unsafe to move trains over" the same, —and prayed for authority to remove the rails and other movable structure or property from said abandoned portion of the line, as the property so removed could be profitably used upon other portions of the Midland Railroad. The Central Trust Company appeared to this petition, and filed answer, stating, in substance, that it represented the bondholders of the Midland Railroad Company, some of whom objected to the proposed abandonment of the track over the summit of said mountain, and to the dismantling thereof, while some of the holders of the consolidated mortgage bonds were favorable thereto, and, declining to consent, asked the court to institute inquiry into the advisability of the proposed action, and for its order in the premises. Judge Caldwell, the circuit judge who had in special charge the conduct of administration of this receivership, without referring the matter to a master for report, upon consideration granted the prayer of this petition, and authorized the removal of the property from the abandoned line, which was accordingly done. On the 11th day of February, 1895, the appellee the Continental Trust Company filed an intervening petition in said foreclosure proceeding; setting out the substance of the provisions of said contract of June 17, 1890, the lease of June 19, 1890, and the mortgage of the Tunnel Company to said appellee. This petition alleged default in the payment of interest coupons upon said bonds of the Tunnel Company which had matured on the 1st day of July, 1894, and the 1st day of January, 1895, and that the receivers had failed to pay same under said order of February 2, 1894, respecting the payment of trackage service of other railroads, and prayed for an order of the court directing the receivers "to carry out and perform said mortgage agreement, said trackage agreement, and said contract of lease, and to pay, as an operating charge of the said Colorado Midland Railroad Company, the defaulted and overdue interest coupons of the Tunnel Company mortgage bonds aforesaid, and the interest on said bonds hereafter to accrue." To this petition

the receivers appeared and answered, admitting the allegations of the petition, and united with the Continental Trust Company in the prayer of said petition; asking that an order granting them leave to borrow money with which to pay the tunnel rentals be made. The Central Trust Company also appeared, and made answer to this intervening petition, and, among other things, stated that some of the holders of said consolidated bonds were also holders of the tunnel bonds, and that there was among the holders of the consolidated bonds a difference of opinion as to whether this petition should be granted, and the interest of the tunnel bonds should be made an operating charge, as prayed for, and asked for an inquiry into the truth of the allegations of the petition, and upon the coming in of the report of the master, or on such hearing as the court might direct, such order be made as to the court seemed just.

Judge Caldwell, without referring the matter to a master, considered the facts, and on the 11th day of February, 1895, entered a decree, the essential portions of which are as follows: "Ordered, adjudged, and decreed that said receivers are hereby authorized and directed to carry out and perform the trackage agreement of the 17th of June, and the agreement of lease of the 19th of June, 1890, executed between the Busk Tunnel Railway Company, the Colorado Midland Railway Company, and the Continental Trust Company of the City of New York, trustee, and to pay, as an operating charge of said Colorado Midland Railroad Company, the rentals and interest charges provided for in said agreements, including all defaulted or overdue interest coupons of the bonds of said Busk Tunnel Railway Company; said bonds bearing date of 1st day of July, 1890, and payable on the 1st day of July, 1935, for the principal sum of one million five hundred thousand dollars (\$1,500,000), with interest at the rate of seven per cent. per annum, payable semiannually. And it is further ordered that the said receivers be, and they hereby are, authorized to borrow, upon the best terms they may be able to secure, such sum or sums of money as may be necessary to make such payments, and upon such loans so made for the purpose aforesaid they are hereby authorized to issue and deliver to the party or parties, bank or banks, corporation or corporations, from whom they may borrow such money or sums of money, their obligations as receivers of the Colorado Midland Railroad, bearing not more than six per cent. interest per annum, in such form and for such time or times as may seem best to them for the interest of their trust; and they are hereby authorized from time to time to renew said loans as they may become due, if they are unable to make payment thereof, and, in case they are not able to renew the same with the parties from whom such loans may be procured, they are hereby authorized to borrow from others such sums, on like terms, as may be necessary to take up such obligations as they mature." The interest on the tunnel bonds which fell due July 1, 1894, and January 1, 1895, was paid by the receivers in pursuance of this order, conformably to the requirements of the trackage agreement and lease. The said named receivers having been succeeded, under order of court, by one Ristine, as receiver, the latter receiver, under the order last aforesaid, paid said interest falling due July 1, 1895, and January 1, 1896.

On the 11th day of March, 1895, the appellant the Central Trust Company instituted a further suit in said court for the foreclosure of the first mortgage of the Colorado Midland Railway Company; alleging default in the payment of interest. The bill prayed for the appointment of a receiver for said railroad company for all its property belonging to it "either as owner, lessee, tenant, or otherwise." Whereupon the court appointed the same receivers as theretofore, under like order and direction. On the 16th day of April, 1895, said receivers petitioned the court for authority to borrow money to pay said rental; reciting the intervening petition aforesaid of the appellee on the 6th day of February, 1895, and the order aforesaid made thereon by the court, and their inability to pay same out of the income of the road, and asking permission to issue receivers' certificates which might create a preferential lien upon said property. To this petition the Central Trust Company made answer, admitting the allegations contained in the petition to be true, and further stated "that a committee representing a large majority of the first mortgage bonds, and a large amount, if not a majority, of the second mortgage bonds, has instructed complainant that it is not advisable to oppose the granting of the order prayed for," and submitted itself to the judgment of the court. On May 2, 1895, the court made an order

consolidating the foreclosure proceedings in said two cases, and thereupon, in the consolidated cases, recited the resignation of the original receivers, and appointed George W. Ristine as sole receiver; and in this same connection the court ordered that all obligations entered into by the former receivers under orders of the court, and all their contracts and liabilities incurred in the operation of said railroad, were confirmed, and their observance and execution were imposed upon said Ristine. On the 3d day of November, 1896, the Central Trust Company filed an amended and supplemental bill of complaint in the consolidated cases, setting forth as among the leasehold interests embraced in the mortgaged property the said lease of the Tunnel Company, and alleged that "the said defendant and the receivers appointed herein have ever since said last-mentioned date (December 16, 1893) continued to hold, use, and enjoy the same under and in pursuance of the terms of said lease." This amended bill further alleged "that the said road leased from said Tunnel Railway Company connects the road of the said defendant on the eastern side of the range of mountains, at a station called 'Busk,' with its road on the western side of said range of mountains, at a station called 'Ivanhoe,' and that the defendant has no means of operating its trains between said points of Busk and Ivanhoe, except over said road of the said Busk Tunnel Railway Company." The object of this supplemental bill was to subject to the lien of the mortgages these leasehold estates; and further on it alleged that this Tunnel Railway Company was "absolutely necessary to the proper, profitable, and successful operation of the railways and railway property owned by said defendant company." The bill prayed that this mortgage deed be declared a primary lien upon all the properties acquired by, under, and through said leases, and that the consolidated mortgage be decreed a lien, subject only to the prior lien of the mortgage.

On July 3, 1896, the receiver, Ristine, presented his petition to the court, asking to be relieved from the payment of the interest upon the tunnel bonds which fell due July 1, 1896, upon the ground that he was unable to obtain the money with which to pay said interest. Like action was taken after default in payment of interest of January 1, 1897. None of the parties in interest had notice, or appeared to the petitions. The court, however, made the order suspending payment of this interest until further order of the court. In this condition of affairs, on May 4, 1897, a final decree of foreclosure was rendered in the consolidated cases. This decree, among other things, recited that the said mortgages were a lien upon all the property and franchises specified in the mortgages and the bill of complaint, including the lease of the Tunnel Company, and directed that the railroad properties be sold as one property, as constituting one system, incapable of severance without injury to the rights of the parties concerned. Upon learning of the action of the court in authorizing the receiver to suspend payment of said rentals until further order of the court, and of the final decree of foreclosure, the Continental Trust Company, on the 19th day of May, 1897, with leave of court, filed a further intervening petition in the consolidated cause, reciting the history of the trackage agreement and the contract of lease, and the taking possession of said tunnel track by the Midland Railroad Company and the receivers, and the said order of the court of February 11, 1895, directing the performance of said trackage agreement and said lease by the receiver, and directing him to pay the interest on the tunnel bonds as of the operating expenses of the road by the receiver, and a failure of the receiver to pay the accrued interest of July 1, 1896, and January 1, 1897, and the said orders of court suspending the payment thereof, and the final decree of foreclosure. The intervener alleged its ignorance of said orders of suspension and the entering of the final decree until after the date of the final decree. The intervening petitioner prayed the court for an order postponing the foreclosure sale, that the orders suspending the payment of interest upon the tunnel bonds be modified or reformed, as also the decree of foreclosure, in order to protect the trust committed to the petitioner, and for an order directing the receiver to pay said defaulted interest, and for all interest accruing during the time the receiver should continue in possession of the property, and that the same be declared an operating charge of the receivership, and further that, upon the failure of the receiver to pay same, said rentals be made a charge and lien upon the corpus of the Midland Railroad, preferable to said mortgages, to be paid out of the proceeds of the sale of the property. To this petition the receiver, the Central

Trust Company, and the railroad company appeared and filed answer. As only the matters stated in the answer of the Central Trust Company are in issue, it is only necessary to refer to the substantive matters set up by it. This answer, among other things, pleaded that it was in no wise connected with, nor consented to, the giving of the mortgage of the Tunnel Company, or to the making of said trackage agreement and lease, nor were any of the bondholders parties thereto. The answer then reiterated the substance of its answer made to the petition upon which the order of February 11, 1895, was made, and charged that, notwithstanding its request that a hearing be had upon said petition, none was had, and the order was made alone upon the allegations of the petition, and the answer of the receiver. It then alleged that the trackage agreement and contract of lease of June 17 and 19, 1890, were unfair, and inequitable in their terms, to the Midland Railroad Company, and ought not to be enforced against the receiver or the trustee, the Central Trust Company. It then alleged that, at the time of the execution of the first and second mortgages by the Midland Railroad Company, it operated its road between Busk and Ivanhoe over said Hagerman Pass, and that this portion of the road formed a valuable part of the security for said bonds; that the discontinuance of said road through Hagerman Pass was without the request or consent of the complainant or the bondholders; that the petition aforesaid of the receiver to the court for leave to abandon the said road over the summit of the mountain, and to remove the rails and superstructures thereon, as heretofore stated, was objected to by the complainant as the destruction or impairment of the security of said mortgages, but, as some of the holders of the consolidated bonds were of opinion that it was better to run the road through the tunnel, it had asked the court, as hereinbefore stated, to have the matter investigated by a master, which inquiry the court had refused to make, and, without hearing, had authorized the receiver to dismantle said portion of the road; that by reason thereof the security given in said mortgages was greatly depreciated. The answer further alleged that the representations made by the receiver and the Midland Railroad Company and its agents, that it was greatly to the interest of the railroad and bondholders that, in lieu of operating the road over the summit of the mountain, the road should be run through the tunnel, whereby the cost of operation would be lessened, etc., induced the bondholders to rely thereon, and failed to instruct the complainant to prevent the Midland Company from using and operating the tunnel railway, and that the Central Trust Company was thereby induced to take no other action than that specified in its answer to the petition for the abandonment of the line over the summit of the mountain. The answer then alleged that these representations of the receiver and others respecting the advantage of operating the road through the tunnel were not true, and that by reason of this change great loss had come to the parties in interest. The answer then averred the belief of the complainant that it would be more advantageous to the trust estate to rehabilitate and operate the road from Busk to Ivanhoe over the original track, than to maintain and operate the tunnel line under the contract and lease. It was then alleged that the receivers had already paid on this tunnel contract, for interest, \$175,000; that said sum was excessive and unjust; that the earnings of the trust estate were insufficient to enable the receiver to pay the interest accruing upon the tunnel bonds. Wherefore the complainant prayed that the order of February 11, 1895, be set aside; that a reference to the master be had, or hearing before the court, to determine what amount, if any, should be paid for the use of the tunnel railway during the receivership. The receiver, Ristine, in his answer, stated it as his opinion that the contract between the Midland Railroad Company and the Tunnel Company was improvident, and that it was not to the interest of the Midland Railroad Company to continue it, and that it was the wiser policy to rehabilitate the abandoned track over the mountain, and to abandon the tunnel track. To the answer of the Central Trust Company, the Continental Trust Company filed exceptions. These exceptions were mainly sustained by the court. And thereupon the court made its order and decree sustaining the intervening petition of the Continental Trust Company, reaffirming the order of February 11, 1895, declaring it in force during the pendency of the receivership, and directed the receiver to pay, as an operating charge of the receivership, the rentals provided for in the trackage agreement and the lease during the continuance of the pos-

session of said road by the receiver, with interest thereon at the rate of 6 per cent. from its maturity, and also decreed that, in the event of the receiver's failure to pay same, such unpaid rentals and interest and costs of intervention should be a lien upon the mortgaged property, and, upon sale under foreclosure, the same should be paid out of the proceeds thereof in preference to either of said mortgages. From the action of the court in sustaining said exceptions, and declaring the unpaid rentals and interest aforesaid to be an operating expense of the receivership, and a first lien on the mortgaged premises, the Central Trust Company prosecutes this appeal.

Henry T. Rogers (Wm. Allen Butler, John Notman, Adrian H. Joline, Wilhelmus Mynderse, Lucius M. Cuthbert, and Daniel B. Ellis, on brief), for appellants.

Charles W. Waterman (Edward O. Wolcott, Joel F. Vaile, and Frederic J. Stimson, on brief), for appellee Continental Trust Co. of City of New York.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

The first matter for consideration is the motion filed by the appellee the Continental Trust Company to dismiss the appeal for the reasons—first, that there is no proper assignment of errors filed in this cause; second, because the record does not show a joint appeal of the Central Trust Company and the receiver, George W. Ristine; and, third, because there was no citation issued against the receiver, Ristine. The only assignment of errors is found in the petition for appeal. After reciting the decree, whereby the court declared the rental interest on account of the tunnel track to be a primary lien upon the corpus of the property, this petition stated as follows:

"In which order or decree the said complainant and the said receiver say that there was error, in this, to wit: that the court erred in sustaining those certain exceptions of the intervener the Continental Trust Company, filed herein, to those certain respective answers of the said complainant the Central Trust Company and the said receiver, filed herein, and in making and entering said order or decree."

Rule 11 of this court (21 C. C. A. cxii., 78 Fed. cxii.) requires that:

"The plaintiff in error, or appellant, shall file with the clerk of the court below, with his petition for writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged."

Having regard to substance, rather than mere form, it certainly is of no consequence that the assignment of errors is contained in the petition for appeal, instead of being expressed in a separate paper. When the errors are incorporated into the petition for appeal, and the petition is then filed with the clerk, the assignment of errors is necessarily filed with the petition.

It is further objected that the specification of errors is too general and indefinite. The object of the rule in requiring the errors relied upon to be separately and particularly asserted is to enable the court to understand what questions it is called upon to decide, so it may not have to go beyond the assignment of errors itself to discover the blot, and also that the exceptor may be confined to the objections actually



taken below. *Van Gunden v. Iron Co.*, 3 C. C. A. 294, 52 Fed. 840. Where various errors are relied on, presenting different propositions, they should be separately and distinctly set forth; but where the errors complained of present a single proposition of law, common to all of them, there can be no reasonable objection to assigning error to the group, as was done in this case. *Andrews v. Pipe Works*, 22 C. C. A. 110, 76 Fed. 170, 171. The errors complained of in this assignment go solely to the action of the circuit court in overruling the exceptions to the complainant's answer, and to the final decree, whereby the court ruled that the unpaid interest which represented the rental of the tunnel track should be a lien upon the mortgaged property, to be paid in preference to the mortgage debts. In view of the fact that the court sustained all of the exceptions made to the answer, and the principle of law arising thereon is common to each portion of the answer ruled out, and to the decree as above stated, involving, in effect, but one question, the assignment of errors is reasonably specific.

Neither is the objection good that the receiver is not a party to this appeal. He joined in the petition for appeal, and the appeal was granted by the court, although he did not join in executing the appeal bond. The bond, however, was executed by the co-appellant, under order of the court, and was accepted by the court. This was sufficient to perfect the appeal. *Brockett v. Brockett*, 2 How. 238; 2 Beach, Mod. Eq. Prac. § 958. It seems that in the printed record the name of the receiver as a party to the appeal was omitted by an oversight of the clerk. This was corrected by the clerk, as was not only permissible, but proper, in order to make the mere clerical work conform to the true record.

In respect to the objection that no citation on the appeal was issued to the receiver, it is sufficient to say that, as the appeal was taken and perfected in open court during the term at which the decree was rendered, no citation was necessary. *Dodge v. Knowles*, 114 U. S. 436, 438, 5 Sup. Ct. 1108, 1197; *Hewitt v. Filbert*, 116 U. S. 142, 6 Sup. Ct. 319; *Brown v. McConnell*, 124 U. S. 491, 8 Sup. Ct. 559. The motion to dismiss the appeal is overruled, at the costs of the appellee the Continental Trust Company.

This brings us to the consideration of the merits of the appeal. The statement of facts may seem to cover too much of mere detail, but it is deemed essential to a correct understanding of Judge Caldwell's various rulings.

It is to be conceded to appellant's contention that the mere order of the court directing the receivers to take charge of the property of the insolvent railroad, including its leased lines, and the taking possession thereof by the receivers, did not have the effect to either change the title to the property, or right of possession in the property. The receivers thereby became the mere custodians of the property for the court. "If the order of the court under which the receiver acts embraces the leasehold estate, it becomes his duty, of course, to take possession of it. But he does not, by taking such possession, become the assignee of the term, in any proper sense of the word. He holds that as he would hold any other personal property involved,—for and as the hand of the court, and not as assignee of the term." Gaither

v. Stockbridge, 67 Md. 224, 9 Atl. 632, and 10 Atl. 309, approved in Railroad Co. v. Humphreys, 145 U. S. 98, 12 Sup. Ct. 787. In respect to leased lines held by the insolvent railroad, the receiver is accorded a reasonable time in which to ascertain the value and importance of the lease, and to make his election as to whether he will surrender or adopt it; but if, after due investigation, the receiver decides that it is best not to sell or surrender the leasehold interest, because it is indispensable to the successful operation of the trust estate, and the court, on consideration, so determines, and notifies the lessor, and thereafter continues the possession, such acts would constitute an adoption of the lease, and, of consequence, carry with it the obligation of the receiver to pay according to the stipulations of the lease. Chief Justice Fuller, in Railroad Co. v. Humphreys, 145 U. S. 99, 12 Sup. Ct. 793, discussing this question, cited approvingly the language of Lord Justice Lindley in *Re Oak Pitts Colliery Co.*, 21 Ch. Div. 322, 330:

"If the liquidator has retained possession for the purpose of winding up, or if he has used the property for carrying on the company's business, or has kept the property in order to sell it, or to do the best he can with it, the landlord will be allowed to distrain for rent which has become due since the winding up. But if he has kept possession by arrangement with the landlord, and for his benefit, as well as for the benefit of the company, and there is no agreement with the liquidator that he shall pay rent, the landlord is not allowed to distrain. \* \* \* When the liquidator retains the property for the purpose of advantageously disposing of it, or when he continues to use it, the rent of it ought to be regarded as a debt contracted for the purpose of winding up the company, and ought to be paid in full, like any other debt or expense properly incurred by the liquidator for the same purpose; and in such a case it appears to us that the rent for the whole period during which the property is so retained or used ought to be paid in full, without reference to the amount which could be realized by a distress."

What does the record in this case disclose? When the receivers were appointed, the managing officers of the Midland Railroad Company had, for what they conceived to be the best interests of the road, made a trackage agreement and lease of the Tunnel Company, to run until 1935. They had abandoned the more perilous, and, as they supposed, more expensive, route, over the summit of the mountain between Busk and Ivanhoe, and were using instead thereof the tunnel track. Possession of the tunnel track was taken by the receivers under the order of court made pursuant to the prayer of the bill of foreclosure. So persuaded were the receivers, after due test, that it was to the interest of the estate to continue the use of the tunnel track, they presented to the court a petition stating that by reason of the abandonment of the summit track, and the exposure of the works to the severe storms and elements, the overhead passway had become impractical, and the property impaired, and therefore prayed for an order authorizing them to dismantle this track, and reuse the materials on other portions of the Midland road. While it cannot be said that the appellant assented to this proceeding, its objection was not to the continued use of the tunnel track, but it made only an advisory suggestion, that its constituents were undecided in opinion as to the advisability of removing the rails, etc., from the summit track. The court, on the hearing, granted the prayer of the receivers. The rails were accordingly removed, and presumptively appellant received the benefit thereof, in the

improvement of other portions of the mortgaged road. This action of the court was administrative in its character, addressed to the sound discretion and business judgment of the chancellor in the management of the estate, which this court could not now correct, as the injury, if any, is irreparable. *Mercantile Trust Co. v. Farmers' Loan & Trust Co.*, 49 U. S. App. 462, 26 C. C. A. 383, and 81 Fed. 254. If it was judicial in character, the complainant had its day in court, and failed to appeal from the order. The order was the complete determination of that subject-matter, and, when executed, the book was closed, as to the transaction. This was followed up by the trustee of the lessor intervening in the cause, claiming that its rentals had not been paid by the receivers, praying for an order directing the receivers "to carry out and perform such trackage and lease agreements." On this petition was based the decree of February 11, 1895, by which the court "authorized and directed [the receivers] to carry out and perform the trackage agreement of the 17th of June, and the agreement of lease of the 19th of June, 1890, and to pay as an operating charge of the said Colorado Midland Railroad Company the rentals and interest charges provided for in said agreements, including all defaulted or overdue interest coupons of the bonds of said Busk Tunnel Railway Company." If this was not, in effect, an adoption of the terms and obligations of the lease by the court, it must be held that nothing short of words such as "it is ordered that the lease is hereby adopted" would have the effect of an adoption. When the court, after holding the leased track one year, and being advised that it had become so far an integral part of the system that the main line could not well be operated without the leased track, ordered the receiver to carry out and perform the contract of lease, it not only did the act, but entered the apt order evidencing the adoption of the lease. Moreover, this appellant, thereafter, both by expression and implication, recognized the fact. In its supplemental amended bill it recited that the receivers held, used, and employed the tunnel track "under and in pursuance of the terms of said lease"; and, as showing its indispensability to the estate, it alleged that the main road "has no means of operating its trains between said points, Busk and Ivanhoe, except over said road of the said Busk Tunnel Railway Company." The continuity and operation of the main line being admitted by all the parties to the record to be dependent upon the leased track, coupled with the order of the court that the receivers carry out and perform the contract of lease, are the important things which distinguish this case from all those cited by the learned counsel in support of their contention that the receivership did not adopt the contract of lease. As the law implies the fact of adoption from the mere refusal of the court to surrender possession to the lessor on his application, how much more conclusive of an adoption when both the trustee and the receiver assert that the possession is indispensable to the estate, and the court not only retains possession, but orders the receiver to keep and perform the contract of lease! Having thus held the leased property, the chancellor, in good conscience, could not do less than he did in the order of February 11, 1895. In this view of the case, it is not essential to say that by the decree of February 11, 1895, the question of whether or not this rental became

an operating charge on the corpus of the property passed in rem judicatum. It is sufficient to say that the propriety and necessity of that order pertain so much, at least, to the administrative discretion in managing the estate, that, after all the parties have acted upon it, this court ought not to disturb it. *Mercantile Trust Co. v. Farmers' Loan & Trust Co.*, supra.

The only remaining important question is, was the final decree right, in giving a preferential lien for the unpaid rentals which accrued after January 1, 1896? By the order of February 11, 1895, the court had expressly recognized the rental fixed in the contract of lease as an operating expense. At no time thereafter did it notify the lessor or trustee of any recession from this position. It is no answer to this to say that the appellee never demanded possession of the leased property. The receivers and the court had declared that its possession and use were essential to the receivership, and the court had ordered the receivers to carry out and perform the contract. If the lessor was content with this arrangement, it was not essential to fix the adoption that he should go through the empty form of demanding that which the court and the parties had in fact said that they could not concede. Neither is it any answer to say that the complainant did not assent to said order, or that the court made it without reference to a master. The complainant was before the court, and the court was not required to make a reference. It was in possession of the facts, and the complainant offered no countervailing evidence. Neither is it any answer now to say that, inasmuch as the lessor was not able to put the property to any earning use had it been turned over to it, it is inequitable to the estate to charge it with the whole contract rental. If there is any justification in obtaining possession of another's property, as a dependent lease to an insolvent estate, and then saying to the owner that, although the receiver elected to hold it, he should not pay the rental stipulated in the lease, because the property would be comparatively useless if turned over to the owner, what is to be said of its value to the liquidator, who admitted he could not get along without the property? If the lease was adopted, the law fixed the rental specified in the lease as the amount of compensation to be rendered. Again, the complainant, after the order of February 11, 1895, recognized the fact that both the court and the receivers were holding this leased property on the assumption that the interest rental was to be an operating expense. When the receivers petitioned the court for leave to borrow money to pay this rental, by issuing preferential certificates, to be made a lien on the corpus of the property, the appellant answered that its constituents did not oppose. What matters it, therefore, that the receivership later on was brought into such straits that it could not obtain, even on such primary security, money enough to meet the interest under the leased contract, and that the court thereupon undertook to suspend further operation of the decree of February 11, 1895? This, in effect, was nothing more than a forced loan. As to the Tunnel Company and the trustee, the action was without notice, and ex parte. It was done at the instance of the receivers, to relieve them from the mandatory order which they were unable to execute. And as a dernier ressort, in so far as it could, the court suspended payment for a time,

subject to the further order of the court; evidently reserving the right to secure the payment thereafter in such method as might be within the compass of a court of equity. Had the claim been for fuel, equipments, or service essential to the operation of the road, which the court at one time directed the receivers to pay out of the money to be obtained on loans to be made a primary lien on the corpus of the property, but, by reason of the inability to effect such loan, the court had made a further order suspending until otherwise ordered, this in no degree would have lessened the equitable obligation, nor diminished the power of the court, in the final decree of foreclosure and distribution, to order a preference in favor of such claims. In the language of this court in *Mercantile Trust Co. v. Farmers' Loan & Trust Co.*, 49 U. S. App. 462, 26 C. C. A. 387, and 81 Fed. 258:

"If the court below properly accepted and adopted the leases, the rentals reserved under them became an integral part of the operating expenses of the trust estate in the hands of the receivers, the same as wages of hired men, the rent of leased engines or cars, the traffic balances due connecting roads, or any other ordinary expense of operation; and in this way claims of these rents secured preference in payment over those of all *cestuis que trustent* out of the proceeds of the railroads, as well as of their earnings during the receivership. The moneys expended and liabilities incurred by the receivers or trustees in the authorized operation, preservation, and management of the property entrusted to them constitute preferential claims upon the trust estate, which must be paid out of its proceeds before they can be distributed to the beneficiaries of the trust."

It is true that after July 1, 1896, the receiver, Ristine, expressed to the court the opinion that experience in operating the tunnel track under the terms of the lease had proven the impolicy, in an economic view, of abandoning the summit route between Busk and Ivanhoe, and recommended the rehabilitation of the abandoned track, and the surrender of the tunnel track. This, however, was not done during the operation of the road under the receivership, but, on the contrary, the retention and use of the tunnel track were continued to the end as theretofore. The receivers had no money to reconstruct the abandoned summit track, and this complainant did not offer to furnish it, nor did it make any application to the court to surrender the leased lines; but, on the contrary, it left unchanged its allegation in its latest supplemental bill "that the defendant has no means of operating its trains between Busk and Ivanhoe except over said road of said Busk Tunnel Railway Company." As the questions raised by the answer were answered by the law of the case, the exceptions thereto were properly sustained; and, as we find no error in the decree, the same is affirmed.

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POKEGAMA SUGAR-PINE LUMBER CO. v. KLAMATH RIVER LUMBER  
& IMPROVEMENT CO.

(Circuit Court, N. D. California. April 18, 1898.)

No. 12,578.

**I. RESTRAINING ORDER—MANDATORY IN EFFECT.**

Where sufficient grounds exist, a court of equity has the power to, and will, issue, on a preliminary application, a restraining order, though mandatory in effect and requiring affirmative action.

2. SAME.

Where the respondent, under claim of right, enters by force upon property in the possession and management of complainant, and drives him away, and assumes control of the same, an order restraining the respondent from interfering with complainant's management and control of such property will not be modified, though in its practical operation it is mandatory, and necessitates affirmative action on the part of the respondent in surrendering the possession he had thus attained.

This was a bill for injunction by the Pokegama Sugar-Pine Lumber Company against the Klamath River Lumber & Improvement Company. The cause was heard on a motion to modify the restraining order.

E. S. Pillsbury (F. D. Madison and James F. Farraher, of counsel), for complainant.

F. S. Stratton (S. C. Denson, W. W. Kaufmann, H. B. Gillis, and James R. Tapscott, of counsel), for respondent.

MORROW, Circuit Judge. It is alleged in the bill of complaint that the complainant is a corporation, organized under and by virtue of the laws of the state of California, for the purpose of carrying on a general lumbering business, operating mills, railroads, chutes, tramways, and all other structures, appurtenances, and appliances necessary and proper for the conduct of said business, and, as such corporation, has ever since the —— day of September, 1897, been engaged in carrying on a lumbering business in the county of Siskiyou, in this state; that the respondent is a corporation organized and existing under the laws of the state of Oregon, for the purpose of carrying on a general lumbering business, and, as such, has been engaged in doing business in the state of California, has acquired property in said state, and is now doing business therein; that on the 24th day of February, 1897, the respondent and one Hervy Lindley entered into an agreement in writing whereby the respondent agreed to lease to said Lindley, or his assigns, the entire lumber plant situated in Siskiyou county, Cal., and Klamath county, Or., consisting of pine lands, logging railway and equipments, log slide, all rights of way and franchises, and booms and improvements, in the Klamath river, sawmill and sawmill property, yard, tramways, switches, and all lands and appurtenances thereto belonging, planing mills, sheds, and lands connected therewith, office, barn, and all fixtures therewith connected, teams, wagons, harnesses, and in fact all appurtenances to respondent's lumber business either at Pokegama (Klamathon), or in the lumbering camps, or wherever located, as the property of the company, for the term of two years from and after the 30th day of March, 1897. The consideration for the lease was a certain division of the profits, and it was further provided that Hervy Lindley, or his assigns, should have the privilege of continuing the lease on the same terms to March 30, 1902, and this privilege was further extended to March 30, 1904. It was also provided that Lindley should have the right until March 30, 1897, to accept or reject the proposition contained in the agreement to lease; and, if accepted, the Klamath River Lumber & Improvement Company agreed to execute a lease in accordance with the terms of the agreement. The time for this acceptance by Lindley was extended to April 10,

1897, and prior to that date Lindley accepted the agreement; and accordingly, on April 7, 1897, the Klamath River Lumber & Improvement Company made, executed, and delivered to Lindley a lease for all the property described in the agreement of February 24, 1897. The bill further alleges that, upon the execution of this lease, Lindley signed and accepted the same, and entered into possession of the property, and immediately undertook its management and operation as a lumbering business; that, on the 15th day of September, 1897, Lindley sold, assigned, transferred, and made over, for a valuable consideration, to the complainant, the said instrument in writing, and all his right, title, and interest therein and thereunder, and thereupon complainant entered into the possession of all said property as the assignee and successor in interest of Lindley, and thereafter conducted, operated, and carried on the plant and lumbering business, pursuant to the terms of the lease, until the interference and interruptions described in the bill. The bill describes the lumbering plant and its appurtenances on the Klamath river, a log slide or chute on the river about 24 miles above the sawmill, and a railroad about 9 miles long, with rolling stock, used for the transportation of logs from the timber lands to the log slide or chute. It is alleged that between the 7th day of April, 1897, and the ——— day of February, 1898, Lindley and the complainant cut, and caused to be cut, 15,000,000 feet of logs, to be sawed at the sawmill during the sawing season of the year 1898; that about 4,500,000 feet were in the woods adjacent and contiguous to the railroad, about 6,000,000 feet alongside of the railroad, ready to be loaded upon the cars, and about 4,500,000 feet were in the Klamath river at Klamathon, and about 1,000,000 feet in the booms connected with the mill; that, in the cutting and preparing said logs for the mill, the complainant had expended more than \$50,000, and had also expended more than \$20,000 in equipping the mill, railroad, and other portions of the plant; that the sawing season for the year 1898 began on or about the ——— day of February, 1898, at which date complainant had the sawmill and plant in complete readiness for the sawing season; that on the ——— day of February, 1898, and in the nighttime, the respondent, acting by and through its president, J. R. Cook, and W. E. Cook and John S. Cook, as directors and agents of the respondent, violently and by force of arms entered into the said sawmill, drove the watchman of complainant out of the mill, and excluded the complainant therefrom by force and violence, and then proceeded to block up said mill, and in such manner as to prevent the use thereof, or the taking of logs from the booms or lumber from the yard, by barricading the openings of the mill; that, in forcibly taking and occupying said sawmill, the respondent employed not only its president, J. R. Cook, and its directors and agents, W. E. Cook and John S. Cook, but also from four to six fighting men, who entered into the mill in the nighttime, armed with shotguns and rifles, and drove the watchman of complainant therefrom by threats and violence, and have ever since remained therein, armed with shotguns, rifles, and ammunition, and have ever since, by force and threats and by the exhibition of firearms, excluded the complainant, its agents, representatives, and employes, from the mill, and prevented the use and occupation thereof by complainant; that the

acts and doings of respondent were not preceded by any peaceable entering upon the property, or any part thereof, or any attempt to make such entry, or any demand upon complainant for the possession of the same, or the privilege of entering thereon, or any complaint that Lindley or complainant had failed to keep or perform any of the covenants or conditions of the lease; that, on account of the violent and unlawful acts of respondent, the complainant has suffered great and irreparable injury by delay and interference in the prosecution of its lumbering business, and, unless respondent be enjoined and restrained from a continuance of its unlawful acts, complainant will suffer still greater and further irreparable damage and injury; that the season for floating logs down the Klamath river will expire on or about June 1, 1898; that the water in the river is unusually low for this time, and there is every reason to expect that the season for floating logs will be shorter during the current year than usual, and the water will thereafter be too low for successfully driving or floating logs; that, if the logs already cut are not hauled, taken to said sawmill, and sawed during the present logging season, they will deteriorate at least 50 per cent. in value, and, if not used in 1899, they will be a total loss; that the said sawmill is the only one available to complainant, and the only mill to which the logs can be delivered; that there is no sale for said logs and no use for the same except to be worked at said mill; that, by the wrongful acts and interferences of the respondent, the complainant has been, and is, subjected to a daily expense of \$100 or more, which is a dead loss to complainant; that respondent threatens to continue its interruptions and annoyances, and will continue the same, unless enjoined and restrained by this court; that the respondent is insolvent and wholly unable to respond in damages on account of the unlawful acts and injuries mentioned, and complainant has no plain, speedy, or adequate remedy at law against the wrongful acts of the respondent. The prayer of the bill is that an injunction may issue, restraining and enjoining the respondent, its successors, officers, attorneys, agents, and servants, and each and all of them, from in any manner interfering with, impeding, or hindering, and from causing to be interfered with, impeded, or hindered, the complainant in the occupation, conduct, transaction, and management of its lumbering business in the county of Siskiyou, state of California, and, in the meantime and until the hearing, the complainant may have an injunction pendente lite, embracing all the relief prayed for in the bill.

Upon the filing of the bill, on the 17th day of March, 1898, an order was issued requiring the respondent to show cause why an injunction pendente lite should not be granted, and, upon the complainant giving a bond in the sum of \$10,000, the respondent, its officers, attorneys, agents, and servants, were restrained, in the meantime, from in any manner interfering with, impeding, or hindering, and from causing to be interfered with, impeded, or hindered, the Pokagama Sugar-Pine Lumber Company, its successors, officers, attorneys, agents, or employes, or any of them, in occupying, conducting, managing, and carrying on all the property mentioned in the lease.



It appears, from the return of the deputy United States marshal, that this order was served at Klamathon, in Siskiyou county, on the 21st day of March, 1898, on the Klamath River Lumber & Improvement Company, by delivering an attested copy of the order to and leaving with John R. Cook, as its president and managing agent, and on John R. Cook, John S. Cook, and W. E. Cook, as its directors and agents, and on H. B. Gillis, as its attorney, at the same time showing to each of them the original order. It appears, further, from the affidavit of the deputy United States marshal, that, upon visiting the office mentioned in the bill of complaint as a part of property at Klamathon leased to the complainant, he found it occupied by John S. Cook and W. E. Cook; that he served the order upon them there, and then departed to find John R. Cook. After serving the latter, the deputy marshal returned to the office, where he met with forcible resistance on the part of W. E. Cook and one George W. Marsh, who endeavored to prevent the deputy marshal from entering the office and to eject him therefrom after he had entered. The deputy marshal then visited the mill for the purpose of making service of the order, but, on arriving at that place, he found the door leading into the mill locked or barricaded, and stationed thereat and within the mill were a number of persons, four or five of whom he saw through the window, and who were in charge of John S. Cook, whom the deputy marshal had previously served with the restraining order. These persons refused to permit the officer to enter the mill for the purpose of making the service. The order was thereupon read aloud in the hearing of the parties, and the officer again demanded admission and was refused. Afterwards the deputy marshal demanded admission to the mill for the purpose of posting within the mill a certified copy of the restraining order, and he was again refused admission. Later in the day the deputy marshal served a copy of the restraining order upon H. B. Gillis, the attorney for the respondent. The deputy marshal, in his affidavit, alleges that Gillis stated to him that he would not recognize the restraining order, and that he had advised his client, the respondent, not to recognize the provisions of the restraining order, and not to allow the complainant, its officers and agents, to occupy the property mentioned in the order, and not to permit or allow it to conduct and carry on the business therein mentioned. This allegation has since been modified by the deputy marshal to the effect that Gillis stated that he did not see anything in the restraining order which warranted his clients in giving up the possession of the property, and he would so advise them. Upon the return of the deputy marshal, and the statements contained in his affidavit, an attachment was issued by the court for the arrest of J. R. Cook, W. E. Cook, John S. Cook, H. B. Gillis, George W. Marsh, and two others, to show cause why they should not be punished for contempt of court in disobeying, and aiding and abetting the violation of, the restraining order of this court. Subsequently, upon affidavits showing that resistance to the order of the court was being continued by others, attachments were issued, until 27 persons were placed under arrest.

Upon the hearing in the contempt proceedings, it was shown that counsel for respondent, without admitting any violation of the order of the court, had advised its officers and agents on March 29, 1898, to do no act which, under any construction that might thereafter be placed upon the restraining order, could be the basis for a finding by the court that from that date it had interfered, impeded, or hindered the complainant in occupying, conducting, managing, and carrying on the property mentioned in the lease, and, in accordance with this advice, the possession of the property was practically surrendered to the complainant.

This brings us to the consideration of the motion made by counsel for respondent, that the restraining order be so modified that the same shall not, in any manner, affect the status quo of any and all matters involved in this litigation up to the filing of the bill of complaint; that the respondent be not required to surrender the possession of the mill, office, and barn mentioned in the bill of complaint; that the complainant be ordered and directed to restore all of the property mentioned in the bill to the same condition, as regards possession thereof, as the same was in at the time of the filing of the bill, in so far as such possession may have been changed or affected by any order of the court. This motion is based upon the contention that the court, by its preliminary restraining order, could not undo that which had been done, or change the status of the property from the condition in which it existed at the time of the commencement of the action.

It is to be regretted that the original counsel for respondent did not adopt this method of procedure, to ascertain the scope and purpose of the restraining order, rather than advise or allow his clients to assume an attitude of armed resistance to the order of the court; but that feature of the case need not be further considered in passing upon the respondent's motion to modify the injunction.

It is contended that the injunction, although preventive in form, was mandatory in effect, its execution resulting in a change in the status of the parties. This contention assumes that the court will recognize the respondent as asserting, at the time the bill was filed, a claim of possession to the property under a color of right to such possession, and that the effect of the order was to oust it from that possession. But equity will not permit a mere form to conceal the real position and substantial rights of parties. Equity always attempts to get at the substance of things, and to ascertain, uphold, and enforce rights and duties which spring from the real relations of parties. It will never suffer the mere appearance and external form to conceal the true purposes, objects, and consequences of a transaction. Pom. Eq. Jur. (2d Ed.) § 378.

Looking at the real situation of the parties to this controversy, what do we find? The respondent, in April, 1897, enters into an agreement with the assignor of the complainant, whereby it leases, for a number of years, a large and valuable lumbering plant, consisting of pine lands, logging railway and equipments, log slide, rights of way, franchises, booms, and improvements, sawmill and

sawmill property, planing mill, office, yard, tramways, and switches, barn and fixtures connected therewith, teams, wagons, and harnesses, and all the appurtenances connected with a large lumbering business. The lessee enters upon the possession, control, and management of this large property, and, after a time, under the terms of the lease, assigns to the complainant. The original lessee and the complainant expend large sums of money in placing this property into practical business operation, and, just at the time when the second season is about to commence, the respondent, by its officers and agents, without notice, demand, or warning, undertakes, by force and arms, to repossess itself of the property. It is charged in the bill that the cause and purpose of this violent and forcible entry were to compel complainant to abandon the premises because the respondent has entered into a contract for the sale of the property to another party at a high figure, provided it could deliver possession thereof to the proposed purchaser. This allegation of the bill is not distinctly denied in any of the affidavits that have been filed in the proceedings for contempt. The only justification claimed for the conduct of the officers and agents of the respondent, in entering upon the property, is that the lessee failed to comply with the terms of the lease providing that the plant should be operated as a lumbering business to its fullest capacity, in keeping with the best business interests of the parties thereto and to its profitable operation, and that, upon the failure of the lessee or his assigns to perform any of the covenants on his part to be done and performed, then the respondent had the right at once to re-enter upon any part of the premises in the name of the whole, and might forthwith determine the tenancy created by the lease without prejudice to other remedies. In other words, the respondent assumed to determine for itself that a forfeiture of the lease had been incurred; that it had thereby succeeded to large and valuable interests and improvements placed upon the property by the lessee and his assignee; and that it had, by reason of such forfeiture, acquired the right to re-enter, drive away the employes of the complainant, and maintain possession of the property by force and arms. A court of equity will not fail to see in such a possession a mere form to hide from view the unlawful character of the proceedings by which the possession was gained, and, whatever may be the substantial rights of the parties in their true relation under the contract, the court will not give its sanction to such proceedings. Moreover, a court of equity will relieve against a forfeiture where it is made to appear that its principal intent and purpose was to secure a performance of the contract, and compensation can be effectually made for the actual damages incurred. 1 Pom. Eq. Jur. § 381; Civ. Code Cal. § 3275. This rule, resting upon the maxim that he who comes into equity must do equity, and must come with clean hands, would deny to the respondent a forfeiture, upon its own showing, if that were the issue now being tried in this court. It is clear, therefore, that the asserted right of possession, which respondent seeks to maintain in these proceed-

ings, cannot be recognized by the court as anything more than a mere trespass and an interruption of the prior possession of the complainant.

It appears that, prior to the commencement of proceedings in this court, complainant commenced an action of a similar character against the respondent in the superior court of Siskiyou county, in this state; that an injunction was issued commanding the respondent to refrain and desist from excluding complainant or its agents from any portion of the sawmill and lumbering plant in controversy, and from in any way interfering with the full and complete possession and enjoyment, by the complainant, of any or all of the said property. The respondent refusing to comply with this order, its officers and agents were cited by the superior court to show cause why they should not be punished for contempt. The defendant demurred to the citation and moved to dismiss the injunction. The court, in a carefully prepared opinion, held that it was not intended, by the injunction, to restore the complainant to the possession of the mill or other property; that the purpose of the injunction was to hold the subject of the litigation in status quo until a final determination of the controversy. In arriving at this conclusion the court points out that section 525 of the Code of Civil Procedure of this state provides that "an injunction is a writ or order, requiring a person to refrain from a particular act," and that the mandatory ingredient of an injunction, found in nearly all the definitions of text writers, is entirely omitted from the Code definition of an injunction. It is not necessary to inquire whether the authorities cited by the court support the conclusion that, under the Code of this state, the court had no power to grant the relief prayed for by the complainant. The opinion of the court is entitled to respectful consideration in interpreting the laws of the state, but this court is not, in this character of proceedings, subject to the limitations of the Code provisions of the state. The source of the general equity jurisdiction of United States courts is found in the principles established by the high court of chancery in England, and recognized by the courts of the United States as applicable to the existing conditions in the United States. In the case of *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 746, a bill in equity was filed in the circuit court for the Northern district of Ohio, and a mandatory order was asked and allowed by the judge of that court, enjoining the respondents from refusing to extend to complainant the same equal facilities as to others for the exchange of interstate traffic. It was objected that the order was mandatory in effect, and that the circuit court had no right to issue such an order upon a preliminary application. The court held that its authority to issue the order rested on well-established principles; citing, among other cases, that of *Beadel v. Perry*, L. R. 3 Eq. 465, where a mandatory injunction was granted, on motion, by Sir John Stuart, vice chancellor. In giving judgment in that case, the vice chancellor said:

"Reference has been made to a supposed rule of court that mandatory injunctions cannot properly be made except at the hearing of the cause. I never heard of such a rule. Lord Cottenham was, so far as I know, the first judge

who proceeded by way of mandatory injunctions, and he took great care to see that the party applying was entitled to the relief in that shape."

The mandatory order of the circuit court of Ohio, in the case cited, was violated by one Lennon, a locomotive engineer, who was found guilty of contempt of court in disobeying the order, and was fined \$50 and costs. Thereupon Lennon filed a petition in the same court for a writ of habeas corpus, alleging, among other things, that the circuit court had no jurisdiction to make the order, because it was beyond the jurisdiction of a court of equity to compel the performance of a personal contract for service and to interfere by mandatory injunction with the contract between him and his employer. The court dismissed the petition, and the case finally reached the supreme court of the United States. *Ex parte Lennon*, 166 U. S. 548, 17 Sup. Ct. 658. The objection was there raised to the proceedings that the order was mandatory and the issuance of such a preliminary order was invalid. In answer to this contention, the supreme court said:

"Perhaps, to a certain extent, the injunction may be termed mandatory, although its object was to continue the existing state of things, and to prevent an arbitrary breaking off of the current business connections between the roads. But it was clearly not beyond the power of a court of equity, which is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action, where the circumstances of the case demand it."

In support of this jurisdiction, the court cites *Robinson v. Lord Byron*, 1 Brown, Ch. 588; *Hervey v. Smith*, 1 Kay & J. 389; *Beadel v. Perry*, L. R. 3 Eq. 465; *Whitecar v. Michenor*, 37 N. J. Eq. 6; *Broome v. Telephone Co.*, 42 N. J. Eq. 141, 7 Atl. 851. In *Robinson v. Lord Byron*, the leading English case upon the subject, Lord Chancellor Thurlow ordered an injunction to restrain the defendant "from maintaining or using his shuttles, floodgates, erections, and other devices, so as to prevent the water flowing to the mill in such regular quantities as it had ordinarily done before the 4th of April, 1785." The defendant, under this injunction, was compelled to remove such floodgates and other erections as he had constructed, if they impeded the regular flow of the water as it had existed before the date designated. This case was cited as authority in *Cole Silver Min. Co. v. Virginia & Gold Hill Water Co.*, 1 Sawy. 685, Fed. Cas. No. 2,990, where Judge Field refused to dissolve a preliminary mandatory injunction, which had been previously issued by Judge Sawyer. Speaking of the authority of a court of equity to issue such an injunction, the learned judge said:

"Undoubtedly, the general purpose of a temporary injunction is to preserve the property in controversy from waste or destruction or disturbance until the rights and equities of the contesting parties can be fully considered and determined. Usually, this can be effected by restraining any interference with it; but in some cases the continuance of the injury, the commencement of which has induced the invocation of the authority of a court of equity, would lead to the waste and destruction of the property. It is just here where the special jurisdiction of the court is needed to restore the property to that condition in which it existed immediately preceding the commencement of the injury, so that it may be preserved until final decree."

The doctrine of the text-books is very clearly in accordance with these authorities. In *High, Inj. § 356*, the general rule that courts

of equity will not interfere, by preliminary injunction, to change the possession of real property, is stated with this qualification:

"Notwithstanding the general rule, as stated in the preceding section, by which courts of equity refuse to interfere with possession before the right is determined at law, if defendant's possession is but an interruption of the prior possession of complainant, whose right is clear and certain, an injunction may be allowed without compelling complainant to establish his title by an action at law. The interference, in such cases, rests, as in cases of nuisance, upon a clear and certain right to the enjoyment of the subject in question, and an injurious interruption of that right, which upon just and equitable grounds ought to be prevented."

In *Beach, Inj.*, there is a reference, in section 1392, to the case of *Sproat v. Durland* (Okl.; 1894) 35 Pac. 682, as an illustration of the plastic character of the injunction process when required to be used in a new and unfamiliar environment. The court there held that:

"A mere assertion of right is insufficient to deprive the rightful occupant of the quiet use of land, and, as between settlers upon the public domain, the courts should inquire into the status of the lands far enough to determine whether or not a person asserting a claim of possession has a color of right to such possession under the homestead law, and if it be found that he is a mere trespasser, or that the law will not, under a fair construction, warrant his claim, it is the clear duty of the courts to issue a mandatory order in injunction, restraining him from the further unlawful occupancy."

In *Bisp. Eq. § 400*, the author refers to the fact that there is a tendency towards greater liberality in granting mandatory orders on preliminary applications, and says:

"Indeed, there would seem to be no good reason why, in a proper case, a mandatory injunction should not issue upon preliminary hearing. Gross violations of right may occur in the shortest possible time, and a few hours of wrongdoing may result in the creation of an intolerable nuisance or in the production of an injury which, if prolonged, might soon become irreparable. In such cases, the interposition of the strong arm of the chancellor ought to be most swift; and if the immediate relief afforded could not, in a proper case, be restorative as well as prohibitory, no adequate redress would in many instances be given."

In a note to 3 *Pom. Eq. Jur. § 1359*, the author says:

"Preliminary mandatory injunctions have evidently been granted more freely by the English courts than by the American. Indeed, it has been said, in some American decisions, that a mandatory interlocutory injunction would never be granted. This doctrine is not only opposed to the overwhelming weight of authority, but is contrary to the principle which regulates the administration of preventive relief, and is manifestly absurd."

Counsel for respondent have cited a number of cases which announce the general rule that a court of equity will not, by a preliminary order, change the status of parties, require that which has been done to be undone, or restore property to a possession claimed to have existed prior to the interferences and disturbances which are the subject of the bill of complaint. All these cases may, however, be easily distinguished from the one at bar, as failing, in some important particular, to present sufficient grounds for the interposition of a court of equity by a mandatory order on preliminary application. It follows that, so far as the restraining order in this case may be deemed mandatory in effect, it was within the power of the court to

issue; and upon the facts, so far as disclosed in these proceedings, it was justified by the circumstances of the case. The motion to modify the order will therefore be denied.

**POKEGAMA SUGAR-PINE LUMBER CO. v. KLAMATH RIVER LUMBER & IMPROVEMENT CO.**

In re COOK et al.

(Circuit Court, N. D. California. April 19, 1898.)

**RESTRAINING ORDER—VIOLATION—ADVICE OF COUNSEL—CONTEMPT.**

A restraining order must be obeyed in its entirety until modified; and, in a proceeding to punish respondents for its violation, the plea that they were acting under the advice of counsel, honestly given, may serve to mitigate the punishment for a violation, but is no defense.

Order to show cause why defendants should not be punished for contempt in violating a restraining order.

E. S. Pillsbury (F. D. Madison and James F. Farraher, of counsel), for complainant.

F. S. Stratton, S. C. Denson, and W. W. Kaufmann, for John R. Cook and others.

H. B. Gillis and James R. Tapscott, per se.

MORROW, Circuit Judge (orally). It has been determined, in passing upon the motion to modify the restraining order in this case, that the order was within the power of the court to issue. 86 Fed. 528. The power vested in courts of the United States to punish for contempt of court is found in section 725 of the Revised Statutes. It provides as follows:

"The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: provided, that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

The restraining order in question was issued March 17, 1898, and was directed to the "Klamath River Lumber and Improvement Company, Your Successors, Officers, Attorneys, Agents, and Servants, and Each and All of Them." It notified them that they were "absolutely restrained from in any manner interfering with, impeding, or hindering, and from causing to be interfered with, impeded, or hindered, the Pokegama Sugar-Pine Lumber Company, complainant herein, its successors, officers, attorneys, agents, or employés, or any of them, from occupying, conducting, managing, and carrying on of the property mentioned in a certain instrument in writing dated and acknowledged April 7, 1897." The order was served March 21, 1898, at Klamathon, Siskiyou county, in this state, on the Klamath River Lumber & Improvement Company, by delivering

to and leaving with John R. Cook, as president and managing agent of the Klamath River Lumber & Improvement Company, and John R. Cook, John S. Cook, and W. E. Cook, designated as directors and agents, and H. B. Gillis, attorney for the company, a certified copy of the order. When this restraining order was issued there had been presented to the judge of this court a verified bill of complaint, in which the complainant demanded equitable relief, and which set forth facts upon which the relief was claimed, and upon these facts the restraining order was made. When the bill of complaint was presented to the judge of this court, it became his duty to consider and decide, upon the facts stated, whether or not to grant the order asked for by the complainant. He had the power to decide this question, and, having determined that the facts were sufficient to warrant him in issuing the order, the order so issued was valid and binding, and should have been received and obeyed. *People v. McKane*, 78 Hun, 154, 28 N. Y. Supp. 981; *U. S. v. Debs*, 64 Fed. 724; *In re Debs*, 158 U. S. 564, 15 Sup. Ct. 900.

The objection that the order was mandatory in its effect has been considered and disposed of on the motion to modify the order. But for the present purpose it is sufficient to say that, although it may ultimately be determined that this order was for that reason erroneous, it was nevertheless within the power of the court to grant, and it should have been obeyed. If there was any doubt as to its scope or character, the question should have been submitted to the court for its determination.

It appears from the testimony that, while the deputy marshal was engaged in serving the restraining order in question, he was forcibly resisted at the office of the lumber company at Klamathon by W. E. Cook and one George W. Marsh, and that they attempted to eject him from the office; that, upon visiting the mill for the purpose of making service of the order upon the persons in the mill, he found the mill openings closed and barricaded, and a number of persons inside in the charge of John S. Cook, who refused the officer admission to the mill; that the deputy marshal afterwards asked admission to the mill that he might post therein a certified copy of the restraining order, and he was again refused; that the deputy marshal also served a copy of the restraining order upon H. B. Gillis, attorney for the respondents, who stated that he did not see anything in the order which warranted his clients in giving up the possession of the property, and that he would so advise them; that the effect of this advice was that the respondent Klamath River Lumber & Improvement Company, by its officers, agents, attorneys, and employes, maintained possession of the property to the exclusion of the complainant, until March 29, 1898; in other words, that complainant was not permitted by the respondent to occupy, conduct, manage, or carry on the business connected with the property involved in this controversy. This was clearly in violation of the restraining order.

It is urged on behalf of the respondents that they are acting under the advice of counsel, and he justifies his advice upon his views of the law and the result of the injunction proceedings in



the state court. What the respondents did, they did not do accidentally or unintentionally, but knowing fully what they were doing. What they did, therefore, is none the less legally a contempt of court, because they did not think they were disobeying the orders of the court, or were advised they were not. Any question of animus can be considered only in determining the extent of the punishment. *Atlantic Giant-Powder Co. v. Dittmar Powder Mfg. Co.*, 9 Fed. 316.

The conduct of the respondents cannot be excused, therefore, on the ground that they were advised that they had a right to maintain possession of the property when such possession was clearly in violation of the order of this court. Nor did the result of the proceedings in the superior court justify the respondents in construing the restraining order of this court for themselves as permitting them to exclude the complainant from the property and from conducting and carrying on the business of the lumbering plant. In *Muller v. Henry*, 5 Sawy. 464, Fed. Cas. No. 9,916, the late Judge Sawyer held that, where parties had been enjoined from grading a street until the hearing of the cause or the further order of the court, and, subsequently, proceeded to grade under the authority of a city ordinance passed after the issuing of the injunction, without first presenting the ordinance to the court and procuring a dissolution or modification of the injunction, were guilty of contempt, and that parties can only be relieved from the operation of an injunction absolutely prohibiting the performance of a specific act by the court granting the injunction.

The principals in the present affair at Klamathon were John R. Cook, the president of the Klamath River Lumber & Improvement Company, whose authority was such that he must be deemed to have sanctioned the proceedings of those who acted with and for him in this matter, and his two sons, W. E. Cook and John S. Cook. Their conduct was clearly in disobedience of the order of the court. The position of H. B. Gillis was that of an attorney for the Klamath River Lumber & Improvement Company and the legal adviser of the Cooks. He admits that the Cooks were acting by and under his advice in these proceedings. With the Cooks were George W. Marsh, George Norris, and Thomas McInerney, who participated aggressively in resisting the officer and the efforts of the complainant to occupy the property. The other respondents were employes acting in various capacities about the premises, principally as watchmen. In my opinion, all the respondents, except David S. Baxter, have been shown to be guilty of contempt of court in a greater or less degree. But manifestly the principals must be held mainly responsible for the acts of resistance that have taken place with respect to the property in question. I shall, however, consider in mitigation of punishment the proceedings in the state court wherein it was determined that it was not intended by the injunction in that case to exclude the respondents from the possession of the property, and the asserted good faith of the advice given by Mr. Gillis based upon such proceedings. I will further consider, as an important fact on behalf of respondents, that

when advised by counsel on March 29, 1898, that they should not exclude the complainant from the occupation of the property, they at once surrendered its possession to the complainant.

It follows, in the opinion of the court, that John R. Cook, W. E. Cook, John S. Cook, and H. B. Gillis have been guilty of contempt of court, and the judgment is that they pay a fine of \$50 each and the costs of the proceedings; and, unless the fines and costs are paid within 10 days, that they be imprisoned until the fines and costs are paid, not to exceed 30 days. That George Marsh, George Norris, and Thomas McInerney are also guilty of contempt of court, and that they be fined \$50 each and the costs of these proceedings; and, unless the fines and costs are paid within 10 days, that they be imprisoned until the fines and costs are paid, not to exceed 30 days. With respect to J. R. Tapscott, I find that he is the junior member of the law firm of Gillis & Tapscott, and that what he did in this case was in accordance with the views of Mr. Gillis, the senior member of the firm. My judgment is, however, that he is guilty of contempt of court, and that he pay the costs of the proceedings, under the conditions heretofore stated. That Henry Martin, Julius H. Stock, Robert Hopkins, Abner Giddings, William Ferguson, J. H. Layman, Norman Campbell, E. Campbell, J. Van Landingham, J. P. Plunkett, Peter Linn, Albert Panknin, Frank L. Martin, William Hanning, Andy Davis, E. A. Farr, Nels Monson, H. L. Small, and Louis Stoneburg are guilty of contempt of court; that they be fined the costs of these proceedings; and, if the costs are not paid within 10 days, that they be imprisoned until the costs are paid, not to exceed 30 days. That in the case of David S. Baxter the order to show cause be discharged.

**FARMERS' LOAN & TRUST CO. et al. v. FIDELITY TRUST CO.<sup>1</sup>**

(Circuit Court of Appeals, Ninth Circuit. February 14, 1898.)

No. 371.

**1. BANKS AND BANKING—DRAFTS BY AGENT—CERTIFICATE OF DEPOSIT TO AGENT INDIVIDUALLY.**

The mere fact that an agent asks for a certificate of deposit in his own name for moneys of his principal is equivalent, nothing to the contrary appearing, to a declaration by the agent that the money is received by him in his individual capacity, for his individual use, and is enough to put the bank on inquiry as to why the agent wanted the certificate so issued, especially where the president of the bank knew the agent to be irregular and unreliable in his business methods.

**2. SAME—PREVIOUS DRAFTS.**

The fact that previous drafts drawn by the agent, and credited to him as such agent on the books of the bank, or cashed when drawn, had been paid by the principal, did not warrant the bank in issuing a certificate in the individual name of the agent on a draft drawn by him as agent.

Hawley, District Judge, dissenting.

Appeal from the Circuit Court of the United States for the Western Division of the District of Washington.

Crowley & Grosscup, for appellants.

R. G. Hudson and R. S. Holt, for appellee.

<sup>1</sup> Rehearing denied May 20, 1898.

Before ROSS and MORROW, Circuit Judges, and HAWLEY, District Judge.

ROSS, Circuit Judge. This is an appeal from a judgment for \$4,641, with costs, rendered against the Northern Pacific Railroad Company and Andrew F. Burleigh, receiver thereof, upon an intervening petition of the Fidelity Trust Company filed in the suit brought by the Farmers' Loan & Trust Company against the Northern Pacific Railroad Company for the foreclosure of certain mortgages. The intervention was based upon a draft drawn April 5, 1895, by one Paul Schulze, as general land agent of the Northern Pacific Railroad Company, upon George S. Baxter, the treasurer of the company, at New York, for \$4,200, and cashed by the petitioner in Tacoma, Wash., the day it bore date, upon its presentation at its bank in that city by Schulze. Before the draft was presented for payment in New York, Baxter had ceased to be treasurer of the company. His successor having refused to pay it, the petitioner sought by its intervention payment thereof out of the funds in the hands of the court, which payment was resisted by the receiver on the ground that Schulze had no authority to draw the draft, and that the money paid thereon by the petitioner was not devoted to the uses of the corporation or its receiver, but was wrongfully appropriated to the personal use of Schulze. That the money paid for the draft by the petitioner was appropriated by Schulze to his individual use, and that none of it was ever received by the Northern Pacific Railroad Company, or its receiver, is shown by the evidence, without conflict. The court below, however, gave the petitioner judgment, upon the ground that, by the course of business of the corporation and its receiver, Schulze, as the general land agent of the company, had been held out to the public, and to the petitioner in particular, as clothed with authority to draw such drafts as that in question, and that the railroad company and its receiver are estopped to deny the binding character of the draft in question by reason of three certain other prior drafts drawn by Schulze, as such general land agent, upon Baxter, as treasurer, for certain sums of money, each of which drafts was at the time cashed by the petitioner, and, upon its presentation to the drawee in New York, promptly paid by him. The first of those drafts was drawn September 20, 1894, for \$4,925; the second was drawn March 15, 1895, for \$3,500; and the third upon April 1, 1895, for \$4,700. The first two were presented by the petitioner, and were paid by the drawee, prior to the drawing of the draft in controversy. The third had not been paid by the drawee at the time when the draft in question was presented to the petitioner's bank at Tacoma, and by it cashed, but was paid on the 8th day of April, 1895,—three days after the fourth draft was cashed by the petitioner. It appears from the deposition of Baxter that on May 9, 1892, he wrote to Schulze, saying:

"I understand all the outside land business of the company on the Pacific Coast is in your charge; and before authorizing any further draft for taxes, or any other purpose, I should have notice from you of any draft to be made."

It further appears from Baxter's deposition that when the draft of September 20, 1894, was presented to him in New York, he telegraphed

Schulze to know if it pertained to the company's business, and received the answer that it was personal business, and that when the draft of March 15, 1895, was drawn, Schulze notified him of it by telegraph, and that Baxter answered, saying, "If it is personal, make the money payable to me personally," and that Schulze complied with his direction, by sending him the money at New York to meet the draft when it was presented. When the draft of April 1st was presented, Baxter had ceased to be treasurer of the company, but he paid the same, as he had paid the preceding ones,—evidently from money sent to him by Schulze. Since all of these drafts were drawn by Schulze as general land agent of the company, it thus appears that Schulze's rascality was connived at and aided by Baxter, the treasurer of the company. The petitioner's bank was the depository of the funds of the Northern Pacific Railroad Company at Tacoma, both before and during its receivership. It carried upon its books several accounts with the railroad company, which were not changed after the receivership, except by noting at the head of the accounts the fact of the receivership, with the names of the receivers. Those accounts were a general account, in which was deposited all the receipts of the station agents in Tacoma and the surrounding territory; the land-department account, in which was deposited the receipts of the Northern Pacific land department at Tacoma; the account of the Puget Sound & Alaska Steamship Company, which was controlled by the railroad company; a pay check and voucher account; a certificate account with the freight agent at Tacoma; and an account with Paul Schulze as general land agent of the company. This latter account was entirely separate and distinct from the account of the land department, which was drawn against by the assistant treasurer of the company at St. Paul only. Schulze was empowered to manage and sell all of the lands of the company in Washington, Oregon, and Idaho, and to collect their proceeds. In pursuance of his powers, he drew drafts on the land commissioner and assistant treasurer of the road at St. Paul for moneys with which to pay taxes upon the lands, and for refunding purchase moneys where necessary. He was charged, too, it would seem, with some disreputable work for the road; for it appears from the record that he drew for and disbursed a political "corruption" fund, although it does not appear on whom he drew for the purpose, or how he disbursed the money. It appears, also, that in the year 1888 Schulze drew two drafts for \$25,000 and \$15,000, respectively, on the treasurer of the company at New York, which were paid; but these drafts were drawn through another bank than that of the petitioner, were never brought to the knowledge of the petitioner, so far as appears, and were drawn under special authority. The only drafts ever drawn by Schulze, as general land agent of the company, on its treasurer at New York, through the petitioner, or through any other medium with its knowledge, so far as the record shows, were the four drafts already mentioned, the fourth of which is the draft in controversy. The first (that of September 20, 1894, for \$4,925) was deposited with the petitioner to the credit of Schulze as general land agent, and the amount of it subsequently checked out by him in the same capacity. The second and third drafts (those of March 15, 1895, for \$3,500, and April

1, 1895, for \$4,700) were cashed by the petitioner over its counter at the time they were respectively drawn. For the fourth draft, with \$300 in cash, delivered by Schulze to the petitioner, petitioner issued in his individual name its certificate of deposit for \$4,500, which was returned to petitioner the next day by the Bank of British Columbia, with Schulze's indorsement thereon, and paid by the petitioner. If this was all, it would be clear that neither the Northern Pacific Railroad Company nor its receiver is responsible by reason of the draft in question; for it cannot be doubted that ordinarily an agent who undertakes to pledge the security of his principal for his own benefit must show express authority therefor, and that whoever deals with such an obligation does so at his peril. *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557; *Chrystie v. Foster*, 9 C. C. A. 606, 61 Fed. 551; *Anderson v. Kissam*, 35 Fed. 699; *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 631. The only thing we find in the record that has any tendency to take the present case out of this most salutary rule is evidence to the effect that the petitioner had frequently issued its certificates of deposits in the individual name of the freight agent of the railroad company at Tacoma for moneys of the company deposited by him with the petitioner, and had also on a number of previous occasions issued similar certificates of deposit in the individual name of Schulze for moneys of the company deposited by him with the petitioner. But it hardly needs argument to prove that the defendant had no right to do anything of the sort. There is nothing in the record tending to show any authority in the freight agent at Tacoma, or in the general land agent, to take, for moneys of the company deposited with the petitioner, its certificate of deposit in his individual name, and nothing to show the principal's knowledge of such conduct. The mere fact that such a certificate was asked for, for moneys of the company, was enough to put the petitioner upon inquiry as to why, for moneys of the principal, the agent wanted a certificate of deposit in his own name. For neither of the three previous drafts drawn by Schulze on the treasurer of the company at New York was a certificate of deposit issued by the petitioner. The amount of the first draft, as has been seen, was credited to Schulze, as land agent of the company; and the amounts of the second and third drafts, respectively, were paid to him, at the time they were drawn, over the counter of the bank,—presumably, for his principal, in whose behalf he had made the draft. But when he came to draw the draft in question, which was for \$4,200, he added \$300 in cash, and asked for and received a certificate of deposit for \$4,500 in his individual name. Here was a feature, and a most important one, that did not appear in respect to either of the preceding drafts drawn by Schulze, as general land agent, on the treasurer of the company at New York. When an agent draws a draft in the name of his principal, and receives from a bank the money therefor, the presumption, in the absence of any showing to the contrary, is that he receives the money in the same capacity in which he draws the draft; that is to say, as agent. But when the agent, for such a draft, asks for and receives from the bank a certificate of deposit in his individual name, not only is such bank thereby put upon inquiry as to why, for money of the principal, the

agent wants such certificate in his individual name, but such conduct—nothing to the contrary appearing—is equivalent to a declaration by the agent that the money is received by him in his individual capacity, and for his individual use; for certainly the legal presumption that follows the deposit of money in the individual name of a man is that the money so deposited is the property of the depositor. In the present case that presumption was strengthened by the fact that Schulze added \$300 in cash to the draft, and by the further fact that he then had, and for years had had, an account, as land agent of the railroad company, with the bank in question. The record further shows that the president of the petitioner well knew that Schulze was very irregular and unreliable in his business methods, for he himself so testifies; and the president of the petitioner further testifies that he had been, without his knowledge, made by Schulze a trustee in a written instrument concerning some of the railroad lands, by which Schulze sought to secure to himself a large profit out of a sale by him of those lands of his principal. Certainly, under such circumstances as these, it was the duty of the petitioner, before issuing to Schulze a certificate of deposit in his individual name for a draft drawn by him, in his capacity as general land agent of the company, upon its treasurer, to inquire into his authority; and certainly the court cannot assume that such inquiry would have disclosed the necessary authority in the drawer. Judgment reversed.

HAWLEY, District Judge (dissenting). I concur in the general proposition announced in the opinion of the court as to the ordinary powers and authority of an agent,—that, when he undertakes to pledge the security of his principal for his own use, he must affirmatively show express authority therefor. But the question here, as I understand it, does not involve the proposition whether Schulze, simply by virtue of his position, had authority from his principal to do the act in question. I am of opinion that the evidence justifies the findings of the circuit court, to the effect that the Fidelity Trust Company believed, and had the right to believe, that the draft in question, as well as the three other drafts which were paid by the treasurer of the railroad company, was drawn, in the regular course of business, for the use and benefit of the railroad company, and would, as the other drafts had been, be paid by the treasurer thereof, and that it relied upon this understanding and knowledge in cashing the draft, and issuing a certificate of deposit therefor in the name of Schulze; that it did not know, and had no reason to believe, that Schulze intended to convert the same to his own use; that the Northern Pacific Railroad Company, and the receivers thereof, by the appointment of Schulze as general land agent, and the authority conferred upon him thereby, and their dealings through him with the Fidelity Trust Company, and the payments of the drafts drawn by Schulze by the treasurer of the railroad company, induced it to believe that Schulze, as the general land agent, had the power, and was authorized, to draw the draft in question, and to take and receive the money therefor; and that, by holding him out by this general course of dealing, they gave him such apparent authority for that purpose as to justify it in entertaining and acting upon

the belief that he was authorized to perform such acts as their agent. In cases of this character, the question is not what authority was intended to be given to the agent by his principals, but what authority were third persons having dealings with him, justified, from the conduct and acts of the principals, in believing was given to him. The fact and scope of his agency is not, in such cases, to be confined to the actual authority given by the principals to the agent, but courts can look at the knowledge that the principals have or had, or by the exercise of ordinary care and prudence ought to have had, as to what the agent was doing. The general rule upon this subject is clearly stated in *Mechem*, Ag. § 84, as follows:

"Whenever a person has held out another as his agent authorized to act for him in a given capacity, or has knowingly and without dissent permitted such other to act as his agent in such capacity, or where his habits and course of dealing have been such as to reasonably warrant the presumption that such other was his agent, authorized to act in that capacity, whether it be in a single transaction, or in a series of transactions, his authority to such other to act for him in that capacity will be conclusively presumed, so far as it may be necessary to protect the rights of third persons who have relied thereon in good faith, and in the exercise of reasonable prudence; and he will not be permitted to deny that such other was his agent, authorized to do the act that he assumed to do, provided that such act is within the real or apparent scope of the presumed authority."

It is a well-settled rule of law that, where one of two innocent parties must suffer through the wrongful act of a third party, the one who has enabled such third party to accomplish the wrong must bear the penalty and suffer the loss. The Fidelity Trust Company in the present case appears to have acted in good faith, and was not guilty of any negligence or wrongdoing. It is true that the president of the bank testified that he knew that Schulze, as the general land agent of the railroad company, had been irregular and unreliable in some of his business methods; but the transaction concerning which this testimony was given occurred long prior to the procuring of the drafts drawn by Schulze, which were paid by Baxter as treasurer of the railroad company. The fact that the railroad company and its receivers continued to have faith in Schulze as a business man, and to repose trust and confidence in him, and that the treasurer of the corporation continued to pay drafts drawn by him without any real authority so to do, were of sufficient weight to overbalance the president's personal knowledge of Schulze's irregular and crooked methods prior to that time. When we take into consideration the character of the acts which the railroad company permitted Schulze, their general agent, to do, and that Schulze's unlawful and unauthorized acts were connived at and aided by Baxter, the treasurer of the company, it furnishes sufficient grounds, in my opinion, to have induced the bank to believe that Schulze had authority, not only to draw the draft, but to have it cashed, and the money paid to himself, or deposited to his order, for the benefit of his principals. The rule announced in the opinion of the court requires greater vigilance upon the part of the bank than it exacts from the principal himself, as to the agent's authority, and, in my view of the case, compels the party least at fault to bear the loss. As long as corporations or individuals hold out to the

general public, and to all parties with whom they have dealings, that their agent has authority to do acts beyond the general scope of an ordinary agent's power, and sanction and approve such acts, without interposing objections thereto when brought home to their knowledge, they cannot thereafter raise the objection that the acts performed by him were beyond the ordinary scope of his agency. The usage and custom of the principals in sanctioning and approving the illegal acts of Schulze, or the acts performed by him without any direct authority from them, was calculated to mislead and deceive the public with whom they dealt, and the knowledge of such parties that the agent was unreliable in his business methods cannot be urged as a reason why they should not be bound by such acts. By their own course of conduct they are estopped from raising such a defense. As before stated, it does not appear that the bank had any knowledge that Schulze intended to appropriate the money obtained upon the draft to his own use. The mere fact that he requested the bank to issue to him a certificate of deposit, and that he procured the same, was not of itself calculated to put the bank upon inquiry as to what use he intended to make of the money. If he had authority to draw the draft, he had the power to obtain the money for the benefit of his principals; and, unless the bank had knowledge to the contrary, it had the right, from the previous course of business, to presume and believe that he was acting for his principals in having the draft cashed, and that he intended using that money for his principals, and not for himself. "For the acts of his agent within his express authority, the principal is liable, because the act of the agent is the act of the principal. For the acts of the agent within the scope of the authority which he holds the agent out as having, or knowingly permits him to assume, the principal is made responsible, because to permit him to dispute the authority of the agent in such case would be to enable him to commit a fraud upon innocent persons." 1 Am. & Eng. Enc. Law (2d Ed.) 990, and authorities there cited; 4 Thomp. Corp. §§ 4881, 4993, 5250.

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## HUBBELL v. HOUGHTON.

(Circuit Court, D. Massachusetts. April 26, 1898.)

No. 667.

## STOCK OF INSOLVENT NATIONAL BANK—REAL AND OSTENSIBLE OWNER—LIABILITY FOR ASSESSMENT.

Defendant acquired stock of a national bank through his agents, in whose names the shares were registered on the books of the bank, and so appeared when the bank became insolvent. Defendant had all the time held the certificates, so indorsed that he might have had the shares registered in his own name. *Held*, that the receiver can recover from defendant an assessment on said stock for the benefit of creditors, though he might have proceeded against those in whose names the shares appeared on the bank's stock register.

Charles S. Hamlin and Robert M. Morse, for plaintiff.  
Benjamin E. Bates and William F. Dana, for defendant.



**PUTNAM, Circuit Judge.** The shares of the capital stock of the national banking association involved in this litigation were never entered on the books of the association in a way which would indicate ownership of them by the defendant. Nevertheless, when they were acquired by the parties in whose names they appeared on its books at the time it became insolvent, they were acquired by them as the agents of the defendant; and, from the time they were acquired, the substantial proprietorship had always been in the defendant, and the defendant had always held the corresponding stock certificates, so indorsed that it was in his power to have the shares properly registered in his name at any time.

Under these circumstances, it is entirely clear, and it is not denied, that the receiver might have brought actions against the individuals in whose names the stock appeared on the books of the association, for the assessment claimed in this suit, and might have recovered judgments against them for the same; and that thereupon, so far as this case shows, those individuals would have had rights of action over against the defendant for the amounts which they might have been required to pay on the judgments, and could have recovered the same from him. In other words, it is clearly the law, and it is not denied, that the ultimate result, under the circumstances shown here, would have been payment by the defendant to somebody of the assessment in suit. If, therefore, there is anything which renders necessary in this instance, in order to accomplish the ultimate result, the multiplicity of suits which the law abhors, it must be something imperative in that behalf, either in the terms of the statutes relative to national banking associations or in the technical rules as to the proper parties to actions.

It is also settled that the individuals who permitted this stock to remain registered in their names on the books of the association were estopped from denying that they were liable for this assessment; but it does not follow that the converse of the proposition is true. On the other hand, it is not inconsistent with the principles of law that, under such circumstances, the receiver had an option to avail himself of this estoppel or to recover from the person who was in substantial proprietorship of the stock, and ultimately liable for the assessment, as he might find the one or the other having the better pecuniary responsibility, or within easier reach of legal process.

It is also well settled that a receiver is not, under all circumstances, limited to a remedy against stockholders of record in a national banking association; because, when such a stockholder has transferred his shares in anticipation of the insolvency of an association, a receiver may, under some circumstances, pursue him, notwithstanding the books of the association did not exhibit his name at the time the insolvency actually occurred. The latest authoritative decision of this character is *Stuart v. Hayden*, 169 U. S. 1, 18 Sup. Ct. 274. Nevertheless, this line of decisions does not reach the case at bar, because it depends on the proposition that the transfer of the stock was, under the circumstances, fraudulent, and, in law, a thing done fraudulently is held as though not done.

The defendant relies on various expressions in the statutes relating to national banking associations which, by their letter, treat, for certain purposes, as stockholders only those persons who appear such of record. We need not detail these, as substantially nothing can be found in them which indicates any purpose except that common in various states to legislation of this character.

Section 5139 of the Revised Statutes provides:

"The capital stock of each association shall be divided into shares of one hundred dollars each, and be deemed personal property, and transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of association."

The by-laws of the association involved in this case provide:

"The stock of this bank shall be assignable and transferable only on the books of this bank, subject to the provisions and restrictions of the banking laws, and a transfer book shall be provided in which all assignments and transfers of stock shall be made."

The certificates put in evidence contain a like restriction, but in a modified form; that is to say, they contain the words, "Transferable only on the books of the bank in person or by attorney, subject to the by-laws, by indorsement hereon, and surrender of this certificate." They are, therefore, in the usual form, so far, at least, as to contemplate the passing of the certificates from hand to hand after proper indorsements, which delivery, according to the well-established usage, conveys, as between the seller and the purchaser, the entire interest. *Johnston v. Laffin*, 103 U. S. 800, 804; *National Bank v. Watontown Bank*, 105 U. S. 217, 221. In *Johnston v. Laffin*, at page 804, Mr. Justice Field, speaking in behalf of the court, says that "the transferability of shares in the national banks is not governed by different rules from those which are ordinarily applied to the transfer of shares in other corporate bodies." Several other decisions of the supreme court are to the same effect, the latest expressions being in *Leyson v. Davis*, 170 U. S. 36, 40, 18 Sup. Ct. 500.

Therefore, as was well said in *Sibley v. Bank*, 133 Mass. 515, 520, the by-law and the stock certificates do not affect the construction of the statute. They run *pari passu* with it, and only indicate the details of the manner in which the transfer shall be made on the books of the association, without adding to, or taking anything from, the legal effect of such a transfer, or of the absence of it.

The defendant cites several expressions of various judges delivering opinions in behalf of the supreme court, to the effect that, under the statutes, no person can be regarded a shareholder, liable to contribution, unless stock appears of record in his name, with the exceptions to which we have referred, and, perhaps, with some other exceptions which are not pertinent here. It is conceded, however, that there is no actual decision in his behalf by that court. It must, also, be conceded by the plaintiff that there is no decision in his behalf; although there are two cases which we think outweigh the various expressions favorable to the defendant, as we will hereafter explain.

The circuit court of appeals for this circuit has so fully considered the nature of expressions found in the opinions of courts which are not necessary to the disposition of the case, in *King v. Asylum*, 12 C. C. A. 139, 64 Fed. 331, 340, that we do not deem it of value to add anything to what is there said as to the lack of the obligatory force of dicta, even of the supreme court. What is there said is reinforced by a late opinion, with reference to this very question of the liability of the holder of shares of the stock of national banking associations, in *Stuart v. Hayden*, 169 U. S. 1, 7, 18 Sup. Ct. 274, already cited, and in a later case, relating to a different topic, *McCormick Harvesting Mach. Co. v. C. Aultman & Co.*, 169 U. S. 606, 611, 18 Sup. Ct. 443.

The decisions of the English courts and of the various state courts on which the defendant relies cannot control us, except so far as they commend themselves to our judgment, and are based on circumstances of like character with those at bar. It is true, as claimed by the defendant, that by a long line of decisions in England, with the exception of a limited class as to which the courts are authorized by statute to rectify a corporation's register, no person can be regarded as a shareholder, subject to calls, unless he appears as such of record; but the subject-matter of the winding up of corporations in England constitutes a special statutory system, harmonious in the whole, and the elements of one part of which necessarily work with, and are molded by, the remaining elements. Therefore we cannot safely transfer elements from it into the system established with reference to national banking associations, which is also peculiar and wholly statutory. It is enough to say that in England no person can become a shareholder, except under special circumstances, until he has been accepted by the corporation; while, under the general rules applicable in the United States, a purchaser of stock has an unrestricted right to be admitted as a corporator.

The state decisions cited by the defendant are inapt. In *Manufacturing Co. v. Smith*, 2 Conn. 579, suit was brought by the corporation itself for an assessment on the shareholders, without any notice in the opinion of the court that it was in the interest of the creditors. The same was the fact in *Vale Mills v. Spalding*, 62 N. H. 605. In *Glenn v. Garth*, 133 N. Y. 18, 30 N. E. 649, and 31 N. E. 344, the party sued was not even substantially the owner of the shares, but merely a broker, who had purchased on margins for customers; that is to say, he was holding the stock as collateral. The question at bar was not presented in that case.

In like manner, the text-books ordinarily accept the general principle, working out the same result as the state decisions to which we have been referred, without carefully distinguishing the relation growing out of a contract between the corporation and the shareholder, on the one side, from a statutory liability created for the benefit of creditors, on the other. The latter relation arises in suits of the character of that at bar under the statutes relating to national banks. *Bank v. Hawkins*, 24 C. C. A. 444, 79 Fed. 51. But, beyond this, there is the fact, to which we have already re-

ferred, that we must determine this suit under statutes constituting a special system. Therefore, we are at liberty, without being prejudiced by the authorities referred to, to apply to the case before us the general rules of law.

Coming to the two decisions of the supreme court which seem to us to bear more directly on the question at bar than any other authorities which have been brought to our attention, we refer, first, to *Anderson v. Warehouse Co.*, 111 U. S. 479, 4 Sup. Ct. 525. There the chief justice says, at page 483, 111 U. S., and at page 527, 4 Sup. Ct.: "It is also undoubtedly true that the beneficial owner of stock registered in the name of an irresponsible person may, in some circumstances, be liable to creditors as the real shareholder."

The connection in which this is said shows that it has no reference to the case of a transfer of stock for a fraudulent purpose. It is also difficult to see the excuse for the line of reasoning of the court if the position of the defendant at bar is correct. The suit was brought by the receiver of a national bank against the Philadelphia Warehouse Company, which was never a registered owner of the stock; and if that was a sufficient answer, as claimed by the defendant here, the court ought not to have felt holden to go into an elaborate discussion of a wholly different principle in order to relieve that corporation. However, it must be said that the precise point which we have now before us was not decided in that case, and yet it carries great weight. We shall have occasion hereafter to refer to another expression in this case in connection with *Pauly v. Trust Co.*, 165 U. S. 606, 17 Sup. Ct. 465. There, Mr. Justice Harlan, speaking on behalf of the court, at page 619, 165 U. S., and at page 470, 17 Sup. Ct., says: "The real owner of the shares of the capital stock of a national banking association may, in every case, be treated as a shareholder, within the meaning of section 5151." This section is the provision of the Revised Statutes which imposes liability on the stockholders of such associations. It may be claimed, however, that this expression goes beyond the case. Further on, at page 623, 165 U. S., and at page 471, 17 Sup. Ct., he states that "congress did not say that those only should be regarded as shareholders, liable for the contracts, debts, and engagements of the banking association, whose names appear on the stock list distinctly as shareholders." This is literally true.

It is held in the case that a pledgee of shares of a national banking association who appears as such on the books of the association is not liable to the statutory assessment. At pages 622, 623, *Id.*, the court meets the objection that, if the pledgee is not liable to the assessment, no one can be; and, in that connection Mr. Justice Harlan makes the statement to which we have referred, that "congress did not say that those only should be regarded as shareholders, liable for the contracts, debts, and engagements of the banking association, whose names appear on the stock list distinctly as shareholders." And also, in this connection, at page 624, 165 U. S., and at page 472, 17 Sup. Ct., he repeats what was said in *Anderson v. Warehouse Co.*, 111 U. S. (already referred to), at page 484, and 4 Sup. Ct., at page 528, that, in cases of this character, the transferrers remain "the

owners of the stock, though registered in the name of others, and pledged as collateral security for their debt."

Now, in *Anderson v. Warehouse Co.*, as in many other like cases, after the stock was transferred to the pledgee on the books of the bank, the name of the pledgor no longer remained of record. Yet it follows, as a necessary result, as said by Mr. Justice Harlan, that the pledgor continued liable to the assessment. Such seems to be his course of reasoning in *Pauly v. Trust Co.*, at various points, and this appears to be so directly involved in the determination of that case as to render it of much more effect than an ordinary dictum. Looking, therefore, at the lines of reasoning and the results in *Anderson v. Warehouse Co.* and *Pauly v. Trust Co.*, we think we are compelled, sitting on the circuit, to hold them as weighty authorities in favor of the plaintiff, notwithstanding the issue made here was not directly made there.

In looking at the merits of the question before us, we are urged by the defendant to determine that the relations between the registered owners of this stock and the defendant are those of trustees and cestui que trust, and that, in no event, can a cestui que trust be holden for an assessment under the statutes relating to national banks. Certainly, there is no express trust here, and we perceive no elements raising an implied trust. The registered owners of the shares had completed their duty with reference to it; they were under no obligation to see to the proper entries of the transfers on the books of the association; and the parties are, in every sense of the word, at "quits," with no existing obligations or confidential relations between them, so far as this stock is concerned. Moreover, if we were compelled to consider the proposition, we should probably hold that the statute, so far as it relates to the status of stock held in trust, concerns only express and active trusts, where there is a probability of some estate to respond to the liability, and also that it does not apply when the records of the corporation show an unincumbered title in the alleged trustee, as is the fact at bar.

We have already said that the directions in the statutes touching national banking associations, with reference to the method of transferring shares of stock and entering the transfers on the books of the corporations, are, in no substantial respect, unlike the provisions of law so common in the various states in regard to the same subject-matter. And we have also said that, under such provisions, the indorsement and delivery of the certificate are sufficient to complete a transfer of stock as between the parties to the transaction, even when it is of the nature of a sale. Nothing in these statutory provisions, so far as we can perceive, concerns the substantial rights of anybody, and all is only directory, except, of course, so far as needed to relieve the registered holder from an estoppel. So far back as *Black v. Zacharie*, 3 How. 483, 513, Mr. Justice Story said with reference to a similar system in the statutes of Illinois: "But this is manifestly a regulation designed for the security of the bank itself, and of third persons taking transfers of the stock without notice of any prior equitable transfer." To the same effect, but having distinct reference to national banking associations, it was said by Mr.

Justice Field, speaking in behalf of the court, in *Johnston v. Lafin*, 103 U. S. 800, 803, 804, already cited:

"The entry of the transaction on the books of the bank, where stock is sold, is required, not for the translation of the title, but for the protection of the parties and others dealing with the bank, and to enable it to know who are its stockholders, entitled to vote at their meetings, and receive dividends when declared. It is necessary to protect the seller against subsequent liability as a stockholder, and perhaps, also, to protect the purchaser against proceedings of the seller's creditors."

We are therefore of the opinion that the statutory provisions which require records of transfers of the shares of stock of national banking associations do not relate to matters of substance, and that they concern only convenience, and are in essence directory. While a non-compliance with them may, as we have already said, place the seller of shares at a disadvantage, yet there is nothing in them which prevents looking through the substance of the transactions when the rights of the creditors of national banking associations are involved. These observations apply to all the provisions contained in the statutes relative to national banking associations which contemplate that, for certain purposes, the holders of shares shall appear of record. Several of these have been specially relied upon by the defendant, but they are all governed by this general observation.

Having come to this conclusion with reference to instances where shares of stock have been actually sold, the case for the plaintiff seems stronger, under the circumstances at bar. Here there was no sale as between the holders of record and the defendant. They had been his agents, and, for all the purposes of this case, they were substantially the same as he; and, as against the rights of the creditors of the bank, the fact that the stock stood in their names on its books, and not in his, ought to be regarded as of the very least importance.

We limit our decision to the precise case presented to us; and we do not undertake to say what the result would be if the defendant had shown that there were equities between him and the record holders of these shares, which might justify him in rescinding the transfers of the certificates by suitable proceedings already commenced, or any other equities of equivalent effect.

Our finding is general, but we will consider any special findings which may be seasonably submitted to us by either party, the same having been first exhibited to the other. The court finds that there must be judgment for the plaintiff, with costs.

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#### WALLACE v. BACON.

(Circuit Court, S. D. California. April 4, 1898.)

#### 1. PLEADING—MATTERS OF PUBLIC RECORD—INFORMATION OR BELIEF—MOTION TO STRIKE OUT.

An answer denying matters of public record, on the ground that defendant has not sufficient information or belief concerning them, will be stricken out as sham.

#### 2. SUBSCRIPTION TO CORPORATE STOCK — INSOLVENCY OF CORPORATION — RESCISSION FOR FRAUD.

A subscription to stock induced by fraud may be rescinded after, as well as before, the corporation ceases to be a going concern, where no considerable

time has elapsed since the subscription, if the subscriber has taken no active part in the management of the corporation's affairs, has been diligent in discovering the fraud and in taking steps to rescind, and where no considerable amount of corporate indebtedness has been created since the subscription, and is still unpaid.

**8. INSOLVENT NATIONAL BANK — LIABILITY OF STOCKHOLDERS — RESCISSION OF SUBSCRIPTION—PLEADING.**

An answer seeking to rescind a subscription to stock of an insolvent national bank, on the ground that it was obtained by fraud, must show that the creditors for whose benefit the assessment sought to be enforced was levied did not become such during the time defendant held such stock, and allege facts showing that defendant has not been guilty of laches.

**4. SAME—RESCISSION OF SUBSCRIPTION—ALLEGATION OF DILIGENCE.**

A national bank went into liquidation November 30, 1896. An action against a stockholder to enforce an assessment made by the comptroller of the treasury was commenced November 9, 1897. Defendant's answer set up in detail the fraud by which he had been induced to subscribe and pay for the stock, alleged that he had ever since been a resident of a distant state, and that, until a short time before the filing of the complaint, he had no opportunity of discovering the fraud. *Held*, that diligence was not shown.

Brousseau & Montgomery, for plaintiff.

C. N. Sterry and McKinley & Graff, for defendant.

ROSS, Circuit Judge. This action was commenced November 9, 1897, by the plaintiff, as receiver of the Missouri National Bank of Kansas City, to recover of the defendant the amount of an assessment levied by the comptroller of the currency on the 30th day of July, 1897, of \$100 upon each of 100 shares of the stock of the insolvent bank alleged by the plaintiff to have been owned and held by the defendant on the 30th day of November, 1896, when the bank is alleged to have failed and gone into liquidation. The defendant filed an answer, including a counterclaim, and also filed a cross complaint. Paragraph 1 of the first answer contains a denial that the defendant ever was the owner of any shares of the capital stock of the insolvent bank. The second, third, and fourth paragraphs of the first answer contain the statement that he has no information or belief on the subject sufficient to enable him to answer the allegations of the complaint in respect to the appointment of the receiver and his qualification, or in respect to the levy of the assessment by the comptroller of the currency, and on that ground he denies those allegations. In the second and third answers made by the defendant, as well as in his counterclaim and cross complaint, he expressly admits and alleges his purchase of 100 shares of the capital stock of the insolvent bank, and the issuance of the certificate therefor to him on the 16th day of July, 1896, in consideration of his payment to the bank of \$10,000. The motion of the plaintiff to strike out the first paragraph of the first answer as sham is therefore granted; also, the motion to strike out the second, third, and fourth paragraphs of the first answer upon the same ground. Matters of public record cannot be denied on the ground that a party has not sufficient information or belief concerning them. In other respects, the motion to strike out is denied.

The remaining answers and the counterclaim and cross complaint contain, in substance, the same matter, consisting of averments to the effect that the defendant's purchase of the shares of stock of the in-

solvent bank was made solely by reason of fraudulent representations made to him, as well as to one Calvin Hood, who was at the time a director of the bank, and who repeated the same to the defendant, respecting the financial condition of the bank. Those representations are set out in detail, and are alleged to have been made by the president of the bank, willfully and falsely; that the defendant believed them to be true, and, relying upon their truth, bought the stock, and paid his money for it. He alleges that he is a resident of the city of Los Angeles, Cal., and was, at the time he bought the stock, and at the time the false representations were made to him, on a short visit to Kansas City, ever since which time he has resided in Los Angeles, and never had any knowledge that the representations upon which he made the purchase were false, or of any fact causing him to believe them false, until a short time before the service of the complaint in this action upon him, and that, until a short time before the filing of the complaint, he had no opportunity to know nor any reason to believe such representations were false; that as soon as he learned of the condition of the bank, at the time he bought the stock and paid his money for it, he "rescinded said contract of purchase, and tendered said certificate of stock to the plaintiff, as receiver of said bank, and demanded that he be paid or allowed a claim for \$10,000" out of the assets of the bank in the hands of the receiver. The counterclaim, as well as the cross complaint, is for that sum, with costs. Neither the answer, counterclaim, nor cross complaint put in issue the averment of the complaint that the bank failed and went into liquidation on the 30th day of November, 1896; nor do either of those pleadings contain a word concerning the creditors of the bank existing at the time of its failure, and while the defendant was the holder of 100 of its shares of stock, in whose behalf and for whose protection the assessment in question was levied.

The question whether a stockholder should be permitted to rescind his subscription on the ground of fraud after the insolvency of the company, said the circuit court of appeals in *Bank v. Newbegin*, 20 C. C. A. 339, 74 Fed. 135—

"Is attended with much doubt and difficulty, because of the peculiar relation which a shareholder sustains to the creditors of the company. In the case of *Upton v. Englehart*, 3 Dill. 496, 505, Fed. Cas. No. 16,800, Judge Dillon, while discussing this subject, pointed out that the unbending English rule [to the effect that a suit to rescind a stock subscription on the ground of fraud cannot be maintained by a stockholder, no matter what diligence he may have shown, after proceedings have been taken to liquidate the affairs of the corporation on the ground of its insolvency] was influenced in a measure by the companies act (25 & 26 Vict. c. 89), which makes provision for a 'register of stockholders,' to which the public have access, and that, as no similar register of stockholders is ordinarily kept in the United States, the English decisions holding that the commencement of a proceeding to wind up a company is in itself a bar to a suit for rescission are not strictly applicable to the conditions which prevail here. He concluded the discussion of the question as follows: 'I am inclined to the opinion that if a company has fraudulently misrepresented or concealed material facts, and thus drawn an innocent person into the purchase of stock,—he at the time being guilty of no want of reasonable caution and judgment, and afterwards being guilty of no laches in discovering the fraud,—and he thereupon, without delay, notifies the company that he repudiates the contract, and, offers to rescind the purchase, these facts concurring, I am inclined to the opinion that the bank-



ruptcy of the company, subsequently happening, will not enable the assignee to insist that the purchase of stock is binding upon him.' There are obvious reasons why a shareholder of a corporation should not be released from his subscription to its capital stock after the insolvency of the company, and particularly after a proceeding has been inaugurated to liquidate its affairs, unless the case is one in which the stockholder has exercised due diligence, and in which no facts exist upon which corporate creditors can reasonably predicate an estoppel. When a corporation becomes bankrupt, the temptation to lay aside the garb of a stockholder, on one pretense or another, and to assume the role of a creditor, is very strong, and all attempts of that kind should be viewed with suspicion. If a considerable period of time has elapsed since the subscription was made; if the subscriber has actively participated in the management of the affairs of the corporation; if there has been any want of diligence on the part of the stockholder, either in discovering the alleged fraud or in taking steps to rescind when the fraud was discovered; and, above all, if any considerable amount of corporate indebtedness has been created since the subscription was made, which is outstanding and unpaid,—in all of these cases the right to rescind should be denied, where the attempt is not made until the corporation becomes insolvent. But if none of these conditions exist, and the proof of the alleged fraud is clear, we think that a stockholder should be permitted to rescind his subscription as well after as before the company ceases to be a going concern."

It is for the defendant, who seeks to avoid the consequences of his holding of stock in a national bank, to allege the facts that exonerate him. If the creditors in whose behalf an assessment is levied by the comptroller of the currency did not become such during the time the defendant was the holder of stock, it is for him to show the fact. This the defendant has wholly failed to do. And, in respect to diligence, the showing made by the defendant is altogether insufficient. The bank went into liquidation, as has been seen, November 30, 1896. The present action was commenced November 9, 1897. The defendant's averment is that he did not have the opportunity of discovering the fraud of which he complains until "a short time before" the filing of the complaint. Diligence on the part of the defendant is one of the essential things for him to show. It is not shown by the allegation referred to. Demurrers sustained, with leave to the defendant to amend within 10 days, if he shall be so advised.

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**SWOFFORD BROS. DRY-GOODS CO. v. MILLS et al.**

(Circuit Court, D. Wyoming. April 7, 1898.)

**1. VOLUNTARY ASSIGNMENT—JURISDICTION TO DETERMINE VALIDITY.**

The power of the district courts in Wyoming, under a deed of assignment, is merely to supervise and direct the administration of the trust; and jurisdiction over an independent proceeding to determine the validity of the assignment is not exclusively in the court where the deed is filed.

**2. SAME—PARTNERSHIP PROPERTY.**

Under the Wyoming assignment law, providing that creditors accepting the benefit of an assignment shall give release in full of their several debts, *held*, that an assignment, by a partnership, of partnership property alone, to pay firm debts only, is invalid; creditors are entitled to look also to the separate property of the partners.

**3. PARTNERSHIP—FALSE STATEMENT OF FINANCIAL CONDITION BY MEMBER.**

A statement by a member of a firm of its financial condition, in order to obtain an extension of credit, is binding on him and on the firm, even though he is mistaken, since he has full opportunity to know its falsity, and by making the statement obtains an advantage he would not otherwise have enjoyed.

#### 4. STATE STATUTE—ADOPTION BY ANOTHER STATE—CONSTRUCTION.

Where a statute of one state is adopted by the legislature of another, the construction placed upon it by the highest court of the former state is also adopted; provided, however, the statutes are identical, and their construction involves the determination of the same questions.

E. E. Lonabaugh and J. C. Baird, for plaintiff.

A. M. Appelget and Burke & Fowler, for defendants.

RINER, District Judge. This case is before the court upon a motion to dissolve an attachment. The defendants were co-partners doing business under the firm name of S. E. Mills & Co., and carrying on a general mercantile business, in Sheridan county, this state, at the towns of Dayton, Parkman, and Slack. On the 14th of January, 1898, they made an assignment of the firm property for the benefit of the creditors of the firm, but made no assignment of the property of the individual members of the firm. The plaintiff brought its action in this court on the 8th of February, 1898, and caused an attachment to be issued and levied upon certain property alleged to belong to the defendants, then in the hands of the assignee under the deed of assignment above mentioned. The attachment was issued upon statutory grounds, fully set out in the affidavit for attachment. The questions presented for determination are: First. Can the validity of this assignment be inquired into and determined by this court, or can that question be heard and determined only in the court having control of the assignment proceedings, under the statute? Second. If this court may inquire into the validity of the assignment, is an assignment, made by a partnership, of partnership property only, a valid assignment, under our statute? Third. If this court may inquire into the validity of the assignment, and if, under our statute, an assignment, to be valid, must include all of the debtor's property, including the property of the individual members of the partnership as well as the property of the partnership, is there such a showing of fraud in law as will sustain an attachment on behalf of this plaintiff? These questions we will briefly notice in their order.

It was insisted at the argument that the subject-matter of the controversy now before the court, viz. the validity of the assignment, can only be heard and determined in the court having control of the assignment proceedings; the contention being that the provisions of the statute requiring the assignee to file a certified copy of the assignment and schedule, his oath, and a written undertaking conditioned for the faithful discharge of his duties, in the office of the clerk of the district court in the county in which the defendant resides or is engaged in business, and giving that court authority over the assignee, in effect confers upon that court exclusive jurisdiction over all questions affecting the assignment. In order that we may arrive at a proper solution of this question, let us inquire first as to the effect of the provisions of our statute authorizing an assignment. The statute cannot be said to create the right to make an assignment for the benefit of creditors. The most that can be said for it is that it recognizes, and in some respects restricts, this right, and provides the method by which the trust shall be carried into effect.

A debtor, under this statute, cannot be compelled to make an assignment, nor can the court by any order or decree obtain control over or possession of the debtor's property. That remains in the hands of the assignee under the deed of assignment, in trust for the benefit of the assignor's creditors. In other words, by the execution of the deed of assignment the debtor conveys his property to the assignee, and an express trust is thereby created, and by the provisions of the statute the district court of the county wherein the assignor resides or transacts business is clothed with power and authority to supervise and direct the administration of the trust thus created. This is the extent of its power. In *State v. Foster*, 38 Pac. 929 (decided in 1895), the supreme court of this state, in the course of its opinion, said:

"The common-law rule is that a general assignment passes the title. Our statute provides the same thing, in effect, and it does not provide that the title shall not pass. It authorizes a debtor to make a general assignment without preference or priority of creditors. It requires that this shall be done by indenture, which is the usual method of passing title. It speaks of the assignment as 'conveying' an interest. The assignee is empowered to sell by virtue of the indenture and recording, and without waiting for an order of the court. The power of the court over the estate is, by the words of the statute, simply a 'supervising' power."

See, also, to the same effect, *Carey v. Foster* (Wyo.) 51 Pac. 206.

The statute under which this assignment was made, however, does not provide for a hearing upon the question of the execution or validity of the deed of assignment. To secure a hearing upon this question, it is necessary, therefore, that an independent proceeding be instituted; and, unless the invalidity of the deed is apparent on its face, a proper mode of raising the question, especially if the title to real estate is involved, would be by a bill in equity; and the jurisdiction over an independent proceeding to test the validity of the assignment is not limited to the court in which the assignee has filed a copy of the deed of assignment, schedule, his oath, and the undertaking. The jurisdiction of the court is given by the law, not by the parties, and can neither be conferred nor taken away by their mere consent or agreement. If the conditions prescribed by the law for jurisdiction exist, the jurisdiction exists, and the court is bound to take jurisdiction when a proper case is brought. As stated by Judge Shiras in the case of *Kohn v. Ryan*, 31 Fed. 638 (which was a case where an assignee was garnished in an attachment proceeding against the assignor):

"The general rule that one court will not seek to take possession of property already within the possession or control of a court of concurrent jurisdiction is too well settled to need discussion. If a state court, through a receiver or administrator appointed by such court, or by levy of a writ issued to the sheriff or other executive officer of the court, has taken possession of property, the United States court will not interfere with such possession. \* \* \* It will be remembered, however, that, in cases of assignment, possession of the property is not taken under or by virtue of any order or process of court. The assignee derives title and possession from the voluntary deed and act of the assignor, and the state court controls the execution of the trust through its control over the assignee. If it be true that the United States court has jurisdiction to entertain a bill in equity to set aside an assignment on the ground of fraud, then it must have the right to compel the assignee to appear and answer to such bill, or

to submit to a decree by default; and, if this be true, then the assignee is liable to be subjected thereby to the same difficulties as may arise upon a garnishment. The fallacy in the position taken lies in confounding the jurisdiction of the state court over the execution of the trust created by the deed of assignment with the jurisdiction over the wholly distinct question of the validity of the deed of assignment. So far as it now appears, no proceeding to test the validity of the assignment has been brought in the state court, and there is nothing to prevent the United States court, at the suit of citizens of states other than Iowa, from taking jurisdiction of this issue."

The case is directly in point here. No proceeding whatever has been instituted in the state court to test the validity of this assignment. The plaintiff being a citizen of another state, and the amount in dispute being large enough, he has a right to have the question heard and determined in the federal court. While the decisions of the state courts are not in harmony upon this question, the federal courts uniformly hold that property in the hands of an assignee for the benefit of creditors under statutes clothing the state courts with power and authority to supervise and direct the administration of the trust, as is the case under our statute, is not in custodia legis. *Jaffray v. McGehee*, 107 U. S. 361, 2 Sup. Ct. 367, was a case where the firm of Morse & Bell, doing business in Arkansas, executed a general assignment of all its property for the benefit of creditors to one James M. Judson, who accepted the trust, gave bond, and filed an inventory of the property in the state court; the assignment being made in December, 1878. In January, 1879, another mercantile firm obtained a judgment in the United States circuit court against the assignors, and the marshal levied execution on the property in the hands of the assignee. Other creditors then filed a bill in the federal court setting forth the execution of the assignment, and praying that further proceeding upon execution be enjoined, and the property returned to the assignee. Upon a demurrer to the bill the circuit court held that the assignment was void on its face, and dismissed the bill, and this ruling was sustained by the supreme court. To the same effect is the case of *Chittenden v. Brewster*, 2 Wall. 191. That was a bill to set aside an assignment filed in the circuit court of the United States for the district of Illinois, and the supreme court sustained the bill; holding that the filing thereof gave the complainant the first lien on the property, although in fact the assignee had delivered over the property to a receiver appointed in a proceeding brought in the state court, but not commenced until after the filing of the bill in the federal court. There are numerous other cases bearing on this question. Among those directly in point are the following: *Shelby v. Bacon*, 10 How. 56; *Adler v. Ecker*, 2 Fed. 126; *Lapp v. Van Norman*, 19 Fed. 406; *Lehman v. Rosengarten*, 23 Fed. 642; *The James Roy*, 59 Fed. 784; *Jones v. Machine Co.*, 27 C. C. A. 133, 82 Fed. 295; *Hogue v. The City of Frankfort*, 62 Fed. 1006; *Rothschild v. Hasbrouck*, 65 Fed. 283; *Bock v. Perkins*, 139 U. S. 628, 11 Sup. Ct. 677. It would be exceedingly interesting, but would extend this opinion to an unwarranted length, to review all of the federal cases upon this subject. It is sufficient to say that the uniform ruling in the federal courts is that the filing of a copy of the

assignment, schedule, oath, and bond of the assignee in the state court by the assignee does not clothe that court with exclusive jurisdiction over the question of the validity of the assignment, nor is that question, in fact, put in issue in the usual proceeding had in executing the assignment. It is therefore open to creditors to attack the validity of the assignment by proper proceedings in any court of otherwise competent jurisdiction, and the judgment or decree of the court wherein the question as to the validity of the assignment is tried is legally binding upon all parties to such proceeding. If, in a hearing upon this question, the assignee being a party, as he is in this case by virtue of his petition of intervention, it is adjudged that the deed of assignment is void as against creditors, the assignee may bring such adjudication to the knowledge of the court having charge of the trust; and that court will undoubtedly give full force and effect to such adjudication, so far as the same may affect the proceeding before it, and in this way the assignee will be fully protected. It results from the views above expressed that the validity of this assignment may be inquired into by this court.

The second question depends upon the construction of the statute of this state regulating voluntary assignments. That statute, in its first section, provides:

"That any debtor or debtors in embarrassed or failing circumstances may make to one or more assignees a general assignment of all of his or their property in trust for the benefit of his or their bona fide creditors; and all assignments hereafter made by such person or persons for such purpose, except as provided for in this act, shall be deemed fraudulent and void. A debtor is insolvent and in embarrassed and failing circumstances within the meaning of this act when he is unable to pay his debts from his own means, as they become due."

It is contended on behalf of the defendants and the assignee, who has intervened in the case, that by the terms of this statute, which provides that any "debtor or debtors" may make an assignment, a co-partnership may make an assignment of its firm property without assigning the property of the individual members of the firm; that the deed of assignment in this case, which is conceded to be an assignment by the partnership of partnership property exclusively, is a valid assignment; and it is insisted that because certain sections of this statute are copied from the statutes of Indiana, and because the supreme court of that state has held that a partnership assignment of partnership property only is valid, this court is bound by that construction. The rule undoubtedly is that, where the statute of one state is adopted by the legislature of another state, the state so adopting the statute adopts it with the construction placed upon it by the highest court of the state from which the statute was taken. In applying this rule, however, it must appear that the statutes are identical, and that their construction involves a determination of the same question. The statute in force in Indiana, and which has been construed by the supreme court of that state as above indicated, does not provide for a release of all claims against the debtor, whereas our statute (Laws 1890, p. 90, § 28) is as follows:

"In all cases where the assignor complies with the provisions of this act, any creditor accepting from the assignee any dividend arising from the property of

the assignor to which he is entitled under any assignment made under this act, shall release the assignor from all further liability on the claim or claims on which said payment may be made."

And the supreme court of this state, in the case of *Downes v. Parshall*, 26 Pac. 996, said:

"The release is a matter which the statute provides for, and not the assignment; a result which the statute causes to follow the execution of an assignment according to the statutory terms." (In other words, that the release is incorporated in the assignment by operation of law and that it is unnecessary to specially provide for it in the deed.)

It will be seen, therefore, that there is a radical difference between the statute of Indiana and the statute now under consideration. In many of the states the statutes authorize the assignors to make provision in the deed for the release of the claims of creditors; and, with few exceptions, where such a release is provided for, either in the deed or by statute, it is held that the assignment, to be valid, must include all of the assignor's property, and that the assignment, by a partnership, of partnership property exclusively, is upon its face a partial assignment only, instead of a general assignment, and as such, under statutes like ours, the assignment is void,—the reason for the rule being that where the debtor, by his deed, or where the statute under which the assignment is made, compels the creditor to assent to a release of all of his claims against him, he must fairly devote his entire property to the payment of his debts. Any other rule would involve the unjust absurdity of allowing a debtor, by the assignment of partnership property only, to obtain a complete discharge from debts for which his individual property, ample in many instances to pay them in full, is liable. Under statutes like ours, where a release of all claims becomes a part of the assignment, as decided by our supreme court, whether included in the deed or not, the necessity for a general assignment of all the debtor's property is at once apparent. As stated by the supreme court of Minnesota in the case of *May v. Walker*, 28 N. W. 252 (which was a case of an assignment by a partnership of partnership property only):

"In contemplation of law, all his unexempt property belongs to his creditors; and to permit him to put a part of it out of their reach unless they will submit to his terms, and take less than they are entitled to, is to permit him to hinder and delay them in the collection of their demands out of property justly and legally liable for the same."

The effect of the statute is to prevent creditors from receiving compensation out of the debtor's property unless they take the risk of yielding up some portion of their debts, and conferring on him a substantial benefit; and if the assignment is not of all the property of the debtor, but only of a part, the condition imposed by the statute, and made a part of the assignment, is oppressive and without any color of justice. I do not think the statute will bear such a construction. It is true that many of the states recognize assignments of partnership property only, but in most of them, to which my attention has been called, where that rule prevails, no releases are required, and partial assignments are upheld. Thus, in Kansas, the supreme court of that state, in

the case of *McFarland v. Bate*, 25 Pac. 238, while recognizing the validity of a partnership assignment of partnership property only, base the decision upon the ground that no releases are required. The court in that case said:

"We are cited to several cases holding against the validity of partial assignments, but these authorities are based on statutes requiring that all the property or estate of the debtor shall be conveyed, or where one of the conditions of the deed making a partial assignment was that the creditors accepting its terms should give releases in full of their several debts. It may now be considered to be established by the weight of authority that a partial assignment, which exacts releases from accepting creditors, and deprives them from access to the residue not assigned, is invalid. In this case, however, no releases were required."

The same is true of the state of Iowa. In that state partial assignments are upheld. In Texas the statute, like ours, provides for a general assignment for the benefit of creditors. True, in its first section, it speaks of an insolvent debtor, and in that respect differs from our statute, which speaks of a debtor or debtors. The second section of the Texas statute, however, provides that the assignment shall be acknowledged, certified, recorded, and that the deputy shall annex to the assignment an inventory containing: First, a full and true account of all creditors of such "debtor or debtors"; second, the place of residence of each creditor, if known to such "debtor or debtors"; sixth, for a full and true inventory of the estate at the date of assignment, and the value of such estate according to the best knowledge of the "debtor or debtors"; seventh, an affidavit shall be made by such "debtor or debtors," etc.,—while our statute, in the second section, provides that the assignor shall make oath, before some person authorized to administer oaths, that the indenture and schedule contain a statement of all the property, rights, and credits belonging to "him," or of which "he" has any knowledge, and that "he" has not directly or indirectly transferred or reserved any sum of money or article of property for "his" own use, and that "he" has not acknowledged a debt, etc., with intent to delay or defraud "his" creditors. Thus, it will be seen that while our statute, in its first section, speaks of the debtor or debtors, in the second section it speaks of the assignor and his property, etc., while the Texas law, in the first section, speaks only of the debtor, but in the second section speaks of the debtor or debtors. This is substantially the only difference between the two statutes in that respect. As to the release provision, the reasons for requiring an assignment to be an assignment of all of the debtor's property certainly applies with full force in this state, because, under our statute, every assignment provides for the release of all of the claims of the creditor against the debtor, if he accepts any dividend arising from the property assigned. Under the Texas law the party making an assignment has a right to insert such a provision in his deed, and, where the assignor avails himself of this right, both the state and federal courts in that state hold that there cannot be a valid assignment by a partnership of partnership property only. In *Donoho v. Fish*, 58 Tex. 164, the supreme court, after holding that only a general assignment is contemplated by the statute of Texas, said:

"If, however, co-partners could, under the act, make an assignment of partnership property only for the benefit of the creditors of the firm alone, there would be an insuperable objection to such an assignment containing a clause requiring a release of the debtors by the creditors, as a condition to the right to participate in the proceeds of the assigned property. \* \* \* He who wants the benefit of the act by which he seeks to be released from his just debt without full payment must comply with the act, by conveying to the assignee all of the property required to be conveyed, whether the same be owned by him individually, or as a member of a firm; and if he does not do so by the terms of his deed, aided by the law, his assignment is void, and imposes no obstacle to creditors in collecting their debts by usual process."

And the ruling in that case was followed in the case of *Kennedy v. McKee*, 142 U. S. 606, 12 Sup. Ct. 303.

I think, under our statute, it must be held that an assignment, to be valid, must include all of the assignor's property; that is to say, the separate property of the individual members of the firm, as well as the firm property. The statute, to my mind, clearly contemplates that all of the property, real and personal, of the debtor making the assignment, except such as is exempt by law from forced sale, whether the same be partnership property, or property owned by each partner in his own individual right, shall pass by the assignment, to make it a valid assignment. As already suggested, the statute does not undertake to make an assignment for a debtor. It provides how an assignment may be made, and aids and makes complete an assignment which evidences an intention of the debtor to comply with its provisions. The provision of the statute is that the debtor or debtors may make a general assignment of all his or their property; and if he makes such an assignment, which is the only assignment authorized by the statute, the statute then, by section 28, p. 90, Laws Wyo. 1890, provides that every creditor accepting from the debtor any dividend arising from the property shall release the assignor from all further liability on the claim or claims upon which the payment is made. The separate property of partnership debtors is liable for their just debts, and, as between debtor and creditor, each partner is liable, and his whole separate property chargeable, as well for his partnership as his individual debts. How, then, can it be said, as contended by counsel at the argument, that a release from all further liability on the claim upon which payment has been made would, in effect, release only the partnership, and that the right to proceed against the individual partners would still exist. I think such a release would release the individual members of the firm, as well as the firm. In the case of *Wyles v. Beals*, 1 Gray, 237, Chief Justice Shaw said:

"It not unfrequently happens that a man of ample means and credit enters into partnership with a person supposed to have capacity for business, but with little or no property. The credit is given to the partnership on the known amount of the separate property of one of the partners, each being liable in solido for the whole of each partnership debt. Under such an assignment as this [which was an assignment by a partnership of partnership property only] partners might obtain a full discharge from all partnership demands, while one or both of them has property which the law makes chargeable with those debts, and which is sufficient to pay them."



I think, therefore, that the assignment, being partial only, cannot be sustained.

The third question is one of fact, arising on the affidavits filed in support of and against the motion to discharge the attachment. I have examined these affidavits with great care, including all of the correspondence between the parties; and, without going over the facts set out in each of the affidavits in detail, I think the attachment must be sustained, at least until the trial of the case, when there may be an opportunity to inquire fully into some of the transactions of the parties, including a number of conveyances which were made by them at or about the time of the assignment. It is true, Mr. Wallace explains that one mortgage for \$4,000 is without consideration, and should be released; but it has not been released, and there is no showing here from the bank, in whose favor the mortgage is made, to the effect that it was without consideration, and is entitled to be released. Another mortgage was made six months prior to the assignment, but was not recorded; neither was this plaintiff advised of its existence. And, further than that, I am inclined to the view that Mr. Wallace's statement of the financial condition of the firm was binding upon him and upon the firm, even if he was mistaken. He was in a position to know, and was seeking to obtain credit, or the extension of credit, upon his statement; and I think he ought not now to be permitted to say that, while it was not true, it was a mere mistake upon his part, and therefore afforded no ground for the action taken by the plaintiff. I think it must be held that one who makes a false representation, on which another relies, is liable, whether or not he knew of its falsity, in a case where he had full opportunity to know that it was false, and where by making the statement he gained an advantage which he would not otherwise have enjoyed.

The views above expressed I believe to be in harmony with the weight of authority. If, however, I am mistaken in this, the defendants are not without remedy. In concluding, I desire to say to counsel upon both sides that I appreciate the very great assistance given the court in the investigation of this somewhat complicated case. The case was argued with distinguished ability, and the briefs were able and exhaustive. The motion to dissolve the attachment will be denied.

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EDMUNDS v. NOLAN.

(Circuit Court, N. D. California. February 23, 1898.)

No. 12,314.

**SALE—RESCISSON—GROUND FOR CONVERSION.**

In June, 1894, a merchant in California ordered shoes of a manufacturer in Boston for the fall trade. Shortly afterwards a receiver was appointed for the manufacturer, and the goods were delayed in shipment, notwithstanding repeated requests for early delivery, until late in the fall, when the buyer notified the receiver to hold them until further orders, and some time later telegraphed that they had been stored at his risk and expense, also making a claim for storage and other expenses. After vainly attempting to compro-

mise on the theory of a sale, the receiver, in August, 1895, tendered the amount claimed for storage and expenses, and demanded possession of the goods, which was refused. *Held*, that he was entitled to recover the value of the shoes at the time of the demand, less the amount of freight and expenses, with interest from the date of demand.

This was an action at law by John Edmunds, receiver of the Eaton & Stephens Manufacturing Company, against P. F. Nolan, doing business under the name of Nolan Bros. Shoe Company, to recover damages for the alleged wrongful conversion of a lot of shoes.

Chickering, Thomas & Gregory and Gerstle & Sloss, for plaintiff.  
Smith & Murasky, for defendant.

HAWLEY, District Judge (orally). This is an action, brought by the plaintiff, to recover \$3,000 damages, against the defendant, for the alleged conversion of a lot of shoes. The cause was tried before the court, a jury being waived. The evidence presents two questions: (1) Was the title to the goods in plaintiff at the time of the alleged conversion? (2) What was the value of the goods at the time and place of the conversion?

The facts elicited at the trial are, in substance, as follows:

That the goods in question were ordered by the defendant, P. F. Nolan, then doing business under the name of Nolan Bros. Shoe Company, from Bent Bros. & Co., through C. S. Pearson, who was a traveling salesman for Eaton & Stephens Manufacturing Company, a corporation, of Boston, Mass., in June and July, 1894. That the name of Bent Bros. & Co. was a company name, used by the corporation in selling goods to the retail trade, in order to keep it separate from the jobbing trade. That certain steps were regularly taken in the courts of Massachusetts which resulted in the appointment and qualification of John Edmunds as receiver for the said Eaton & Stephens Manufacturing Company, and the transfer, assignment, and sale of all the personal property of the corporation, including certain leather and material for the manufacture of shoes, to the receiver, who thereby became vested with the title to all of said property. That the plaintiff, as such receiver, manufactured from said leather and materials 2,026 pairs of shoes. That during the months of November and December, 1894, the goods in question, so manufactured, were shipped by the plaintiff to Nolan Bros. Shoe Company, San Francisco, Cal., as shown by certain invoices, as follows: "Nov. 28, 1894, invoice amounting to \$1,145; Dec. 5, \$723.50; Dec. 12, \$846.10,"—making a total value, as shown by the invoices, of \$2,714.60. That the following telegrams, concerning the goods, were sent and received by the respective parties, viz.:

"Oct. 12, San Francisco, Cal.

"Bent Bros. & Co., \* \* \* Boston: When will you ship our goods? Answer.  
Nolan Bros. Shoe Co."

"10/24, San Francisco, Cal.

"Bent Bros. & Co., \* \* \* Boston: Why don't you answer Nolan's telegram? He wants goods badly.  
C. S. Pearson."

"Oct. 25.

"Chas. S. Pearson, \* \* \* San Francisco, Cal.: Can ship cheap goods November fifteenth. Will notify on others Saturday. Wire if Nolan will wait.

"John Edmunds, Receiver."

That the goods described in the invoices, above mentioned, are the cheap goods referred to in the telegram of October 25th, corresponding in every respect with the order for the goods, through Pearson, to Bent Bros. & Co. That after the arrival of the goods at San Francisco, the following telegrams were sent by Nolan Bros. Shoe Company to, and received by, John Edmunds, receiver:

"Dec. 21, 1894.

"Goods too heavy for spring trade. Hold subject to order."

"Jan. 2, 1895.

"Explanation not required. Goods ordered for fall trade. Came too late."

"Jan. 22.

"Not hearing from you, we have stored the goods at your risk and expense."

"Feb. 26.

"We suppose you know that your goods are stored here at your risk, and not insured."

That no reply to either of these telegrams was made by the plaintiff. That the defendant made claim against the plaintiff for \$150 for money expended for freight, commission, storage, and other expenses. That on August 6, 1895, the plaintiff, after fruitless efforts to compromise and agree upon the price of the goods upon the theory of a sale and delivery, tendered defendant \$150 for expenses and charges claimed by the defendant, and demanded the possession of the goods, which was refused.

Upon the part of the plaintiff, the testimony shows that the goods, at the time they were shipped to San Francisco, were of the value set forth in the invoices, and would be of the same value, if acceptable for the trade, in San Francisco as in Boston, where manufactured; that these goods, in August, 1895, owing to the advance in all kinds of leather, were worth from 20 to 25 per cent. more than at the date of the invoices. On the part of the defendant, the testimony shows that the goods in question were ordered by him for the fall trade; were heavy shoes, mostly with cork soles, and only adapted to the winter trade; that when the order was given to Pearson it was with the understanding that the goods would be shipped without delay; that the goods for the fall trade should be in the store as early as September or October; and that, if they arrived for the Christmas holidays, they were too late for the winter trade. Several witnesses engaged in the boot and shoe business in San Francisco testified that if such goods were ordered for the fall trade in June or July, 1894, and were not delivered until the latter part of December, they would not be of the same value as if delivered in time for the fall trade, and that the depreciation in value would average about 50 per cent. on all the goods. The printed heading on each invoice of goods contained the name of "Bent Brothers & Company," over which was stamped the name of "John Edmunds, Receiver," with date of invoice, and "Terms, 5/30. Sold to Nolan Brothers Shoe Co., San Francisco, Cal." The goods were received by the defendant from the railroad company, and the freight charges paid by him. After the refusal of the defendant to pay for the goods, or to deliver the same, upon demand being made by plaintiff, an action was commenced by the plaintiff against Nolan Bros. Shoe Company, a corporation. Certain depositions were taken in that action, but when

the case came to trial it was discovered that the wrong party had been sued, and the parties hereto, by stipulation, have mutually agreed that the depositions taken in that action might be used upon the trial of this case. The defendant herein, P. F. Nolan, in that action verified an amended answer, averring that it (the corporation) had no information or belief on the subject sufficient to enable it to answer, and on that ground "denies that the reasonable value of the shoes mentioned in the complaint is now, or ever was, the sum of \$3,000, or that the same were of any other or greater value than the sum of \$2,000."

Upon these facts, the contention of the plaintiff is that the title to the goods at the time of the alleged conversion thereof by the defendant was in the plaintiff; that the contract for the purchase of the goods was never completed; that the goods were not shipped according to the contract; that the minds of the parties never met; that, Nolan having refused to pay for the goods, and having notified the plaintiff that he would not receive them, the plaintiff had the right to bring and maintain this action. The contention of defendant is that there was a sale of the goods; that the goods were shipped with that understanding, and, having been received by Nolan, the only recourse which plaintiff could have would be an action for the value of the goods; that in such an action the defendant would be entitled to recover damages which had accrued to him by reason of the delay in the delivery of the goods; that, in any event, under all the facts, the defendant is entitled, if there was no sale, to such reduction of the damages as would correspond to the depreciated price or value of the goods at the time they were received by the defendant.

Without discussing any of the legal questions or peculiar phases of the transaction arising upon the facts, I content myself with simply stating my conclusions thereon. I am of opinion that the plaintiff has established sufficient facts to entitle him to recover in this action. I find the value of the goods, at the time demand was made for the possession thereof, to be \$2,035.95, from which should be deducted \$150, storage charges, leaving the sum of \$1,885.95. The plaintiff is therefore entitled to judgment for said sum of \$1,885.95, together with legal interest thereon from August 6, 1895, and for costs. Let judgment be entered accordingly.

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STANDARD LIFE & ACCIDENT INS. CO. OF DETROIT, MICH., v.  
CARROLL.

(Circuit Court of Appeals, Third Circuit. April 11, 1898.)

No. 8.

ACCIDENT INSURANCE—FAILURE TO ANNEX COPY OF APPLICATION TO POLICY.

The Pennsylvania act of May 11, 1881, declaring that, in all controversies relating to "life and fire insurance policies," neither the application, constitution, by-laws, nor other rules of the company shall be received in evidence or be considered as part of the contract or policy, unless copies of the same are attached thereto, does not include policies of insurance against bodily accidents.

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

C. Heydrick, for plaintiff in error.

W. J. Breene, for defendant in error.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

ACHESON, Circuit Judge. The question for our determination is whether, under the special verdict, judgment should have been entered in favor of the plaintiff below in the sum of \$1,600, with interest from the 1st day of July, 1896, or in the sum of \$4,000, with interest from said date. The action was upon an accident insurance policy dated January 24, 1895, which provides as follows:

"The Standard Life and Accident Insurance Company of Detroit, Michigan, in consideration of the warranties in the application for this policy, and of twenty-four dollars, hereby insures John Carroll, of Titusville, Pa., by occupation a passenger conductor, under classification extra preferred, for the term of twelve calendar months from noon of twenty-fourth day of January, 1895, in the sum of twenty dollars per week, against loss of time, not exceeding fifty-two consecutive weeks, resulting from bodily injuries caused solely, during the term of this insurance, by external, violent, and accidental means, which shall, independently of all other causes, immediately and wholly disable him from transacting any and every kind of business pertaining to the occupation under which he is insured; or if the entire loss of one hand or foot, by severance at or above the wrist or ankle, shall result from such injuries alone within ninety days, will pay the insured one-third the principal sum herein named, as a specific indemnity, in lieu of said weekly indemnity; or if such injuries shall, within said period, entirely destroy the sight of one eye, one-eighth of said principal sum, as a specific indemnity, in lieu of said weekly indemnity; or in the event of the entire loss of two hands or two feet, or of one hand and one foot, by severance at or above the wrist or ankle, or of the entire loss of the sight of both eyes, within ninety days, solely through the injuries aforesaid, will pay the insured the full principal sum hereof; or, if death shall result from such injuries alone within ninety days, will pay the principal sum of four thousand dollars to Annie Carroll, wife, if surviving, or, in the event of her prior death, to the legal representatives or assigns of the insured: except that, if the insured be injured in any occupation or exposure classed by this company as more hazardous than that stated in said application, the insurance, weekly indemnity, or specific indemnity shall be only for such sum as the premium paid will purchase at the rate fixed by said company for such increased hazard."

The plaintiff's own evidence in chief showed that, while exercising the occupation of a conductor of a mixed railway train,—composed of freight cars, with a combination passenger and baggage car attached,—the insured, John Carroll, received injuries, by external, violent, and accidental means, from which his death resulted within 90 days thereafter. The defendant gave in evidence, under objection, the application of John Carroll for this accident policy, in which he stated his occupation to be that of a "passenger conductor,"—the same occupation as that stated in the policy itself; and the defendant also gave in evidence its "Accident Manual," exhibiting its classification of risks and premiums of insurance in the several classes of hazards, and showing that the occupation of conductor of a mixed railway train was classed by the company as more hazardous than that stated in the said application and policy, and that the premium paid for the said policy of insurance

would purchase, at the rate fixed by the company for such increased hazard, the sum of \$1,600, and no more.

From the above extract from the policy, it will be perceived that subsequent change of occupation by the insured during the term of insurance was contemplated by the parties to the contract, and was provided for in and by the policy. To effectuate their intention in this regard, the parties made the application of the insured, and the company's classification of hazards, essential parts of their contract. Nevertheless it is contended that the application and classification of hazards are to be excluded from consideration by reason of the Pennsylvania act of May 11, 1881. That act is as follows:

"An act relating to life and fire insurance policies.

"Be it enacted," etc., "that all life and fire insurance policies upon the lives or property of persons within this commonwealth, whether issued by companies organized under the laws of this state or by foreign companies doing business therein, which contain any reference to the application of the insured, or the constitution, by-laws or other rules of the company, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain, or have attached to said policies, correct copies of the application, as signed by the applicant, and the by-laws referred to; and unless so attached and accompanying the policy, no such application, constitution or by-laws shall be received in evidence in any controversy between the parties to, or interested in, the said policy, nor shall such application or by-laws be considered part of the policy or contract between such parties." P. L. 1881, p. 20 (Purd. Dig. 1046, pl. 62).

At the date of this act there was, and still is, in Pennsylvania, a legislative classification of insurance. The act of May 1, 1876 (P. L. 53), provides for the incorporation of four different kinds of insurance companies: First, to make insurance against fire and marine risks; second, to make insurance upon lives; third, to make insurance upon health, and against accidents; and, fourth, to make insurance upon live stock. And the act contains distinctive provisions applicable to these several classes of insurance companies. Now, the act of May 11, 1881, does not purport to cover all policies of insurance, but it is limited to two specified classes. The subject-matter of the act is expressed in its title, "An act relating to life and fire insurance policies"; and the enacting clause reads, "All life and fire insurance policies upon the lives or property of persons," etc. Presumably, the legislature intended to exclude from the operation of the act the classes of insurance policies not named. The suggestion that the act includes policies of insurance against bodily accidents seems to us to be quite inadmissible. The instrument sued on here is strictly an accident insurance policy. The form of the policy is that commonly used in insurance against bodily accidents. The primary purpose is to secure a weekly indemnity in money to the insured in the event of his disability from accidental injury. In certain specified contingencies, resulting from accidental injury, a specified gross sum is to be paid. In some of these resulting contingencies the stipulated specific payment is a proportionate part of the principal sum named in the policy, and in other contingencies the whole principal sum is to be paid. One of the latter is death resulting from the accident within

90 days thereafter. But this contingent provision does not make the instrument a life insurance policy, either in a popular or in a legal sense.

The views we have thus expressed require a reversal of this judgment, unless, as the counsel for the defendant in error contends, the supreme court of Pennsylvania has construed the act of May 11, 1881, as embracing accident insurance policies, equally with life and fire insurance policies. It is claimed (and the reporter's syllabus gives some color to the contention) that in the case of *Pickett v. Insurance Co.*, 144 Pa. St. 79, 22 Atl. 871, that learned court put such a construction upon the act of 1881. Now, we have examined that case with great care, verifying our understanding of the facts as stated in the official report by consulting the copy of the record contained in the paper books found in the Hirst Law Library, Philadelphia (volume 140, Paper-Book Series); and we feel entirely justified in saying that the decision by no means goes to the length supposed. The plaintiff there declared upon "a policy of insurance in the sum of \$5,000 upon the life of John W. Moore." The stipulation upon which the plaintiff relied, and under which recovery was had, was in these words:

"The Pacific Mutual Life Insurance Company of California, in consideration of the warranties in the application for this insurance, and the stipulations herein contained, and of the sum of \$37.50, does hereby insure John W. Moore, by occupation, profession, or employment a contractor and driller, residing in Warren, county of Warren, and state of Pennsylvania, in the principal sum of five thousand dollars, for the term of twelve months, ending on the fourth day of June, eighteen hundred and ninety, at twelve o'clock noon. The said sum to be paid to the legal representatives of the insured after due notice and satisfactory proof that the insured has, during the continuance of this policy, sustained such violent and accidental injuries as shall externally be visible upon his person, and which shall alone have caused his death within ninety days of the date of such accident."

This was the only insurance effected by the policy. Following the above-cited clause are the words, "Or, if policy be issued for both death and indemnity, will pay the insured; \* \* \*" but the policy, as issued, was not for both death and indemnity. The insurance was only upon the life of the insured. The instrument, as issued, might well be held to be a restricted life insurance policy, within the meaning of the act of May 11, 1881. The court ruled that the act did apply to that particular policy. The great question in *Pickett v. Insurance Co.* was whether a condition against "inhalation of gas" applied to an involuntary and unconscious inhalation of poisonous gas by the insured in the course of his employment, and it was held that the condition did not apply. That question, which went to the substantial merits of the case, and was decisive of the controversy, was discussed with great fullness in the opinion of the court. The other question, namely, the applicability of the act of 1881 to the case, was briefly disposed of thus:

"Another ground of defense suggested in the defendant's fifth, sixth, and seventh points was that the deceased was injured in an occupation or exposure classed by the company as more hazardous than that specified in the policy, etc. The points referred to appear to be predicated of testimony which was improperly before the jury. The company, in disregard of the provisions of

the act of May 11, 1881 (P. L. 20), had failed to attach to the policy copies of the by-laws or application, and should not have been permitted, against the plaintiff's objection, to give them in evidence. The act was passed in the interest of honesty and fair dealing, and its provisions should be strictly enforced. We have no doubt they apply to such companies as the defendant."

This language, of course, was used with reference to the particular instrument before the court, and must be so read. There is no warrant, we think, for the assumption that the court thereby meant to declare that the act of May 11, 1881, applies to accident insurance policies. In the present case the offer of the application was not to defeat a recovery, or to set aside any of the stipulations of the policy. The parties contracted with reference to a future change of occupation by the insured. Such change was not to avoid the policy. It was allowable upon agreed terms. The change of occupation simply altered the amount of indemnity so as to accord with the increased hazard. This is the plain contract of the parties, evidenced by the policy itself. The provision for changes of occupation and hazard is reasonable and just, and, indeed, in the interest of the holders of accident insurance policies. We discover no good reason here for denying effect to the provision. The judgment is reversed, with costs to the plaintiff in error in this court; and the cause is remanded to the circuit court, with direction to enter judgment in favor of the plaintiff in the sum of \$1,600, with interest from the 1st day of July, 1896, and costs in the court below.

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WILSON v. OWENS.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 990.

1. STATUTE OF FRAUDS—INDIAN TERRITORY—LEASE OF LANDS.

There was no statute of frauds in force in the Indian Territory until the act of May 2, 1890, extended to the territory certain laws of Arkansas; and a verbal contract for a seven-years lease of land, made prior thereto, was valid, and not affected by the adoption of the Arkansas statute.

2. INDIAN TERRITORY—LAWS OF INDIAN TRIBES.

The United States courts do not take judicial notice of the local laws of the various tribes in the Indian Territory, but such laws are on the footing of local usages and customs, and must be pleaded and proven, where they are at variance with the laws which have been extended over the territory for the guidance of the United States courts.

3. APPEAL AND ERROR—LAWS OF INDIAN TRIBES—PLEADING.

Where a law of the Chickasaw Nation, relied upon, was not pleaded or urged in the trial court, it cannot be set up in the territorial court of appeals, or in the circuit court of appeals.

**In Error to the United States Court of Appeals in the Indian Territory.**

This case comes on a writ of error from the United States court of appeals in the Indian Territory. It is a suit in ejectment brought by J. B. Wilson, the plaintiff in error, against Sol B. Owens, the defendant in error, to recover possession of certain lands situated in the Indian Territory. Judgment was rendered against the plaintiff below at nisi prius, and the judgment was affirmed by the court of appeals in the Indian Territory. *Wilson v. Owens*, 38 S. W. 976. It is conceded by counsel for the plaintiff in error that the following is a



correct statement of the character of the controversy: "The plaintiff, J. B. Wilson, a resident of the Chickasaw Nation, and a member of the Chickasaw tribe of Indians, entered into a verbal contract in the spring of 1888 with W. P. Kendall; the substance of the same being that Kendall was to put all the land in a certain valley in cultivation, erect a wire fence on oak posts, thirty feet apart, around said land (it being the land in controversy), and build thereon a certain house, of the value of \$200, dig a well, and fit the place as a farm, for all of which the said Kendall was to have and enjoy the use and occupation of the place for the period of seven years from the spring of 1888. Afterwards, in 1889, the defendant, Sol B. Owens, purchased from said Kendall his contract with the plaintiff, Wilson, and impliedly obligated himself to fulfill the terms and obligations of the Wilson-Kendall contract. In 1889 the plaintiff, Wilson, entered into a further verbal contract with the defendant, Owens, for a valuable consideration, by the terms of which the defendant, Owens, was to have two years' occupancy of the place, in addition to the Wilson-Kendall contract. The plaintiff contends, and supports his contention with evidence, that the defendant has failed to place the improvements on the place, as per terms of the Wilson-Kendall contract, within seven years, and that by reason thereof the defendant has forfeited his contract, and that the plaintiff is entitled to the possession of the same; that in 1895, just after the expiration of the seven-years occupancy of the place, plaintiff made a written demand upon defendant for possession of the place, which demand for possession was refused, whereupon the plaintiff below brought the present suit."

J. W. Hocker and Zol J. Woods, for plaintiff in error.

B. D. Davidson and Dorset Carter, for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

THAYER, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Confining ourselves to the questions which are open for review on the present record, the first and most important inquiry is whether the plaintiff below was entitled to invoke the protection of the statute of frauds. It is claimed in behalf of the plaintiff that the contracts of rental upon which the defendant bases his right to possession were void, because they were verbal, and not to be performed within one year. We think that this contention was properly overruled by the territorial court of appeals. In the case of *McClellan v. Pyeatt*, 32 U. S. App. 104, 14 C. C. A. 140, 66 Fed. 844, this court held that the statute of 13 Eliz. c. 5, concerning fraudulent conveyances, was not in force in the Indian Territory until it was put in force by the act of congress of May 2, 1890 (26 Stat. 81, c. 181, § 31), which extended certain chapters of the Revised Statutes of Arkansas over the territory. The same must be true of the statute of frauds passed at a later date, during the reign of Charles II. (29 Car. II. c. 3). The latter statute did not go into effect in the Indian Territory until it was put in force by the act of congress aforesaid, and until that time there was no statute of frauds, applicable to the territory, of which the courts of the United States can take judicial notice. In the case of *Pyeatt v. Powell*, 10 U. S. App. 200, 2 C. C. A. 367, 51 Fed. 551, this court decided that while the common law could not be presumed to exist in the Indian Territory on March 1, 1889, when congress created a United States court for the territory, and gave it jurisdiction of a certain class of controversies (25 Stat. 783, c. 333), yet that, such court having been created by an act of congress, it would be inferred that congress in-

tended that said court should apply the rules and principles of the common law to the adjudication of such cases as came before it, especially when there was no proof of any local law, custom, or usage, in the light of which the rights of the parties ought to be adjudicated. This conclusion was based upon the ground that in the federal courts the common law furnishes the rule of decision, in the absence of any statute repealing or modifying it. The phrase "common law," as used in the case of *Pyeatt v. Powell*, 10 U. S. App. 200, 2 C. C. A. 367, 51 Fed. 551, was intended to signify those rules and principles of the common law not embodied in the provisions of any statute, which are termed the "*lex non scripta*." Whart. Law Dict. 161; 1 Bl. Comm. 35. It is manifest from our subsequent decision in *McClellan v. Pyeatt*, 32 U. S. App. 104, 14 C. C. A. 140, 66 Fed. 844, holding that the statute of fraudulent conveyances did not become operative in the Indian Territory until May 2, 1890, that the phrase "common law," as employed in *Pyeatt v. Powell*, was not used in a sense which would embrace the statute of frauds, and make that statute operative in the Indian Territory, as a part of the law of the forum. The result is that, inasmuch as the oral leases in question were made prior to the extension of the statute of frauds over the Indian Territory, they were valid when made, and were not affected by the subsequent adoption of the statute in that territory.

Another contention of counsel for the plaintiff in error is that a law of the Chickasaw Nation declares such leases as those involved in the present case to be absolutely null and void, and that in accordance with such law the leases should have been pronounced void. This contention was overruled by the court of appeals in the Indian Territory for the reason that the point was not made or urged in the trial court. An inspection of the record discloses the fact that the local statute in question was not pleaded by the plaintiff, nor offered in evidence, to avoid the effect of the leases. Neither was the trial court asked to take judicial notice of the same, by an instruction directing a verdict for the plaintiff because of the existence of the local statute. It is urged in this court, however, that the trial court, and the court of appeals as well, should have taken judicial notice of the local law, of their own motion, and should have directed a verdict for the plaintiff, although the plaintiff did not insist upon such action. We cannot assent to this view. We are of opinion that the territorial court of appeals took a correct view of this question. There are a number of tribes domiciled in the Indian Territory, which have different laws, customs, and usages. This court does not have convenient access to books, local decisions, or official documents which would enable it to determine with certainty what are the laws of these tribes on various subjects; and we apprehend that the United States courts sitting in the Indian Territory are confronted, in a measure, at least, with the same difficulty. Any attempt, therefore, to take judicial notice of the local laws of the various tribes in that territory would be attended with doubt and difficulty, and would lead to error. We think that it is wiser to place such laws on the footing of local usages and customs, and to require them to be pleaded and proven by litigants who rely upon them for protection, if they are at variance

with the code of municipal law which has been extended over the Indian Territory for the guidance of the United States courts sitting therein. We are of opinion that this view, if acted upon, will, in the great majority of cases, lead to a more correct and just administration of the law.

The territorial court of appeals, when it reached the merits of the controversy, decided, in substance, that even though Owens, the lessee, had not fully complied with all the provisions of his contract relative to making improvements upon the demised premises, yet, as the landlord or lessor had not reserved the right to forfeit the lease for a failure to make each and all of the improvements specified, such right of forfeiture or rescission could not be exercised when there had been such a part performance by the lessee of the covenants of the lease as was shown by the evidence in the case at bar. It accordingly held that, for the breach of the contract complained of, the plaintiff was not entitled to declare the lease forfeited, and sue in ejectment for the recovery of the demised premises, but that his sole remedy for the alleged breach was by an action at law for damages. It further decided, on this ground, that the trial court might very properly have directed a verdict for the defendant, without submitting any issue to the jury. 38 S. W. 976, 979. Inasmuch as this view of the law is not challenged in the brief of counsel for the plaintiff in error, nor by the assignment of errors, it is not necessary to consider the case at greater length, or to notice some other points which have been discussed. We have no doubt, as the territorial court of appeals held, that there had been such a part performance of the stipulations of the lease by the lessee as rendered it impossible for the plaintiff below to declare a forfeiture, and maintain a suit in ejectment. The judgment of the United States court of appeals in the Indian Territory, and the judgment of the United States court for the Southern district of the Indian Territory, are therefore affirmed.

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LONG-BELL LUMBER CO. v. STUMP et al.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 1,008.

1. TRIAL—PROVINCE OF COURT—ACCOUNTS STATED.

Where accounts are rendered monthly, through a period of more than two years, without objection, the question whether notice of objection was within a reasonable time is wholly one of law, for the court, and should not be submitted to the jury.

2. SAME—EXCEPTIONS.

Where a party requests the court to give a proper declaration of the law to the jury, which the court refuses to do, to which refusal exception is taken, and the court then declares the law to be otherwise, it is not necessary to again except to this latter declaration.

3. CONSTRUCTION OF CONTRACT.

Where a contract is wanting in perspicuity or clearness of meaning, there is no better rule than to adopt the construction put upon it by the parties before any controversy arose.

4. SAME—GRADING LUMBER.

Where a contract provided that lumber was to be "subject to the grades adopted by the Southern Lumber Manufacturers' Association," but did not

specify by whom the grading was to be done, the reasonable inference is that both parties are to participate.

5. SAME.

Where a contract provided for the grading of lumber, but did not say by whom it should be graded, and, during the whole period of dealings, after the lumber reached its destination it was graded by the purchaser, and accounts of shipments and gradings were sent monthly to the vendor, with acceptances, which he accepted, in a suit in which the issue was whether the lumber contained culls it was error to charge the jury that when the vendor, at his mill, delivered the lumber to the agent of the purchaser, and the agent received the lumber, and furnished a statement to the vendor, the lumber at the mill became the property of the purchaser, and was received by him as merchantable lumber.

6. ESTOPPEL—STATED ACCOUNTS.

Where for a number of years the purchaser rendered monthly accounts of lumber received, giving the date, quantity, and grading, and the amount due thereon, with acceptances, which the vendor cashed or negotiated without notifying the purchaser of his dissatisfaction with the grading, the vendor is estopped from impeaching the stated accounts, except for fraud or mistake.

Thayer, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Western District of Arkansas.

The Petross-Stump Lumber Company is a voluntary association conducting in the state of Arkansas and the Indian Territory the business of manufacturing and selling lumber. The Long-Bell Lumber Company is a Missouri corporation, with its principal business office at Kansas City, Mo., with an agency at Van Buren, Ark., where the lumber in question was principally shipped after having been milled. On the 17th day of November, 1893, these companies entered into the following contract:

"Memorandum of agreement made this, the 17th day of November, 1893, between the Petross-Stump Lumber Company, of Tuskahoma, I. T., and the Long-Bell Company, of Kansas City, Mo., witnesseth: The said Petross-Stump Lumber Company agree to sell all the merchantable lumber manufactured by their mill now located at Tuskahoma, I. T., or any other mill or mills they may erect or operate during the year 1894, at the following prices, per Exhibit A, hereto attached, and made a part of this agreement. All shipments and grades to be subject to grades adopted by the Southern Lumber Manufacturers' Association. The said Petross-Stump Lumber Company agree to cut all lumber of such lengths and of such thickness and widths as the said company may direct, and to cut all stock plump, as to length, width, and thickness, and to insure all lumber in stack at the end of each month in favor of said company, and pay the premium on the same. And in consideration of the above the said company agrees to take an inventory of all the lumber in stack at the mill of the said Petross-Stump Lumber Co. between the 1st and 10th of each month during this contract, and the said Petross-Stump Lumber Co. will, after said inventory, turn over to the agent of the said company all of the said lumber so mentioned, which was to become the property of the said company, and for which the agent of the said company will render a statement to the said Petross-Stump Lumber Co. for all lumber received from them. The said company further agrees to advance \$5 per thousand for all lumber checked up each month, in 120-day acceptances; reserving the right to discount the same at 4 per cent., and pay the remainder when the stock is shipped out on the same terms. No advance will be made on star and clear, but all shipments made during the month will be paid for in full between the 1st and 10th of the following month, as per terms specified above,—120-day acceptances. And it is expressly understood and mutually agreed upon that the company is under no obligation, by reason of taking the entire output of the mill, to accept any lumber that will not meet the requirements of the grades referred to. This contract is to continue in force until Jan. 1st, 1894."

Shipments of lumber under this contract were made to the Long-Bell Company (hereinafter called the "defendant"), by the Petross-Stump Lumber Company

(hereinafter called the "plaintiff"), up to the 9th day of January, 1895, at which time the plaintiff assigned said contract to the Bank of Springdale, Ark., when it sent to the defendant the following notice thereof:

"Tuskahoma, I. T., Jan. 9th, 1895.

"Long-Bell Lumber Co.—Gentlemen: Pay to the Bank of Springdale, Arkansas, any and all sums of money now due, or which may hereafter become due, from you under the agreement and contract existing between yourself and the undersigned; we having this day sold and assigned to the said the Bank of Springdale all our right and title, claim and interest, in and to all accounts and claims and interest, in and to all accounts and claims in our favor, and against you, for any and all lumber now being held by us for your account under said agreement.

"Respectfully,

Petross-Stump Lumber Co. L. S. P."

Up to the time of this assignment, monthly statements of such shipments, showing dates, quantity, quality, and grade, as also cost price during the current month, accompanied with defendant's check for the amount of each month's dues, were regularly sent by the defendant to the plaintiff. And after the assignment the shipments were continued as theretofore up to the last consignment, in January, 1896, and monthly statements and remittances as aforesaid were sent to the bank. Thus matters stood until this action was instituted by the plaintiff in June, 1896, claiming a balance on account of \$2,413.44. The answer, *inter alia*, pleaded that by reason of the assignment the plaintiff is not the real party in interest. It denied that the exhibit filed with the petition as a part of said contract was either the original, or a copy thereof; and defendant filed with its answer what is claimed to be a correct copy. It also pleaded that all the lumber shipped by plaintiff was not merchantable lumber, as called for by the contract. It then specifically pleaded the facts aforesaid respecting the rendering of monthly accounts,—that each monthly stated account was closed up and settled by them at the time, and that by its acceptance thereof, as also its assignee, the bank, without objection or protest, the plaintiff is estopped from reopening the account and maintaining this action. The reply only put in issue—First, the allegation of the answer respecting the assignment of the contract to the bank; and, second, "that it is not true, as set up in the third paragraph of defendant's answer, that plaintiff is estopped; that defendant has not accounted to this plaintiff as set forth; neither has this plaintiff ever acquiesced in any settlement with, or account rendered by, defendant."

The trial was to a jury. The principal contention around which the battle raged at the trial was as to the quantity of unmerchantable lumber, known as "culls," contained in the shipments made. The plaintiff, while conceding that culls were not within the terms of the contract, yet contended that all the lumber shipped was merchantable, while the defendant contended that the discrepancy between the quantity shipped and the quantity accounted for was attributable to the presence of culls in the shipments. At the conclusion of the testimony the defendant asked the court, and it refused, to give the following instructions: "You are instructed that the defendant, the Long-Bell Lumber Company, having rendered to the plaintiffs monthly accounts showing the debits and credits existing between them, and the credits therein being upon account of lumber delivered, and an account of such lumber, giving its grade, and showing the amount culled therefrom as not merchantable, having been rendered plaintiff upon each shipment, then such accounts became stated accounts, and, unless objected to within a reasonable time, became binding upon the plaintiffs; and they can only object to them now upon the ground of fraud or mistake. I instruct you, as a matter of law, that the evidence shows that the plaintiffs did not object to the grading, and did not object to the culling from the lumber of certain amounts, as unmerchantable, within a reasonable time; and hence your inquiry in this case is confined to the simple question as to whether the defendant, the Long-Bell Lumber Company, practiced upon the plaintiffs a fraud in the grading and culling of the lumber shipped, or whether the grading and culling was founded upon a mistake as to grades and culls; and in the latter case, if, after full knowledge of the grades and amount of culls made upon each car, the plaintiffs acquiesced therein, then they are estopped to claim now that such grades and culls were founded upon mistake." "The defendant having fur-

nished the plaintiffs with a statement of the grades of the lumber shipped, and the amount of lumber rejected as unmerchantable, the plaintiffs must have objected within a reasonable time to the grades and culls so stated; and if they failed to do so within a reasonable time, and accepted the purchase price of the lumber at the grades, and less the rejected lumber, then they became bound by the grading and culling so reported to them, and cannot in this suit reopen that question." To which action of the court in refusing said instructions the defendant duly excepted. Among the instructions given by the court of its own motion, to which exceptions were taken, are the following: "(2) The court instructs you that, under the contract upon which suit is brought, when the Petross-Stump Lumber Company sawed, stacked, and insured their lumber at the mill— And I just stop long enough to say to you what I mean when I use the word 'contract' hereafter. I mean this paper that is marked as a copy of the contract, and attached to the complaint. The court instructs you that, under the contract upon which suit is brought, when the Petross-Stump Lumber Company sawed, stacked, and insured their lumber at the mill, and the agent of the Long-Bell Lumber Company had inventoried the same, and the Petross-Stump Lumber Company had turned the lumber over to the said agent, that the lumber at the mill became the lumber of the Long-Bell Lumber Company, as soon as the said agent had received said lumber, and furnished a statement thereof to the plaintiff company; that is, to the Petross-Stump Lumber Company,—the men who sawed it. (3) The court further instructs you that, when the lumber was so received by the Long-Bell Lumber Company as their lumber, it was received as merchantable lumber, under the terms of the contract, subject, however, to be graded under the rules adopted by the Southern Lumber Manufacturers' Association for grading lumber. Either party therefore had the right to grade the lumber, and no place was fixed in the contract as to where, when, or by whom it should be graded. The evidence tends to show that both parties undertook to grade the lumber according to the rules adopted by the Southern Lumber Manufacturers' Association. Whether either party did so is a question of fact for you to determine." "(5) The defendant alleges in its answer that the plaintiffs had assigned all their interest under the contract sued on to the Bank of Springdale, Arkansas, before the suit was instituted. The plaintiffs deny this. The letter introduced to convey the interest of the plaintiffs in the contract to the bank. Plaintiffs introduced evidence tending to show that the paper offered in evidence tending to show the assignment was intended to convey their interest in the contract sued on, as collateral security to the bank for the payment of a debt which plaintiffs owed to the bank, and that said debt was discharged before the institution of this suit, and that the contract and rights and interest under it reverted to them before the institution of this suit. If, therefore, you find from the evidence that the assignment was made simply as collateral security, and that the debt was discharged before the suit was brought, then whatever interest in the contract had been assigned as collateral security upon the payment of the debt at once reverted to the plaintiffs; and plaintiffs would have a right to sue upon the contract in their own names, and recover from the defendant whatever was due thereupon in their own right, if you find anything was due." The jury returned a verdict for plaintiff in the sum of \$1,108.15. The defendant brings the case here on writ of error.

W. R. Cowley, for plaintiff in error.

A. F. Miles (O. L. Miles, on brief), for defendants in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

PHILIPS, District Judge, after stating the case as above, delivered the opinion of the court.

The conservative rule in instructing a jury is to confine the charge to the real and decisive issues in the case. By so doing, mere discursive discussion of abstract questions is avoided, whereby the minds of jurors are often diverted to the consideration of improper issues, calcu-

lated to mislead to the prejudice of one of the parties. If there was no estoppel in the case, as claimed by defendant, the vital question at issue was whether or not any of the lumber, and how much, was unmerchantable. This was a fact to be determined by the method stated in the contract, to wit, "Subject to the grades adopted by the Southern Lumber Manufacturers' Association." The contract does not, in terms, specify by whom or when this grading was to be made. The reasonable inference would be that both parties were to participate. One thing, however, is clear, and that is that the contract, on its face, does not contemplate that the grading by which the merchantable character of the lumber was to be ascertained was to be made by plaintiff alone at the time of stacking at the mill, so as to bind the defendant. This was, in terms, guarded against in the last paragraph of the written contract, as follows:

"It is expressly understood and mutually agreed upon that the company [that is, the defendant] is under no obligation, by reason of taking the entire output of the mill, to accept any lumber that will not meet the requirements of the grades referred to."

Looking at the contract as an entirety, from its four corners, and having regard to the situation of the parties, the practical meaning of it is that as the plaintiff, before shipment, was to receive on all the lumber stacked up, except as to star and clear, \$5 per 1,000, on 120-day acceptances, with the option of a 4 per cent. discount for cash payments, and the remainder on the same terms, "when the stock is shipped out," the object of taking an inventory at the mill becomes obvious. To secure the purchaser, the lumber was then to be insured, and turned over to the agent, which lumber "was to become [not which then and thereby became] the property of the said company," the defendant. This prepayment evidently was to enable the plaintiff to obtain the necessary means for running the mills and paying the hands. If any doubt remained as to this interpretation, it is entirely removed by the conduct and actions of the parties. There is no better established rule, or one more instinct with the spirit of equity, in the construction of contracts wanting in perspicuity or clearness of meaning, than to adopt that which the parties, by their course of dealing, placed upon it before any controversy arose between them. "In cases where the language used by the parties to the contract is indefinite or ambiguous, and hence of doubtful construction, the practical interpretation of the parties themselves is entitled to great, if not controlling, influence. The interest of each generally leads him to a construction most favorable to himself, and when differences have become serious, and beyond amicable adjustment, it can be settled only by arbitrament of law. But in an executory contract, and where its execution necessarily involves a practical construction, if the minds of both parties concur there can be no great danger in the adoption of it by the court as the true one." *Chicago v. Sheldon*, 9 Wall. 50, 54; *Topliff v. Topliff*, 122 U. S. 131, 7 Sup. Ct. 1057. "Courts may use the actual construction put thereon by the conduct of the parties under the contract as a controlling circumstance to determine the construction which should be put upon the contract in enforcing the rights of the parties." *Thomas v. Railway Co.*, 81 Fed. 919; *Sanders v. Munson*,

20 C. C. A. 581, 74 Fed. 651. Again it is held that one of the most satisfactory tests of ascertaining the true meaning of a contract is by putting ourselves "in the place of the contracting parties when it was made, and then considering, in view of all of the facts and circumstances surrounding them at the time it was made, what the parties intended by the terms of their agreement. When their intention is thus made clear, it must prevail in the interpretation of the instrument, regardless of inapt expressions or careless recitations." *Rockefeller v. Merritt*, 22 C. C. A. 608, 76 Fed. 915. During the whole period of dealings between these parties after the lumber was shipped, as it came in by car loads, it was graded by the defendant at the point of destination, under the rules of the Southern Lumber Manufacturers' Association. Thereupon the accounts of these shipments and gradings were sent at the beginning of each month, by mail, to the plaintiff, with acceptances for the amount due thereon, which plaintiff accepted, without more. What occasion, therefore, was there for the court to say to the jury, as it did in the instructions excepted to, that when the plaintiff sawed, stacked, and insured the lumber at the mills, etc., "the lumber at the mill became the lumber of the Long-Bell Company, as soon as the agent had received said lumber, and furnished a statement thereof to the plaintiff company"? The issue in this respect being solely as to whether the lumber delivered contained culls, and, if so, how much, why advise the jury that when the plaintiff turned the lumber over to defendant's agent the lumber at the mill became the lumber of the defendant? The contract simply said, "Which [meaning the lumber] was to become the property of said company." The effect of this was manifestly calculated to impress the jury with the thought: If the defendant then and thereby became the owner of the lumber, the plaintiff had performed its part of the contract; and why, therefore, should defendant undertake to bind the plaintiff by any grading afterwards done by its agents and servants in the absence of the discharged vendor? The court went further in this direction, by charging the jury "that, when the lumber was so received by the Long-Bell Lumber Company as their lumber, it was received as merchantable lumber, under the terms of the contract." It is true, this was qualified by adding, "subject to be graded under the rules adopted by said association." But this did not prevent misconception by the jury. It was calculated to shift in the minds of the jury the burden of proof. The last clause of the contract, as already shown, purposely guarded the purchaser, by reason of taking the entire output of the mill, against any liability for any lumber that did not meet the requirements of the grades referred to. More than this, as already adverted to, the course of dealing between the parties declared their understanding to be that the defendant was to render an account of the grading, and finally settle therefor, after the lumber was received at Van Buren. It was then and there that the defendant threw out what it deemed to be culls. Why, then, instruct the jury that when the lumber was received at the mills it was received as merchantable lumber? Under the pleadings, the burden rested on the plaintiff to show that the lumber was merchantable. Rather, therefore, should the jury have been told that no implication arose that all the lumber



stacked and inventoried at the mills was merchantable, within the terms of the contract; but its quality remained to be ascertained, subject to the test of the rules of the Southern Lumber Manufacturers' Association. These instructions were misleading and liable to prejudice the jury against the defendant. It was therefore error to give them, in the form employed.

The more important question, as it is more decisive of this controversy, is the estoppel pleaded in the answer. It is a well-settled and wholesome rule of law that, between merchantmen dealing with each other in a successive series of like transactions, accounts rendered by one to the other from time to time, showing the state of dealings between them, and not objected to within a reasonable time, become stated accounts, concluding the parties, so that they cannot be reopened except for fraud or mistake. *Wiggins v. Burkham*, 10 Wall. 129; *Oil Co. v. Van Etten*, 107 U. S. 333, 334, 1 Sup. Ct. 178; *Lockwood v. Thorne*, 11 N. Y. 170; *Burke v. Isham*, 53 N. Y. 631. "When the account is stated between the parties, or when anything shall have been done by them which by their implied admission is equivalent to a settlement, it has then become an ascertained debt. \* \* \* All intricacy of account, or doubt as to which side the balance may fall, is at an end." *Toland v. Sprague*, 12 Pet. 333. The evidence shows, clearly enough to put it beyond debate, that, for the two years or more during which the shipments of lumber were made under this contract, the defendant, at the beginning of each month, up to the assignment of the contract to the bank, rendered to the plaintiff a full account of the lumber received the preceding month,—giving the date, quantity, and grading, as also the amount due thereon to the plaintiff,—and forwarded the statements, with defendant's acceptances therefor, which the plaintiff at once cashed or negotiated. And after the assignment of the contract to the bank a like course was pursued, in rendering these statements to the bank, and making payments thereon to it, which were accepted by the bank without one word of objection or protest. Mr. Petross, one of the plaintiffs, at the trial testified as follows:

"Q. Each of the statements they sent you showed the number of culls, and the amount? A. Yes, sir. Q. Shows the dimensions of the pieces of culls that were thrown out, does it not? A. Yes, sir."

On every principle of justice and fair dealing, it was the duty of the plaintiff, as of the bank, its assignee, on receipt of this statement, and before the appropriation of the proceeds of the acceptance, to have examined the accounts so rendered (and the presumption is that it did so), and, if dissatisfied with the grading or computation, to have, by post or messenger, promptly notified the defendant of any dissatisfaction with the account. *Wiggins v. Burkham*, supra. This course was demanded in justice to the defendant company. After it had rendered an account therefor each month to the plaintiff, and paid therefor, the lumber would be sold, and pass out of its present form into various structures, and the culls would be abandoned to waste and decay. And it was of the utmost importance to the defendant to know whether it was to be held liable to further inspection, grading, and accounting. The plaintiff produced not a word of evidence, in a

single letter, making complaint of the gradings and accounting. All the correspondence between them in evidence only showed complaint (or, rather, suggestions) from plaintiff pertaining to such matters as shortage in quantity in some car, or some particular car not accounted for. Some of these discrepancies were explained in the letters, and the presumption is to be indulged that they were all satisfactorily adjusted, as no further complaints appear in the correspondence. The only attempt on the part of plaintiff, at the trial, to show any objection to the statements rendered to it, consisted in the most trivial and unsatisfactory statements by some of the employes of plaintiff as to some talk had at some indefinite time with some of the employes of defendant, to the effect that they thought the defendant's agents were rejecting too much of the lumber shipped. But there was no reliable, tangible evidence to warrant a jury in saying that any such complaints were made directly by plaintiff to the defendant company. And, even if such talk had occasionally occurred between some of the employes of the two concerns, yet if thereafter the plaintiff and its assignee, the bank, received payments from the defendant on statements sent in, without making a direct protest within a reasonable time, it ought not now to be heard to ask that the accounts be reopened. The only avoidance of the legal effect of the stated accounts is to impeach them for fraud or mistake. The answer pleaded the facts constituting estoppel. The reply put in issue nothing but a denial of the fact that defendant had rendered the accounts, or that plaintiff acquiesced in any settlements. No issue of fraud or mistake in the stated accounts was raised by the reply. The only question, therefore, to be passed upon by the jury touching this issue, was, were the accounts so rendered, and did plaintiff thereafter, in a reasonable time, make objection thereto? The first and third instructions asked by the defendant should have been given. While the first instruction went further than the issues required, in asking to have submitted to the jury any question at all respecting fraud or mistake, it was no reason for the rejection that the defendant thereby accorded to the plaintiff the benefit of such avenue of escape. This error was not cured by the charge given by the court on this issue. In the first place, the court left it entirely to the jury to find whether the notice, if any, of objection to the stated accounts, was given in a reasonable time. As applied to the facts of this case, where these accounts were rendered monthly through a period of two years and more, the question of reasonable time is wholly one of law, for the court. *Wiggins v. Burkham*, 10 Wall. 132, 133; *Oil Co. v. Van Etten*, 107 U. S. 334, 1 Sup. Ct. 178. In the second place, the court in its charge also applied the estoppel to the defendant if the jury found that the plaintiff had rendered accounts to it, and it failed to make objection thereto. There was no such issue presented by the pleadings. The plaintiff did not sue upon an account stated, but upon an open, running account. Nor was there any evidence to support such issue, if it had been within the pleadings. The instructions given by the court are in other respects objectionable, but as no exceptions were taken thereto, and no assignment of error was made thereon, they will not be noticed.

This brings us to the consideration of the final question raised in this connection. It is suggested that inasmuch as the defendant did not except to, nor assign error on, the instruction in question, as given by the court, it is presumed to have waived the exception taken to the action of the court in refusing the instructions asked by it, and to have acquiesced in the error committed by the court. To this we cannot assent. After diligent search, we find no precedent for this practice. The furthest the courts have gone in the denial of the litigant's right to complain of the error of the court in refusing a proper instruction is where the court, in another instruction given, laid down the equivalent of the declaration asked by plaintiff in error, or where, notwithstanding the court has improperly declared the law, the party complaining has justified it by committing the same blunder in a declaration requested by him, or where he has invited the court to commit error. In *Dows v. Rush*, 28 Barb. 180, the court laid down the recognized rule of practice, that if a party would raise the objection to the charge given, that it is not sufficient or proper, it should appear that he had refused to deliver a correct proposition on the precise point desired by the party excepting. The court say:

"If he had so refused, a proper exception would have been to such refusal."

In *Railway Co. v. Boyce* (Kan. App.) 48 Pac. 949, of the refusal to give a proper instruction, the substance of which was not given in the general charge, the court said:

"Where special instructions, correct in point of law, and conforming to the facts at issue, are refused, their substance must be given, or the general charge, considered as an entirety, must sufficiently cover the matter presented."

So, in *Milling Co. v. Ames*, 23 Colo. 171, 47 Pac. 382, the court regarded the error sufficiently saved, when taken to the refusal of the court to grant an instruction asked for, where no equivalent of the proposition was found in other portions of the charge. The court said of this refusal:

"This was error. We do not find that the substance of either of these instructions which were refused by the court was given in any of the instructions by the court of its own motion, but, on the contrary, in so far as there was an attempt to instruct upon these points the law was not correctly given."

The case of *Earle v. Thomas*, 14 Tex. 584, presents this question quite aptly. In speaking to the objection that the exception to the charge of the court was not properly saved in the assignment of errors, Wheeler, J., said:

"In the present case the error complained of is suggested by the instruction refused. It has sometimes been said that a party, to take advantage of any error in the charge of the court, must except; but by this it is not intended that he shall take a bill of exceptions, for he may attain the same purpose by asking such instructions as will place the law of the case in a proper light before the jury, which, if refused, will have the effect of a bill of exceptions."

In *Evans v. Clark* (Ind. T.) 40 S. W. 771, it is held that where the applicant requested the giving of a proper instruction, which was refused, it is not necessary, in order to insist upon error of such refusal, that the party should have excepted to an inconsistent instruction given by the court. The court said:

"Where a party takes proper exception to any matter in the record, it is not necessary to take other exception, if the exception thus taken covers the matter in issue."

While this is the language of the court of appeals of the Indian Territory, it is nevertheless valuable for the force of the reason assigned. See, also, *Guinard v. Knapp, Stout & Co. Co.* (Wis.) 70 N. W. 671, where the court lays down the rule to be that the refusal to give a correct instruction is reversible error, unless it appears that the same was substantially given in the general charge. Having requested the court to give a proper declaration of law, and the court, by its refusal, having declared that it held the law to be otherwise, to which exception was duly taken, why should counsel be required again to except to the converse or modified declaration given by the court? It would be but a repetition of the objection already expressed in the first exception. And, so far from the silence of counsel at the reassertion of the error by the court evidencing a waiver of the first error, it but evinces a respectful deportment by counsel towards the court, in refraining from repetitious objections at the ruling of the court, after having once taken exception involving in effect the same principle which would be represented in the second exception.

In view of the conclusion reached by the court, it is not deemed necessary to consider other assignments of error. It results that the judgment of the circuit court is reversed, and the cause is remanded, with direction for further proceedings in conformity with this opinion.

THAYER, Circuit Judge. I am not able to concur in the foregoing opinion. The case is reversed, as it seems, for alleged error on the part of the trial judge in giving two instructions of its own motion, and for error in refusing two instructions which were requested by the defendant company. I am unable to discover any material error in the two instructions which the trial court gave of its own motion. These instructions declared, in effect, that the lumber involved in the controversy became the property of the defendant, the Long-Bell Lumber Company, when its agent had received the same at the plaintiff's mill, and had furnished a statement of the amount to the plaintiff company, and that when so received it was accepted on behalf of the defendant company as merchantable lumber, subject to its right to have it graded according to the rules adopted by the Southern Lumber Manufacturers' Association. These instructions, in my judgment, embodied a correct interpretation of the contract between the parties. The acceptance of the lumber did create a presumption, for the time being, that it was merchantable, but the purchaser retained the right to cast out the culls if a more careful examination showed that it was not all merchantable. The other instructions which the trial court gave, as well as the two instructions under consideration, showed that the right of the purchaser to make a subsequent inspection was fully conceded, and that the first acceptance of the lumber at the mill was merely tentative, and simply created a presumption until further examination that it was merchantable. I am at a loss to conceive how the jury could have been misled by these instructions. The second refused instruction, quoted above in the statement, obviously required the jury to

determine whether the plaintiff below had objected to the grades and culls within a reasonable time after it was notified thereof by the defendant. The trial court adopted that view of the case, by submitting to the jury the precise issue which it was asked by this instruction to submit. The language of the court in that respect was as follows:

"On the other hand, if the defendant, within a reasonable time after receiving the statement and grades as furnished by the plaintiffs, graded the lumber itself, and furnished plaintiffs with a statement of the amount and grades as it had graded it, then the law required the plaintiffs, if they were dissatisfied with the grading which the defendant had made, to give notice thereof; and, if they failed so to do within a reasonable time, then they would be bound by the grading as done by the defendant, and could only be heard now to complain on the ground of fraud or mistake."

Error, therefore, cannot be assigned for the refusal of the defendant's second instruction. The defendant had the full benefit of that instruction in the charge as actually given.

The defendant's first refused instruction, which is also quoted above in the statement, is at variance with its second instruction, in this: that in one of the instructions the court was asked to determine, as a matter of law, that the plaintiff had not objected to the grading in a reasonable time, while in the other instruction it was asked to allow the jury to decide that issue. If the record showed that the trial court was first asked to pursue the former course, and upon its declining to do so an exception was saved, and that the court was thereupon asked to give the other instruction, which was also refused, I should have no doubt of the defendant's right to urge both of its exceptions. I think, however, that when two contradictory requests are presented at the same time, and the trial court is required to choose between them, and it adopts one of the requests, error cannot be assigned in an appellate tribunal because of the refusal of the other. When two contradictory instructions are asked, the record, in my judgment, ought to show affirmatively that they were presented separately, and that the one was asked because the court had declined to grant the other. Counsel ought not to be allowed to offer inconsistent requests at one and the same time, and, if one is granted, assign error for the refusal of the other. But, if I am mistaken as to the correct rule of practice in this regard, I think it is nevertheless true that this court cannot say that the trial judge erred in refusing to direct the jury, as a matter of law, that the evidence showed that the plaintiff did not object to the grading and culling of the lumber within a reasonable time, because the bill of exceptions does not show that we have before us all the testimony. At the end of the bill of exceptions is this phrase, and nothing more, "Testimony closed;" and this court has heretofore decided, in *Corporation v. Hage*, 32 U. S. App. 548, 16 C. C. A. 339, and 69 Fed. 581, that such a phrase, found in a bill of exceptions, is not tantamount to a statement that it contains all the testimony. As it does not appear, therefore, affirmatively, that we have before us all the evidence which was heard during the progress of the trial, we cannot say that the trial court erred in refusing the instruction now under consideration, but must presume, in support of the judgment, that the instruction was properly refused.

Touching the merits of the case, I deem it proper to say that the

record discloses, without contradiction, that a very large amount of lumber was shipped by the plaintiff company from its mill to the defendant company, which was not paid for. The defendant says that the difference is accounted for by unmerchantable lumber, or culls, that it had the right to reject, and did reject. On the other hand, the plaintiff contends that it shipped no culls, and that the poorest of the lumber shipped, whether it consisted of culls or otherwise, was worth at least \$5 per 1,000, and that the defendant retained it in its possession, and has paid nothing therefor. The case seems to have been one which was peculiarly appropriate for a jury, and I am opposed to disturbing their verdict, except for substantial errors clearly apparent upon the face of the record, which, in my judgment, do not exist, or at least have not been pointed out.

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ANDREWS BROS. CO. v. YOUNGSTOWN COKE CO., Limited.

(Circuit Court of Appeals, Sixth Circuit. April 11, 1898.)

No. 554.

1. CORPORATION—ESSENTIAL ATTRIBUTE.

The only absolutely essential attribute of a corporation is the capacity to exist and act within the powers granted, as a legal entity, apart from the individual or individuals who constitute its members.

2. FEDERAL JURISDICTION—DIVERSE CITIZENSHIP—PARTNERSHIP ASSOCIATIONS.

A "partnership association, limited," or organized under Act June 2, 1874, which is governed by a board of managers, with liability of members limited to the amount of their unpaid capital stock, power to sue and be sued, and to hold and convey real estate, in its associated name, is a corporation and a citizen of Pennsylvania, within the meaning of the statutes of the United States requiring diversity of citizenship to give federal jurisdiction, though the assignee of the interest of a member in the capital stock cannot participate in the affairs of the company unless elected to membership therein by a majority of its members.

3. RES JUDICATA.

Where, in an action for specific performance between the parties to a contract, the same is declared invalid, it cannot be set up and again litigated in an action brought to recover the value of coke delivered to the defendant thereunder.

4. INVALID CONTRACT—PROPERTY DELIVERED THEREUNDER—RECOVERY.

Where a contract not immoral or against public policy is declared invalid by reason of its improper execution, either party may recover from the other the value of the property delivered by him to, and retained by, the other under the contract.

In Error to the Circuit Court of the United States for the Eastern Division of the Northern District of Ohio.

This is an action by the Youngstown Coke Company, Limited, claiming to be a corporation organized under the law of Pennsylvania, against the Andrews Brothers Company, a corporation of the state of Ohio, to recover \$7,967.95, with interest from January 31, 1889, for coke sold and delivered to the defendant by an unauthorized agent of the plaintiff, and used by the defendant corporation. The suit is to recover the market value as for a conversion. A jury was waived, and the issues of law and fact submitted to the court, which found for the plaintiff, and entered judgment for \$9,519.16. This writ of error was sued out by the defendant for the purpose of reversing this judgment.

Thomas W. Sanderson, for plaintiff in error.  
John G. White, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

LURTON, Circuit Judge, after making the foregoing statement of facts, delivered the opinion of the court.

The first and principal question is whether the circuit court had jurisdiction. The plaintiff is described in its original petition as "a limited partnership association, duly organized and existing under and by virtue of the laws of the state of Pennsylvania, of which state it is a citizen." This was perhaps an insufficient statement of its corporate character, under *Chapman v. Barney*, 129 U. S. 677, 9 Sup. Ct. 426, and *Carnegie, Phipps & Co. v. Hulbert*, 3 C. C. A. 391, 53 Fed. 10. To meet this difficulty, an amended petition was filed, in which it was averred that the plaintiff was a corporation under the laws of Pennsylvania and a citizen of that state. The defendant in an amended answer, and by way of abatement, admits that the plaintiff company was created and organized under the Pennsylvania act of June 2, 1874, but denies that it thereby became either a corporation or a citizen of said state, within the meaning and effect of the statutes of the United States, requiring diversity of citizenship to give jurisdiction to a United States court. A Pennsylvania act of March 21, 1836, provided for the creation of limited or special partnerships, having one or more general partners with unlimited liability and special partners with limited liability. But such associations had none of the attributes or faculties of a corporation. The history of that act and its amendments is fully stated in the opinion of the court in *Lafin & Rand Co. v. Steytler*, 146 Pa. St. 434, 23 Atl. 215. The act of 1874, under which the Youngstown Coke Company was organized, was neither an amendment nor a supplement to the act of 1836. In the case cited above, the court, in speaking of this act of 1874, say:

"The act of 1874, it will be seen, was not a mere amendment or supplement to anything that went before, but, like the act of 1836, a new scheme, carefully and elaborately drawn, creating a new kind of artificial person, standing between a limited partnership as previously known and a corporation, and partaking of the attributes of each. It was, however, a step forward in the same line of legislative recognition of business demands uniformly pursued since the start, in 1836."

The act of June 2, 1874, under which the defendant in error was organized, is in 17 sections. The first provides that three or more persons desiring to organize under the act may do so by preparing, signing, and acknowledging a statement in writing which shall set forth the amount of capital subscribed for by each; the total amount of capital, and when and how to be paid; the character of the business and location of same; the name of the association, with the word "Limited" added thereto as a part of same; the duration of the association, which shall not exceed 20 years; and the names of the officers selected in conformity with the act. The second section provides that the members of the association shall not be liable for the debts or engagements of the company beyond their unpaid subscriptions to the capital. The fourth section provides that interests in such associations shall be personal estates, and may be transferred, given, be-

queathed, distributed, sold, or assigned under such rules and regulations as shall be adopted from time to time—

“By a vote of a majority of the members in number and value of their interests; and in the absence of such rules and regulations the transferee of any interest in any such association shall not be entitled to any participation in the subsequent business of such association, unless elected to membership therein, by a vote of a majority of the members in number and value of their interests. And any change of ownership, whether by sale, death, bankruptcy or otherwise, which occurs in the absence of any rules and regulations of such association regulating such transfer, and which is not followed by election to membership in such associations, shall entitle the owner or transferee only to the value of the interest so acquired at the date of acquiring such interest, at a price and upon terms to be mutually agreed upon, and in default of such agreement, at a price and upon terms to be fixed by an appraiser to be appointed by the court of common pleas of the proper county, on the petition of either party, which appraisement shall be subject to the approval of said court.”

The fifth section provides for a board of managers, who shall be not less than three nor more than five, one of whom shall be chairman, one the treasurer, and one the secretary. This section also provides that:

“No debt shall be contracted or liability incurred for such association, except by one or more of the managers, and no liability greater than five hundred dollars, except against the person incurring it, shall bind the association, unless reduced to writing and signed by at least two managers.”

The sixth and seventh sections provide for distribution of profits through dividends, such dividends not to impair capital, and that it shall be unlawful to lend its credit, name, or capital to any member, or to any other person, without consent of a majority in number and value of members in writing. The eighth, ninth, and tenth sections provide how such companies may be dissolved, and how the property shall be distributed. The remaining parts of the act provide—First, that the association may sue and be sued in its associate name, service of process to be made upon one of its officers, or on any agent, clerk, or manager in counties where it may maintain an office; second, that such associations may acquire, hold, and convey real estate in its associated name.

This act does not declare these associations to be “corporations,” nor are they styled “corporations.” They are called “partnership associations.” Neither does the act disclaim a purpose to create corporations, as was the case under the English and New York joint-stock acts mentioned and construed in *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, and *People v. Coleman*, 133 N. Y. 279, 31 N. E. 96. But the fact of corporation or no corporation must depend upon the existence or nonexistence of those faculties which are of the essence of corporate existence. We need not be too attentive to mere names. The inquiry must go deeper, and a solution be reached upon principle.

In the masterly opinion of Chief Justice Nelson in *Thomas v. Dakin*, 22 Wend. 9, 70, that learned jurist, when engaged in the determination of a like question arising under the New York law providing for banking associations, was confronted with the fact that the act did not declare the associations thereby organized to be corporations, or style them such, and said:

“A corporate body is known to the law by the powers and faculties bestowed upon it, expressly or impliedly, by the charter. The use of the term ‘corporation’ in its creation is of itself unimportant, except as it will imply them.”



In the same case, Judge Cowen (22 Wend. 103) said:

"It has been impossible for me to see the force of the argument that the legislature have constantly avoided to call these associations, or any of their machinery, a corporation. Therefore we cannot adjudge them to be so. If they have the attributes of corporations, if they are so in the nature of things, we can no more refuse to regard them as such than we could refuse to acknowledge John or George to be natural persons, because the legislature may, in making provisions for their benefit, have been pleased to designate them as belonging to some other species. Should the legislature expressly declare each of them to be corporations, without giving them corporate succession or other artificial attributes, the declaration would not make them so. On the other hand, even an express legislative declaration that certain associations are not included in the definition of corporations would not change their character, provided they should in fact be clothed with all the essential powers of corporations."

In *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566-576, in considering the corporate character of the Liverpool Insurance Company, a joint-stock association organized under an English act of parliament, the court said:

"It is also urged that the several acts of parliament we have mentioned expressly declare that they shall not be held to constitute the body a corporation. But, whatever may be the effect of such a declaration in the courts of that country, it cannot alter the essential nature of a corporation or prevent the courts of another jurisdiction from inquiring into its true character, whenever that may come in issue. It appears to have been the policy of the English law to attach certain consequences to incorporated bodies, which rendered it desirable that such associations as these should not become technically corporations. Among these, it would seem from the provisions of these acts, is the exemption from individual liability of the shareholder for the contracts of the corporation. Such local policy can have no place here in determining whether an association, whose powers are ascertained and its privileges conferred by law, is an incorporated body. The question before us is whether an association, such as the one we are considering, in attempting to carry on its business in a manner which requires corporate powers under legislative sanction, can claim, in a jurisdiction foreign to the one which gave those powers, that it is only a partnership of individuals. We have no hesitation in holding that, as the law of corporations is understood in this country, the association is a corporation, and that the law of Massachusetts, which only permits it to exercise its corporate function in that state on the condition of payment of a specific tax, is no violation of the federal constitution or of any treaty protected by said constitution."

Definitions are dangerous. They are most often too narrow, but not infrequently too broad. Many definitions of a corporation have been attempted. Most of them include one or more faculties which in this country are clearly not essential, or are included within more general powers already catalogued. Kyd defines a corporation thus:

"Though many things be incident to a corporation, yet, to form the complete idea of a corporation aggregate, it is sufficient to suppose it vested with the three following capacities: (1) To have perpetual succession under a special denomination, and under an artificial form; (2) To take and grant property, to contract obligations, and to sue and be sued by its corporate name in the same manner as an individual; (3) To receive grants of privileges and immunities, and to enjoy them in common. These alone are sufficient to the essence of a corporation."

Judge Nelson, in *Thomas v. Dakin*, cited above, says:

"We may, in short, conclude by saying, with the most approved authorities at this date, that the essence of a corporation consists in a capacity to have perpetual succession under a special name, and in an artificial form; (2) to take and grant property, contract obligations, sue and be sued by its corporate name as an individual; and (3) to receive and enjoy, in common, grants of privileges and immunities."

### Judge Dillon defines it thus:

"A corporation is a legal institution, devised to confer, upon the individuals of which it is composed, powers, privileges, and immunities which they would not otherwise possess, the most important of which are continuous legal identity and perpetual or indefinite succession, under the corporate name, notwithstanding successive changes, by death or otherwise, in the corporators or members of the corporation. It conveys, perhaps, as intelligible an idea as can be given by a brief definition to say that a corporation is a legal person, with a special name, and composed of such members, and endowed with such powers, and such only, as the law prescribes." 1 Dill. Mun. Corp. (3d Ed.) § 18.

Angel and Ames, in their work on Corporations, define a corporation as, "a body created by law, composed of individuals united under a common name, the members of which succeed each other, so that the body continues the same, notwithstanding the change of the individuals who compose it, and is, for certain purposes, considered as a natural person." 1 Ang. & A. Corp. §§ 1-30.

It is not essential to the idea of a corporation that it shall have perpetual existence, for limited corporations are a matter of most common occurrence, whether organized under special or general laws. Neither is it essential that it shall have capacity to sue and be sued under its corporate name, for it may be authorized only to sue in the name of one of its officers, as was the case under the New York banking law. That it shall have capacity to sue and be sued under some name standing for the collective body is all that is necessary. *Thomas v. Dakin*, 22 Wend. 9; *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566. In the last analysis, the only absolutely essential attribute of a corporation is the capacity to exist and act within the powers granted, as a legal entity, apart from the individual or individuals who constitute its members.

Thus, in *Green's Brice*, *Ultra Vires* (2d Am. Ed.) §§ 1, 2, it is said that "a corporation is a person which exists in contemplation of law only, and not physically." Again, the same author, in commenting on *Kyd's* definition, says:

"But sufficient stress is not laid upon that which is its real characteristic in the eye of the law, viz. its existence separate and distinct from the individual or individuals composing it. \* \* \* This is the one important fact. The members of a corporation aggregate, and the one individual who is constituted a corporation sole, may, from their connection with such, have rights and privileges, and be under obligations and duties, over and above those affecting them in their private capacity; but they get them by reflection, as it were, from the corporation. They individually are not the corporation,—cannot exercise the corporate powers, enforce the corporate rights, or be responsible for the corporate acts."

A forcible illustration of this distinction between the corporation and its members is found in the case of *Button v. Hoffman*, 61 Wis., 20, 20 N. W. 667. There one who was the sole owner of all the capital stock of a corporation sought to recover corporate property in an action of replevin in his own name. It was held that he was not the legal owner of the property and could not maintain the action.

In the great *Dartmouth College Case*, Chief Justice Marshall gave a definition which has been frequently quoted. "A corporation," said he, "is an artificial being, invisible, intangible, and existing only in contemplation of law. Being a mere creature of law, it possesses only those properties which the charter of its creation confers upon it,

either expressly or as incidental to its very existence." After considering those powers usually conferred, he proceeds: "It is chiefly for the purpose of clothing bodies of men, in succession, with qualities and capacities, that corporations were invented and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object like one material being." 4 Wheat. 518-636. And in *Bank v. Billings*, 4 Pet. 514-562, the same great judge said: "The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men." The capacity to be is one thing, and of doing, another. The latter constitute the franchises, and may be separated both in conception and fact from the former. Thus, in *Memphis & L. R. Co. v. Railroad Com'rs*, 112 U. S. 609-619, 5 Sup. Ct. 299, in considering that which passed under a foreclosure sale under a mortgage of the property and franchises of a railroad company, the court, through Justice Matthews, said:

"The franchise of being a corporation need not be implied as necessary to secure to the mortgage bondholders, or the purchasers at a foreclosure sale, the substantial rights intended to be secured. They acquire the ownership of the railroad, and the property incident to it, and the franchise of maintaining and operating it as such; and the corporate existence is not essential to its use and enjoyment. All the franchises necessary and important to the beneficial use of the railroad could as well be exercised by natural persons. The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises."

But these associations authorized by the Pennsylvania act of 1874 possess every attribute deemed essential to the existence of a corporation under any authoritative definition of a corporation. They come into being only by the creative power of the sovereign will, as expressed in the statute which authorizes their organization. That act constitutes at once the authority for their existence and the measure of their powers. When organized, they constitute a new artificial person, endowed with the power of suing and being sued, and of acquiring, holding, and conveying property in its artificial character. Created by compliance with the constating law, they can be dissolved only in the way pointed out by that law. Individual liability for corporate debts, beyond unpaid subscription to the capital stock, does not exist. *Coal Co. v. Rogers*, 108 Pa. St. 147-150; *Stevens v. Ball Club*, 142 Pa. St. 52-61, 21 Atl. 797. The members do not act as individuals, or as partners, but through and in the name of the collective or corporate body. *Hill v. Stetler*, 127 Pa. St. 145-162, 13 Atl. 306, and 17 Atl. 887. The members are not liable individually for the torts of the association, unless they personally participate. *Whitney v. Backus*, 149 Pa. St. 29, 24 Atl. 51. In all these respects it would be difficult to distinguish these companies from the ordinary business corporations authorized under general acts in most, if not all, of the states of the Union. In other respects they are somewhat peculiar, and it is these peculiar features which distinguish them from the ordinary busi-

ness corporations provided for by other Pennsylvania legislation, and which have led to some confusion in defining their character. Thus, the managers alone may create a debt, and no liability in excess of \$500 is valid, unless the contract be in writing, and signed by two, at least, of the managers. This is a mere limitation upon the usual powers of officers and agents to bind the artificial body, and in no way affects the corporate character of that body. But the most marked peculiarity is found in the provisions of the fourth section of the constituting act, whereby, in the absence of some other regulation, adopted by the members, the assignee of the interest of a member in the capital stock, by operation of law or otherwise, does not become a member until elected. In default of election, the association must pay the value of the interest as ascertained by agreement, or, in default thereof, by an appraiser, provided for in the statute. This *dilectus personarum* is a most inviting inducement to the formation of small business corporations, where the personnel of the members is a matter of some importance, and is the only feature which particularly distinguishes these associations from ordinary corporations. This power of selection is similar to that belonging to ordinary co-partnerships. A member may sell his interest, but such sale dissolves the partnership. If the remaining members assent to the admission of the new member, the legal result is a new firm. Under this provision of the act of 1874, the sale of an interest does not operate as a dissolution, but requires that the company shall buy the interest unless the transferee is acceptable. The principle is not new in partnerships where the partners give a preference to the firm or its members by contract in event of sale or other devolution of title.

The case of *Carter v. Oil Co.* (Pa. Sup.) 38 Atl. 571, has been much relied upon by the plaintiff in error as a supposed adjudication by the supreme court of Pennsylvania of the noncorporate character of these companies. That case involved the status of a member who had bought the interest of another, and who was denied the status of a member in respect of this new interest. The court maintained the validity of a rule of the association refusing to one acquiring the capital stock of another the rights of a member in respect thereto, unless he should be elected a member. The contention of the plaintiff was that a corporation could not deny to any one acquiring capital stock the rights and privileges of a member in respect thereto. To this the court said:

"We cannot assent to the plaintiff's claim that the defendant company is a corporation, and restricted in the adoption of by-laws, rules, and regulations for its government to such as it is within the power of the latter to prescribe. It may be conceded that the defendant company has some of the qualities of a corporation, but it is, nevertheless, a partnership association, governed by the statutes and articles under which it was organized, and the rules and regulations it may prescribe in execution of the power with which the statutes have invested it. We concur in, and need not add anything to, what the learned judge of the court below has so well said on this point."

What the court below had said was this:

"Whether the partnership association ought to be classified by the professor of legal science as a species of the genus corporation, or the genus partnership, or whether it should be set apart as a new genus, seems to me unimportant. If a corporation, it is so peculiar in its features that the general law of corporations

cannot be applied to it without important modifications. If a partnership, it so differs from the common-law type that the general law of partnerships is but slightly applicable. Both the law of corporations and the law of partnerships are to be resorted to in the absence of statutory regulations, the choice being determined by the nature of the feature under consideration. In the present case we derive little assistance from either. The general rule of corporations invoked by the plaintiff has been laid down to meet the conditions existing in corporations in which the ownership of stock carries with it, ipso facto, membership in the corporate body. If there are corporations in which the conditions are different, it is manifest that the rule is inapplicable to the extent of the difference. \* \* \* A partnership association differs from the common type of partnerships in that the members vote, and do not act with the powers of partners, and in that they are subject to no joint liability. It differs from the common type of corporations in that the members have a right to admit or refuse membership in the company to the transferee of the interest as well as in some other particulars."

The most that can be said of this decision is that the court declined to classify these companies with ordinary corporations, and contented itself by giving it its statutory designation.

We have already seen by the Pennsylvania cases cited that that court had time and again held these companies to have the very attributes which enable us to distinguish a corporation from a mere partnership. The fact that these companies were not called "corporations" in the act of 1874, and that they possessed this *dilectus personarum*, has led to some confusion of terminology in the effort to describe them. In *Coal Co. v. Rogers*, 108 Pa. St. 147-150, where the question was as to whether such company was included within a penal act touching trespasses by any person or corporation, the court said:

"Such an association is not technically a corporation, yet it has many of the characteristics of one. It can sue and be sued in its associate name only. The longest period of its duration is fixed by the act which provides for its existence. Like most corporations, its capital (except in certain cases designated by the act) is alone liable for its debts. The making of any division of profits which shall at the time diminish or impair the capital of the association is prohibited. \* \* \* The act further provides for a dissolution of the association, for winding up its business, and for the distribution of its property. It may not be improper to call such an association a 'quasi corporation.' If not a corporation, it is a person. It is either a natural or an artificial person. There is no intermediate place for it to occupy, no other name for it to bear. It cannot claim an existence which exempts it from all liabilities imposed on either class of persons. In law, the main division of persons is between natural and artificial persons. The latter class are corporations."

In *Hill v. Stetler*, 127 Pa. St. 145-161, 17 Atl. 887, the court said of associations organized under the act, that the act provides for the "creation of a new artificial person, to be called a joint-stock association, having some of the characteristics of a partnership, and some of a corporation."

In *McGeorge v. Manufacturing Co.*, 141 Pa. St. 575-578, 21 Atl. 671, the court said:

"A short comprehensive name or phrase descriptive of the status, powers, and responsibilities of associations like the defendant, does not yet appear to be agreed upon. They are called 'partnership associations, limited,' in the statute authorizing their formation,—the act of June 2, 1874, p. 271. Mr. Brightly, in his Digest, designates them as 'joint-stock companies.' Chief Justice Mercur, in the case of *Coal Co. v. Rogers*, 108 Pa. St. 147, says it may not be improper to call such an association a 'quasi corporation'; and Justice Williams, in *Hill v. Stetler*, 127 Pa. St. 161, 17 Atl. 887, calls them 'joint-stock associations,'

having some of the characteristics of a partnership, and some of a corporation." "The chief point of difference between them is that, while the corporation cannot refuse to permit a transfer on its books of shares of its stock to any purchaser thereof, a partnership association, limited, can except according to its rules."

In *Stevens v. Ball Club*, 142 Pa. St. 52-61, 21 Atl. 798, the court, in speaking of the Ball Club, said:

"The association was organized under the act of 1874, providing for the creation of limited partnerships. Such associations were referred to in *Coal Co. v. Rogers*, 108 Pa. St. 147, as quasi corporations. They are certainly artificial bodies, not natural persons."

These decisions are not overruled or criticised in *Carter v. Oil Co.*, heretofore cited. We do not therefore agree with counsel for plaintiff in error that the supreme court of Pennsylvania has determined that such associations are not corporations; on the contrary, the corporate character of the organization is most distinctly recognized, though distinguished from the ordinary corporation provided for by other general statutes. "A new artificial person," organized under a statute, and empowered thereby to contract, hold, and convey property, sue and be sued, as such, is a corporation, and can be nothing else. In addition to the recognition of these associations as corporations of a peculiar character by the Pennsylvania court, we may add the pregnant circumstance that section 13 of article 16 of the state constitution provides as follows:

"The term 'corporations,' as used in this article, shall be construed to include all joint-stock companies or associations having any of the powers or privileges of corporations not possessed by individuals or partnerships."

Article 16 is devoted to the subject of private corporations and their regulation.

But does the existence of the *dilectus personarum* take from the body possessing it the character of a corporation, if it possesses those attributes which, by general consent, distinguish a corporation from a mere voluntary association? The general and well-settled rule is that, in the absence of statutory authority, a corporation may not make the transfer of shares dependent upon the discretion of the corporation, its officers or agents. They may by reasonable rule regulate such transfer, but they cannot prohibit. *Mor. Priv. Corp.* §§ 164, 165. But that this power may be conferred by the charter is equally well settled. *Id.*, and authorities cited; *Lowell, Stocks*, § 31. This privilege of the *dilectus personarum*, while unusual in corporations for profit, is a very common provision in the charters of companies not for profits, such as clubs, boards of trade, fraternal societies, educational and charitable associations. Joint-stock companies have no invariable character. Sometimes they are incorporated, and sometimes they are not. The test is the attributes conferred by the statute under which they are organized. *Mor. Priv. Corp.* § 6. Certain express companies, widely known in this county as joint-stock companies, have been held not to be corporations, within the meaning of local taxing laws.

The case of *People v. Coleman*, 133 N. Y. 279, 31 N. E. 96, is interesting as showing the history and legislative origin of certain of these companies. The case only involved the question as

to whether there was a legislative or practical distinction between joint-stock associations and corporations organized under the law of New York, and whether the capital of a joint-stock company was taxable under a New York statute, taxing the capital stock of corporations. The court refers to *People v. Wemple*, 117 N. Y. 136, 22 N. E. 1046, and says that case "shows very forcibly how almost the full measure of corporate attributes has, by legislative enactment, been bestowed upon joint-stock associations until the difference, *if there be one, is obscure, elusive, and difficult to see and describe.*" (The italics are ours.)

In endeavoring to discover whether any difference remained, the New York court, speaking through Finch, J., said:

"But I think there was an original and inherent difference between the corporate and joint-stock companies known to our law which legislation has somewhat obscured, but has not destroyed, and that difference is the one pointed out by the learned counsel for the respondent, and which impresses me as logical and well supported by authority. It is that the creation of the corporation merges in the artificial body, and drowns in it the individual rights and liabilities of the members, while the organization of a joint-stock company leaves the individual rights and liabilities unimpaired and in full force. The idea was expressed in *Supervisors of Niagara v. People*, 7 Hill, 512, and in *Gifford v. Livingston*, 2 Denio, 380, by the statement that the corporators lost their individuality, and merged their individual characters into one artificial existence; and upon these authorities a corporation is defined on behalf of the respondents to be 'an artificial person, created by the sovereign from natural persons, and in which artificial person the natural persons of which it is composed become merged and nonexistent.' I am conscious that legal definitions invite and provoke criticism, because the instances are rare in which they prove to be perfectly accurate; and yet this one offered to us may be accepted if it successfully bears some sufficient test. In putting it on trial, we may take the nature of the individual liability of the corporators on the one hand, and of the associates on the other, for the debts contracted by their respective organizations, as a sufficient test of the difference between them, and contrast their nature and character. It is an essential and inherent characteristic of a corporation that it alone is primarily liable for its debts, because it alone contracts them, except as that natural and necessary consequence of its creation is modified in the act of its creation by some explicit command of the statute which either imposes an express liability upon the corporators in the nature of a penalty, or affirmatively retains and preserves what would have been the common-law liability of the members from the destruction involved in the corporate creation. In other words, the individual liability of the members, as it would have existed at common law, is lost by their creation into a corporation, and exists thereafter only by force of the statute, upon some new and modifying conditions, to some partial or changed extent, and so far preventing, by the intervention of an express command, the total destruction of individual liabilities which otherwise would flow from the inherent effect of the corporate creation. \* \* \* Exactly the opposite is true of joint-stock companies. Their formation destroys no part or portion of their common-law liability for the debts contracted. Permission to sue their president or treasurer is only a convenient mode of enforcing that liability, but in no manner creates or saves it. \* \* \* We may thus see upon what the legislative intent to preserve them as separate and distinct is founded, and what distinguishing characteristics remain. The formation of the one involves the merging and destruction of the common-law liability of the members for the debts, and requires the substitution of a new or retention of the old liability by an affirmative enactment, which avoids the inherent effect of the corporate creation. In the other the common-law liability remains unchanged and unimpaired, and needing no statutory intervention to preserve or restore it. The debt of the corporation is its debt, and not that of its members. The debt of the joint-stock company is the debt of the associates, however enforced. The creation of the corporation merges and drowns the liability of its corporators. The creation of the stock

company leaves unharmed and unchanged the liability of the associates. The one derives its existence from the contract of individuals; the other from the sovereignty of the state. The two are alike, but not the same. More or less, they crowd upon and overlap each other, but without losing their identity; and so, while we cannot say that the joint-stock company is a corporation, we can say, as we did say in *Van Aerman v. Bleistein*, 102 N. Y. 360, 7 N. E. 537, that a joint-stock company is a partnership, with some of the powers of a corporation. Beyond that we do not think it is our duty to go."

If the nonliability of the members for the collection of debts be in fact a test of a corporation, then these Pennsylvania companies are clearly corporations under this authority. But we cannot be supposed to concede this. In *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566-575, the fact of the liability for company debts of the members of the Liverpool Insurance Company was held to be no sufficient test of the corporate character of that joint-stock association. Justice Miller, as to this, said:

"To this view it is objected that the association is nothing but a partnership, because its members are liable individually for the debts of the company. But, however the law on this subject may be in England, it is quite certain that the principle of personal liability of the shareholders attaches to a very large proportion of the corporations of this country, and it is a principle which has warm advocates for its universal application when the organization is for pecuniary gain."

The Massachusetts court is cited as holding that these Pennsylvania associations are not corporations, and could not, therefore, be sued in Massachusetts as such. *Edwards v. Gasoline Works*, 168 Mass. 564, 47 N. E. 502. The case does so hold. But the decision is expressly rested upon the earlier Massachusetts cases holding that joint-stock companies organized under the law of that state were mere partnerships. *Tappan v. Bailey*, 4 Metc. (Mass.) 529; *Tyrrell v. Washburn*, 6 Allen, 466. "If," says Lathrop, J., delivering the opinion of the court, "the question were an open one in this commonwealth, it might well be held that such an association could be considered to have so many of the characteristics of a corporation that it might be treated as one." The court in that case express their unwillingness to adopt the views of the supreme court of the United States in *Liverpool Ins. Co. v. Massachusetts*, 10 Wall. 566, and say that their own decision, reported in *Oliver v. Insurance Co.*, 100 Mass. 531, and affirmed in that opinion, was rested upon the ground stated by Justice Bradley in his dissenting opinion. We have neither the disposition nor the freedom of the Massachusetts court in respect to the opinion of the supreme court in *Liverpool Ins. Co. v. Massachusetts*. The Youngstown Coke Company presents many more of the characteristic features of a corporation than did the Liverpool Insurance Company, and that case is an authority most strongly supporting our conclusion that it is a corporation. The same conclusion was reached in regard to another one of these Pennsylvania associations by Judge Lacombe, in *Bushnell v. Park Bros. & Co.*, 46 Fed. 209. That case was subsequently affirmed by the court of appeals, in 9 C. C. A. 138, 60 Fed. 583, though this question seems to have been abandoned by the plaintiff in error, against whose protest the case had been removed from the state court. Our conclu-



sion, therefore, is that the Youngstown Coke Company is a corporation and a citizen of Pennsylvania, within the meaning of the jurisdictional requirement in respect to diversity of citizenship.

The invalidity of the contract which plaintiffs in error undertook to set up as an agreement under which the coke sued for had been received and used was *res judicata*. The record of the suit between the same parties from the circuit court of the United States for the Western district of Pennsylvania involved the invalidity of that very contract. It was in that suit decided that a contract not signed by two managers of such partnership association, and which involved a contract exceeding \$500 in value, was not enforceable in law or equity, and that all persons dealing with companies organized under the Pennsylvania act of 1874 were bound to take notice of this limitation upon their powers. That suit was one in equity, begun by the plaintiff in error for the purpose of compelling a specific performance of that agreement, or having same so executed by two managers as that it might be enforceable at law. The bill averred that the contract had been signed and delivered by one manager, who was the general manager of the Youngstown Coke Company, and its treasurer, and that he had been duly authorized to make such contracts for the future delivery of coke. It also charged that the said company took the position that it was not bound by the contract in question, and was threatening to discontinue performance. The greater part of the evidence offered and excluded by the court below was evidence which had been heard on the trial of the former suit. There was no error in the ruling of the court that the validity of that contract could not be again litigated, and in excluding evidence which could not reasonably have any other effect. The opinion of Judge Atchison, who decided the former case, is reported in 39 Fed. 353.

But it is said that, if the contract was invalid, no recovery could be had by reason of any coke delivered thereunder. The contract was neither *malum in se* nor in any wise affected by public policy. It was simply an agreement not executed as required by the charter of the Pennsylvania Company. This action was not upon the contract, but in disaffirmance of it, and for the value of the coke actually received as for a conversion. The averment is that this was an invalid agreement,—a contract not binding upon either party. That, under color of this invalid and unenforceable agreement, the plaintiff had delivered and the defendant received the coke in quantity and at the time shown in the exhibit to the petition. The suit was upon a *quantum meruit*. It was not a suit upon or in affirmance of the agreement, but for a conversion, and in disaffirmance of a contract which bound neither party. To the extent that one party had received, retained, and used the property of the other, it is equitable and just that there should be compensation. The contract, not having been immoral or contrary to public policy, may be disaffirmed, and suit brought for the value of benefits which the other has received and retained thereunder. This is well settled. *Parkersburg v. Brown*, 106 U. S. 487-503, 1 Sup. Ct. 442; *Pennsylvania Ry. Co. v. Keokuk & H. Bridge Co.*, 131 U.

S. 371-389, 9 Sup. Ct. 770; Day v. Buggy Co., 57 Mich. 146, 23 N. W. 628; Mor. Priv. Corp. §§ 714, 715. There being no error, the judgment must be affirmed.

### SUTHERLAND-INNES CO., Limited, v. VILLAGE OF EVART.

(Circuit Court of Appeals, Sixth Circuit. April 5, 1898.)

No. 552.

#### 1. TAXATION—PURPOSES.

In the absence of special enabling provisions in the constitution of a state, taxation is permissible only for public purposes.

#### 2. MUNICIPAL CORPORATION—OBLIGATIONS—MEANS OF PAYMENT.

Where there is no special fund for payment of a municipal obligation, a resort to taxation is implied; hence the power of a municipal corporation to contract is limited by the purposes for which taxes may be levied.

#### 3. SAME—ASSISTANCE OF PRIVATE BUSINESS.

A contract by a municipal corporation to encourage the establishment and operation within its limits of a private manufacturing establishment is not for a public purpose, and is therefore beyond the power of such municipality; and legislation authorizing such contracts is void, in the absence of express constitutional authority.

#### 4. STATE STATUTES—CONSTRUCTION AND VALIDITY—FEDERAL COURTS.

It is the duty of the federal courts to accept the decisions of the highest courts of a state upon the construction of a state statute and its conformity to the state constitution, when rights acquired upon the faith of the statute or earlier decisions are not involved.

### In Error to the Circuit Court of the United States for the Western District of Michigan.

This is an action at law against defendant in error, a municipal corporation, created under the laws of Michigan, to recover damages for the breach of a contract in failing and refusing to maintain a fire hydrant, as required by the contract sued on. The contract was between defendant in error and C. E. Fenton, and subsequently assigned by Fenton to plaintiff in error, said Fenton having sold to plaintiff in error the mill property, for the benefit of which the contract was executed. It is agreed that the contract is correctly set out in the declaration, as follows: "Whereas, Clarence E. Fenton, of Linwood, Bay county, Michigan, is the owner of a mill and the necessary machinery for the manufacture of staves and heading for slack barrels, which he proposes to move to Evart, Osceola county, Michigan, on the Main Muskegon river, and to erect, equip, and operate said mill in the village of Evart, aforesaid, and to employ what would be equal to fifteen men ten months in the year for the term of five years, and to produce timber for the purpose of manufacture in said mill; and whereas, the village of Evart, Osceola, Michigan, being desirous of obtaining the location within its boundaries of a stove and heading mill, for the purpose of giving employment in part to the citizens and creating a market for the sale of timber for the inhabitants of the surrounding county, thereby putting money in circulation by the employment of the labor and purchase of timber, and thus adding to the purchasing power of its and the surrounding country's inhabitants, thereby increasing the general prosperity of the village and its citizens: Now, therefore, it is agreed between the village of Evart, Osceola county, Michigan, of the first part, and Clarence E. Fenton, of Linwood, Bay county, Michigan, of the second part, as follows: The first agrees that it will place and maintain a fire hydrant within a reasonable distance of a mill building hereafter to be built, and furnish water for the fire protection free during the term of the operation of said mill, and will also give to the aid of said second party to in part reimburse him for the cost of tearing down and removal from Linwood, Mich., to Evart, Mich., and rebuilding and putting up the aforesaid stove and heading mill, and the machinery necessary to successfully operate the same,

the sum of seventeen hundred dollars, the same to be paid as follows: Seven hundred dollars when the mill plant is completed and in operation, and one thousand dollars to be paid in a village order to be delivered to second party when said mill plant is completed and in operation, said order to be made payable on or before August 15, 1893. Said second party, in consideration of the above agreements, agrees that he will remove said mill and machinery to the village of Evart within ninety days from this date, and locate and put said mill in operation during the present year, and will manage same so as to give employment to what would equal fifteen men ten months in the year for five years from the date of putting in operation of said mill, and further agrees by himself, his heirs or assigns, to maintain, keep in repair, and operate such stave and heading mill for the manufacture of staves and heading for slack barrels, and containing all the machinery necessary to successfully manufacture the same, and will not remove from Evart, or cause the same to be done, said mill during the term of five years; and it is hereby expressly agreed and understood that, in case of default in [any] of the agreements to be performed by the second party, the first party shall be entitled to receive from the second party or his heirs, in an action for moneys had and received, a sum for the unearned time remaining after the violation of this agreement, in proportion as seven hundred dollars is to five years; and that the money advanced by the said village of Evart shall constitute a lien in proportion to the unearned time as against the removal of the said mill from the said village of Evart for the period of time as herein specified; and that the mill is unincumbered." It is averred that Fenton and plaintiff in error, to whom the contract was assigned, have duly performed the contract on their part. The defendant in error paid the \$1,700 bonus, and continued for a time to maintain the hydrant as stipulated, but finally ceased and failed to do so. The mill, machinery, and contents were afterwards destroyed by fire. It is alleged that the fire was promptly discovered, and could have been extinguished except for the defendant's failure to furnish fire protection by maintaining the hydrant. In consequence of this violation of the contract, \$19,000 is claimed as damages for the loss. The declaration was demurred to upon the grounds, among others, that the contract sued on was void, because not authorized by the charter of the village of Evart or by the laws of Michigan, and was without consideration. The court sustained the demurrer, holding that the contract was, *ultra vires* and without consideration. Final judgment was accordingly entered dismissing the suit, and, to review that judgment, this writ of error is brought.

S. E. Engle, for plaintiff in error.

C. H. Rose, for defendant in error.

Before TAFT and LURTON, Circuit Judges, and CLARK, District Judge.

CLARK, District Judge, after stating the case, delivered the opinion of the court.

Two questions arise on this record: First, whether or not, under the charter of the appellee or the general provisions of the Michigan statutes in relation to corporations of this class, the appellee was invested with power to make the contract here in question; and, second, whether or not this charter and the general statutes upon the subject construed as conferring power to make this contract would be valid under the constitution of Michigan.

We prefer to deal first with the question whether or not a charter or statute conferring upon the village of Evart power to make a contract like that now in question would be valid under the constitution of Michigan, for it depends upon the proper disposition of that question whether the case will require any inquiry into the question whether, upon a proper construction of the charter or laws of Michigan,

the power to make this contract is conferred. It is to be observed in the outset that, as this action is one upon a specific contract to recover damages for breach of that contract, we are not concerned with the consideration of any question relating to the governmental or public duty of the appellee in regard to fire protection, nor with any question of negligence in respect of such duty. Admittedly, the only consideration which supports this contract, and the only purpose for which it was made, was the establishment and operation for the period named of the stave and heading mill, and the indirect advantages to result to the inhabitants of the village thereby. Unless that contract as made was valid, no obligation was incurred by the village of Evart, and no suit upon the contract could be maintained. It is undoubtedly true, as a general proposition, that, where the construction or validity of a state statute does not involve rights acquired upon the faith of the statute or earlier decisions, it is the duty of federal courts to accept the decisions of the highest courts of the state in regard to the construction of state statutes and the conformity of such laws to the constitution of the state, those courts being the appropriate tribunals for the determination of such questions. *Sanford v. Poe*, 37 U. S. App. 378, 16 C. C. A. 305, and 69 Fed. 546; *Louisville Trust Co. v. City of Cincinnati*, 47 U. S. App. 46, 22 C. C. A. 534, and 76 Fed. 296; *Forsyth v. City of Hammond*, 166 U. S. 506, 17 Sup. Ct. 665; *Telegraph Co. v. Poe*, 64 Fed. 9; *Long Island Water-Supply Co. v. City of Brooklyn*, 166 U. S. 685, 17 Sup. Ct. 718; *Merchants' & Manufacturers' Nat. Bank v. Pennsylvania*, 167 U. S. 461, 17 Sup. Ct. 829. There is nothing in this case to bring it within any of the recognized exceptions to the rule. If, then, the decisions of the highest court of the state of Michigan furnish a rule by which to dispose of the question here raised, the decisions of that court are controlling.

As counsel in the case differ as to the proper conclusion to be drawn from the decisions of the supreme court of Michigan in their application to the case at bar, it will materially aid in understanding and applying those decisions to examine and restate the generally established doctrine upon the subject. In the absence of special enabling provisions in the constitution of a state, the levy of a tax or the appropriation of revenue derived from taxation is permissible only for a public purpose or object, and legislative power is limited accordingly. And in the ordinary case of municipal obligation, in whatever form incurred, in the absence of a fund specially provided otherwise, a resort to taxation to satisfy such obligation is implied. It is upon this principle, therefore, that the power to contract on behalf of such corporation must be limited by the objects and purposes for which taxes may be laid and appropriated when collected. That this must be true in a general sense cannot admit of question, for otherwise the anomalous result would, in effect, be to recognize the power to incur the obligation while denying the only power by which the obligation could be satisfied.

In *Tied. Mun. Corp.* § 254, it is said:

"The levy of a tax is only permissible, except under tyrannical government, when it is made for a public purpose, and it is proportioned uniformly among the subjects of taxation. When the tax is imposed for some private or individual benefit, or it is not uniformly imposed upon those who ought to bear it, it is perfectly proper, nay it is the duty of the courts, to interfere and prohibit

what may be justly called an 'extortion.' \* \* \* But, if the purpose be truly private,—if the tax in effect takes the property of one man, and gives it to another,—it is illegal, and it is the duty of the courts to enjoin its collection. For example, it has been held unlawful to levy taxes in aid of manufacturing and other private industrial enterprises, for the relief of farmers whose crops have been destroyed, to supply them with seeds and provisions, or for making loans to persons whose homes have been destroyed by fire. It has also been held illegal to pay a subscription to a private corporation which is to be devoted to a private purpose."

And in section 188 the principle is thus stated:

"The policy of our laws is against any species of paternalism by which the state, or any of its component parts, shall become a partner in any private industry, however important or beneficial that business may be; and bonds issued for such purposes are ipso facto void, and neither the payment of interest nor the acts of the city officials operate, by way of estoppel, to render the corporation liable on such obligations."

In the leading case of *Loan Ass'n v. Topeka*, 20 Wall. 655, the action in the court below was upon coupons for interest attached to bonds of the city of Topeka, issued, as appeared upon their face, pursuant to an act of the legislature of Kansas, to a manufacturing corporation, to aid it in establishing shops in the city of Topeka for the manufacture of iron bridges; and these bonds were held void even in the hands of a purchaser in good faith and for value. The single question considered and determined by the court was the authority of the legislature of the state of Kansas to enact that part of the statute which authorized the bonds. Mr. Justice Miller, delivering the judgment of the court, said:

"If these municipal corporations, which are in fact subdivisions of the state, and which for many reasons are vested with quasi legislative powers, have a fund or other property out of which they can pay the debts which they contract, without resort to taxation, it may be within the power of the legislature of the state to authorize them to use it in aid of projects strictly private or personal, but which would, in a secondary manner, contribute to the public good; or where there is property or money vested in a corporation of the kind for a particular use, as public worship or charity, the legislature may pass laws authorizing them to make contracts in reference to this property, and incur debts payable from that source. But such instances are few and exceptional, and the proposition is a very broad one that debts contracted by municipal corporations must be paid, if paid at all, out of taxes which they may lawfully levy, and that all contracts creating debts to be paid in future, not limited to payment from some other source, imply an obligation to pay by taxation. It follows that in this class of cases the right to contract must be limited by the right to tax, and if, in the given case, no tax can lawfully be levied to pay the debt, the contract itself is void for want of authority to make it. If this were not so, these corporations could make valid promises, which they have no means of fulfilling, and on which even the legislature that created them can confer no such power. The validity of a contract which can only be fulfilled by a resort to taxation depends on the power to levy the tax for that purpose. It is therefore to be inferred that, when the legislature of the state authorizes a county or city to contract a debt by bond, it intends to authorize it to levy such taxes as are necessary to pay the debt, unless there is in the act itself, or in some general statute, a limitation upon the power of taxation which repels such an inference."

The court, after pointing out that municipal loans or aid voted to railroads by counties and towns had been the subject of contest and discussion in almost every state in the union, further observed:

"We have referred to this history of the contest over aid to railroads by taxation, to show that the strongest advocates for the validity of these laws never placed it on the ground of the unlimited power in the state legislature to tax

the people, but conceded that where the purpose for which the tax was to be issued could no longer be justly claimed to have this public character, but was purely in aid of private or personal objects, the law authorizing it was beyond the legislative power, and was an unauthorized invasion of private right."

And in respect to what may be regarded as a public object, for which liability may be incurred by contract to be satisfied by taxation, the court used this language:

"We have established, we think, beyond cavil, that there can be no lawful tax which is not laid for a public purpose. It may not be easy to draw the line in all cases so as to decide what is a public purpose in this sense and what is not. \* \* \* But in the case before us, in which the towns are authorized to contribute aid by way of taxation to any class of manufactures, there is no difficulty in holding that this is not such a public purpose as we have been considering. If it be said that a benefit results to the local public of a town by establishing manufactures, the same may be said of any other business or pursuit which employs capital or labor. The merchant, the mechanic, the innkeeper, the banker, the builder, the steamboat owner, are equally promoters of the public good, and equally deserving the aid of the citizens by forced contributions. No line can be drawn in favor of the manufacturer which would not open the coffers of the public treasury to the importunities of two-thirds of the business men of the city or town."

This case has been repeatedly followed, and its doctrine reaffirmed in subsequent decisions of the supreme court of the United States, and in the courts of highest authority in the states. It is to be noted that the decision in this case did not proceed upon the ground that there was any specific restriction in the constitution of Kansas in the way of the legislative act under which the bonds were issued. The judgment rested upon the broad ground that under a general grant of legislative power, and in the absence of specific provision in the constitution, the legislature was without power to authorize the issue of bonds to be satisfied by taxation, except for a strictly public purpose, and that the object for which the bonds in question were issued was not a public use, and that such was the view is made manifest in the dissenting opinion of Mr. Justice Clifford. It was in reference to this broader proposition that the court said, in effect, that there are limitations of power on all branches of government, state and national, arising out of the very nature of free governments, and that among such limitations of power was the one in respect to the right of taxation; that it could only be used in aid of a public purpose for which governments are established.

In *City of Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442, the question raised was in regard to the validity of bonds issued under authority of an act of the legislature of West Virginia, for the purpose of lending the same to persons engaged in manufacturing, and it was again held that the bonds were invalid. Among various defenses set up in the answer by the city to the bill, it was insisted that it was in excess of the constitutional power of the legislature of the state to authorize taxation for the purpose of paying the bonds, unless that power was clearly conferred on it by the constitution of the state, and that no such power was conferred by the constitution of that state. This view was sustained upon the authority of *Loan Ass'n v. Topeka*, and the doctrine of that case, in its broadest statement, reaffirmed.

See, also, *City of Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 361,

in which, although the question on which the case turned was whether authority to issue the bonds had been granted by the legislature, the general reasoning of the opinion is applicable.

In *Cole v. City of La Grange*, 113 U. S. 1, 5 Sup. Ct. 416, bonds had been issued under authority of an act of the legislature of Missouri, authorizing the city to issue its bonds by way of donation to a private manufacturing corporation, and the action was to recover the amount of coupons for interest for a stated time. The issue of the bonds was regular, and in exact accordance with the requirements of the statute, and the only question in the case was the validity of the act. The grant of legislative power in the constitution of Missouri was in the usual general terms by which that power is defined, there being no enabling or special provision under which the legislature could have acted. Mr. Justice Gray, speaking for the court, said:

"The general grant of legislative power in the constitution of a state does not enable the legislature, in the exercise, either of the right of eminent domain, or of the right of taxation, to take private property, without the owner's consent, for any but a public object. Nor can the legislature authorize counties, cities, or towns to contract, for private objects, debts which must be paid by taxes. It cannot, therefore, authorize them to issue bonds to assist merchants or manufacturers, whether natural persons or corporations, in their private business. These limits of the legislative power are now too firmly established by judicial decisions to require extended argument upon the subject. In *Loan Ass'n v. Topeka*, 20 Wall. 655, bonds of a city, issued, as appeared on their face, pursuant to an act of the legislature of Kansas, to a manufacturing corporation, to aid it in establishing shops in the city for the manufacture of iron bridges, were held by this court to be void, even in the hands of a purchaser in good faith and for value. A like decision was made in *City of Parkersburg v. Brown*, 106 U. S. 487, 1 Sup. Ct. 442. The decisions in the courts of the states are to the same effect. *Allen v. Inhabitants of Jay*, 60 Me. 124; *Lowell v. City of Boston*, 111 Mass. 454; *Weismer v. Village of Douglas*, 64 N. Y. 91; *In re Application of Eureka Basin Warehouse & Mfg. Co.*, 96 N. Y. 42; *Bissell v. City of Kankakee*, 64 Ill. 249; *English v. People*, 96 Ill. 566; *Railroad Co. v. Smith*, 23 Kan. 745."

This is an instructive case.

In *Scotland County Court v. U. S.*, 140 U. S. 41, 11 Sup. Ct. 697, the court held that when, at the time of issue of bonds, there existed a power of taxation sufficient to pay the bonds and interest, such power entered into and formed a part of the contract, and could not be taken away by subsequent legislation. The relation between the power to tax and the power to contract was referred to by the court in this language, being taken from the opinion of the court in *Ralls County Court v. U. S.*, 105 U. S. 733:

"The power to tax is necessarily an ingredient of such a power to contract; as, ordinarily, political bodies can only meet their pecuniary obligations through the instrumentality of taxation."

See, also, *U. S. v. City of New Orleans*, 98 U. S. 381.

The house of representatives of Massachusetts (Opinion of Justices, 155 Mass. 601, 30 N. E. 1142) submitted to the justices of the supreme judicial court of that state the question whether power might be conferred on cities and towns to buy and sell coal and wood for fuel to the inhabitants of the cities and towns. The justices, first stating that the proper answer depended on the question whether such a business could be regarded as a public object, said:

"This Inquiry underlies all the questions on which our opinion is required. If such a business is to be carried on, it must be with money raised by taxation. It is settled that the legislature can authorize a city or town to tax its inhabitants only for public purposes. This is not only the law of this commonwealth, but of the states generally and of the United States. The following are some of the decisions or opinions on the subject: *Lowell v. City of Boston*, 111 Mass. 454; *Mead v. Inhabitants of Acton*, 139 Mass. 341, 1 N. E. 413; *Opinion of Justices*, 150 Mass. 592, 24 N. E. 1084; *Kingman v. City of Brockton*, 153 Mass. 255, 26 N. E. 998; *Loan Ass'n v. Topeka*, 20 Wall. 655; *City of Ottawa v. Carey*, 108 U. S. 110, 2 Sup. Ct. 361; *Cole v. City of La Grange*, 113 U. S. 1, 5 Sup. Ct. 416; *Allen v. Inhabitants of Jay*, 60 Me. 124; *Opinion of Justices*, 58 Me. 590; *Attorney General v. City of Eau Claire*, 37 Wis. 400; *State v. City of Eau Claire*, 40 Wis. 533; *State v. Osawkee Tp.*, 14 Kan. 418; *Mather v. City of Ottawa*, 114 Ill. 659, 3 N. E. 216."

A railroad corporation obtains its franchises largely because of its public importance, and is consequently often called a "quasi public corporation." It is the one great method of modern travel, of carrying on commerce, of communication by mail, and the chief means of moving crops and other products, and essential to the successful operation of all industrial establishments. On these and other grounds which might be enumerated, a railroad may be and has been held so far a public object as to justify municipal aid. But these reasons can obviously have no application to a private mill like the one now in question, and no justification, upon principle or authority, can be found for municipal aid by contract to such an enterprise. When the legislature has authorized the issue of bonds by a municipal corporation or other contract obligation, for an object which must be considered private as distinguished from public in the legal sense, it is not sufficient to uphold such legislation as valid that no restrictive provision in that regard is found in the constitution. The authority to enact such legislation must affirmatively appear. This must be accepted as the result of these and other cases that might be referred to. As is well known, there has been much discussion and some conflict in the decisions over the question whether a municipal corporation, under legislative authority, may aid, by taxation, the construction of a railroad. In all such cases the decision has been made to turn upon whether such a purpose was public. The legislation in such cases authorizing such aid was held valid or invalid, as the courts concluded that the object was a public or a private one. A great preponderance of authority is in favor of the proposition that such an object is public. The decisions of the supreme court of Michigan, however, clearly establish the doctrine for that state that the construction and operation of a railroad is not a public purpose, in aid of which a municipal corporation may be authorized to pledge its credit or issue bonds. *People v. Township Board of Salem*, 20 Mich. 452; *People v. State Treasurer*, 23 Mich. 499; *Thomas v. City of Port Huron*, 27 Mich. 320. The provisions of the constitution of Michigan, so far as they affect this question, will be found sufficiently referred to in these cases, and need not be recited now.

In *People v. Township Board of Salem*, 20 Mich. 452, the judges delivered separate opinions. Cooley, J., said:

"But, if the legislature should pass an act providing that the township of Salem should give or loan a certain percentage of its taxable property to any mer-



chant who will undertake to erect a store within the township, and hold himself ready at all times to sell goods therein to the people of the township on terms as favorable as those he would exact from others, he would be a bold man who should undertake to defend such legislation on constitutional principles. Yet the case would possess all the elements of public interest which are to be found in the case before us. The public convenience would be subverted, and there would be a like tendency to increase local values. The difference in the cases would be in degree, and not in kind; and it would be easy to suggest enterprises as to which the comparison, even in degree, would not be to the advantage of the railroad. And when we have once determined that a municipal government can tax its citizens to make a donation to a railroad company, because of the incidental benefits expected from its operation, we do not go a single step further when we hold that it may use the public funds to erect a cotton or woolen factory, or a building suited to the manufacture of tobacco, and present it on grounds of public benefit, to any person who will occupy it."

In regard to the power of taxation, Chief Justice Campbell said:

"It cannot be claimed that there is no limit to the power of taxation, which can prevent the imposition of taxes for all purposes which the legislature may choose. There are purposes the illegality of which would be so manifest that, although not mentioned in any constitution, no one could hesitate to say the burden was not validly imposed to further them. The purposes for which taxes are imposed must be public purposes, and, however close some things may be to the dividing line, yet, whenever any subject lies clearly on one side or the other, the courts must sustain or reject the tax accordingly, whether the purpose be laudable or not."

The general doctrine announced was that the exercise by a municipal corporation of the power to pledge its credit was the incipient step in the exercise of the power of taxation, and that unless the object to be promoted was such as might be provided for by taxation, the power to make the pledge or incur the obligation did not exist, and that the legislature could not confer such power. The doctrine that the contract power and the power of taxation are equally limited to a public object or purpose is a clear implication in these cases. It would seem to be obvious enough that if a municipal corporation is without power to contract an obligation by a pledge of its credit, or the issue of bonds, it is equally without power to accomplish the same result indirectly by the execution of a contract on which judgment may be rendered against the corporation for damages to be satisfied only by taxation. The only difference which could be suggested relates merely to form, and to the differences between a direct and indirect method of incurring an obligation which does or may require a resort to the power of taxation.

The purpose of the contract in question, as appears on its face, was to encourage the establishment and operation in the village of Evart of a private business, and the object was clearly not a public one. We think it is manifest that if the charter of the village of Evart, or any general statute defining the powers of municipal corporations of that class upon a proper construction, could be regarded as conferring power to make a contract of this character, the legislation would be invalid under the constitution of Michigan. As this view of the case furnishes sufficient, and we think undoubted, ground for sustaining the judgment of the court below, we do not find it necessary to inquire into the construction of the legislation with a view to ascertaining whether the power is conferred. Judgment affirmed.

## UNITED STATES v. NG PARK TAN.

(District Court, N. D. California. April 12, 1898.)

No. 3,494.

## ADMISSION OF CHINESE MERCHANT—CERTIFICATE OF IDENTIFICATION—ENGAGING IN LABOR.

Where a Chinaman is admitted into this country upon presentation of a certificate in conformity with 22 Stat. 58, as amended by 23 Stat. 115, identifying him as a merchant, proof that, ever since he was permitted to land, he has continuously engaged in manual labor, will overcome the effect of such certificate as prima facie evidence of his right to remain in the United States.

Bert Schlesinger, Asst. U. S. Atty.

Ward McAllister and J. E. Foulds, for defendant.

DE HAVEN, District Judge. The complaint filed in this court on January 15, 1898, charges the defendant with being a Chinese laborer unlawfully in the United States. The defendant was permitted to land at the port of San Francisco by the collector of that port on December 4, 1897, upon presentation of a certificate, dated October 27, 1897, identifying him as a merchant. The certificate was in conformity with section 6 of the act of May 6, 1882 (22 Stat. 58), as amended by the act of July 5, 1884 (23 Stat. 115). This certificate is only prima facie evidence of the right of the defendant to remain in the United States, and its effect as such is overcome by the other evidence in the case, showing that defendant, immediately after landing in this country, engaged in manual labor, and so continued until January 18, 1898, the date of his arrest in this proceeding. In support of this conclusion, I need only refer to the case of U. S. v. Yong Yew, 83 Fed. 832, the opinion in which contains an able discussion of the question relating to the effect of evidence showing that a defendant in this class of cases has continuously engaged in manual labor after being permitted to land upon a certificate like that held by the defendant here. The exceptions to the report of the United States commissioner are overruled, and judgment will be entered that defendant be deported to China.

## MORGAN ENVELOPE CO. v. WALTON et al.

(Circuit Court of Appeals, Third Circuit. April 1, 1898.)

No. 3.

## 1. TRADE-MARK—GEOGRAPHICAL NAMES.

"Columbia," being a geographical name, cannot be appropriated as an exclusive trade-mark. Mill Co. v. Alcorn, 14 Sup. Ct. 151, 150 U. S. 460, followed.

## 2. SAME—UNFAIR COMPETITION.

An injunction to restrain unfair competition will not be granted where the proofs show that defendant has not been guilty of intentional or actual unfairness, and has not employed imitative devices to draw trade from the complainant, or acted with bad faith or wrongful purpose.

Appeal from the Circuit Court of the United States for the District of New Jersey.

Melville Church, for appellant.  
Walter D. Edmonds, for appellees.

Before ACHESON and DALLAS, Circuit Judges, and BRADFORD, District Judge.

ACHESON, Circuit Judge. This is an appeal from an interlocutory order or decree upon cross applications for preliminary injunction. The material facts, as they appear from the original bill and answer, the cross bill, exhibits, and affidavits, are as follows: In the year 1885 the Morgan Envelope Company, the appellant, a manufacturer and vendor of tissue or toilet paper, devised and adopted for its packages of paper a wrapper or label bearing as a central figure a symbolical or allegorical representation of Columbia, having the word "Columbia" on its pedestal, and surrounded by a rectangular border or framing having a star at each corner, and bearing at each side-edge of the package the word "Columbia," in fanciful design, and at each end of the package the words "Pure Tissue." This wrapper or label the appellant continuously applied to its packages of toilet paper from its adoption, in 1885, until the entry of the injunction order in this case. In the year 1883 David S. Walton and George West, trading under the firm name of D. S. Walton & Co. (the appellees), manufacturers and vendors of tissue or toilet paper, devised and adopted for their packages of toilet paper a wrapper or label having printed in large letters diagonally across the face the word "Columbia," surrounded by a narrow, rectangular border, within which are fanciful corner designs, a peculiar design near the middle of the left-hand side, a conspicuous figure of a stork in the lower part of the right-hand side, the printed words "Medicated Toilet Paper," and the figures and words "1000 Sheets—Wire Looped." This wrapper or label the appellees have applied to paper packages continuously from its adoption by them, in 1883. Except in the common use of the word "Columbia," these two wrappers or labels are entirely dissimilar. Both in details and in general effect they are unmistakably different. No purchaser using the slightest attention could mistake the one for the other. Until after this litigation began, neither of these parties had any knowledge or information of the existence or use of the wrapper or label of the other. The original bill was filed on February 24, 1897, by the Morgan Envelope Company against D. S. Walton & Co., and charged the defendants with the then use upon their packages of toilet paper of a wrapper or label which was a counterfeit of the plaintiff's wrapper or label. In their answer the defendants admitted that they were then so using, and intended to continue to so use, a wrapper or label which was substantially identical with that of the plaintiff; and they justified their use thereof on the ground that they were the original appropriators and users of the word "Columbia" as a trade-mark applied to tissue or toilet paper; and they set forth that, before the plaintiff had adopted its said wrapper or label, they (the defendants) had adopted and used, and thereafter continuously used, upon packages of toilet paper, their wrapper or label above described, a copy of which they attached to their answer. D. S. Walton & Co. then filed a cross bill against the

Morgan Envelope Company. The cause having been heard upon the pleadings, exhibits, and affidavits, on cross motions for preliminary relief, the court refused to grant a preliminary injunction against D. S. Walton & Co., under the prayer of the original bill, but, under the prayer of the cross bill, granted against the Morgan Envelope Company a preliminary injunction which restrains that company from applying its said wrapper or label to tissue or toilet paper, and from making any use of the word "Columbia" upon any wrapper or label applied to such paper.

Upon careful consideration of the facts, we find ourselves unable to concur in the conclusions which the court below reached. In *Mill Co. v. Alcorn*, 150 U. S. 460, 466, 14 Sup. Ct. 151, which involved the complainant's right to the exclusive use of the word "Columbia" as a trade-mark for flour of its manufacture, the supreme court of the United States decided that the general rule that a word in common use as designating locality, or section of a country, cannot be appropriated by any one as his exclusive trade-mark, applies to the word "Columbia." The court there declared:

"The appellant was no more entitled to the exclusive use of the word 'Columbia' as a trade-mark than he would have been to the use of the word 'America,' or 'United States,' or 'Minnesota,' or 'Minneapolis.' These merely geographical names cannot be appropriated and made the subject of an exclusive property. They do not, in and of themselves, indicate anything in the nature of origin, manufacture, or ownership; and in the present case the word 'Columbia' gives no information on the subject of origin, production, or ownership."

All this is strictly applicable here, and the ruling, we think, is decisive against the appellees' claim of right to the exclusive use of the word "Columbia" as a designation of tissue or toilet paper.

Nor can the injunction against the Morgan Envelope Company be sustained on the ground of unfair competition. Certainly the appellant is not justly chargeable, under the proofs, with bad faith or wrongful purpose. It has been guilty of no intentional unfairness. It has not employed imitative devices to draw trade from the appellees to itself. The appellant devised and adopted its label without knowledge of the appellees' label. For more than 10 years the appellant had continuously used its label in the course of trade without any information that the other label existed. Then there is no misleading similarity here. Save in the common use of the word "Columbia,"—which, as we have seen, is open to both parties,—the appellant's label and the appellees' original label are wholly unlike. Apart from the mere use of the word "Columbia," the appellees' original label, by reason of its characteristic arrangement, designs, and figures, no doubt constitutes a lawful trade-mark. So, likewise, the appellant's label involves a valid trade-mark; and, by the admissions contained in their answer, the appellees are infringers thereof. It follows, therefore, that the interlocutory order or decree must be wholly reversed. The interlocutory order or decree of the court below is reversed, and the injunction against the Morgan Envelope Company is dissolved; and the cause is remanded to the circuit court, with direction to grant a preliminary injunction against the firm of D. S. Walton & Co. in accordance with the views expressed in the foregoing opinion.

**PILLSBURY-WASHBURN FLOUR MILLS CO., Limited, et al. v. EAGLE.**

(Circuit Court of Appeals, Seventh Circuit. April 5, 1898.)

No. 462.

**1. TRADE-MARK—FRAUDULENT COMPETITION—EQUITY JURISDICTION.**

Where one person has so dressed out his goods as to deceive the public into the belief that they are the goods of another person, and so put them upon the market to the manifest injury of that person and of the public, an action at law will lie for the deceit; and, to save a multiplicity of suits, and prevent irreparable injury, equity will restrain such unfair and fraudulent competition.

**2. SAME—GEOGRAPHICAL NAMES.**

While a geographical name is not the subject of a trade-mark, and any one may use it, yet where it has been adopted, first, as merely indicating the place of manufacture, and afterwards has become a well-known sign and synonym for superior excellence, persons residing at other places will not be permitted to use it as a brand or label for similar goods for the purpose of appropriating the good will and business of another.

**3. SAME—PROPRIETARY RIGHT.**

Where the question is simply one of unfair competition, it is not essential that there should be any exclusive or proprietary right in the words or labels used, as, irrespective of any question of trade-marks, rival manufacturers have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals.

**4. SAME—JOINDER OF PARTIES.**

Where one person or corporation is entitled to relief in a case of fraudulent competition in trade, two or more persons or corporations having a common interest in preventing the fraud may unite to maintain an action in equity.

**5. SAME—MINNEAPOLIS FLOUR MANUFACTURERS.**

Certain millers in Minneapolis, Minn., and their predecessors in business have for 30 years made flour by the roller patent process, and used as brands the words "Minneapolis," "Minneapolis, Minn.," "Minneapolis, Minnesota," "Minnesota," "Minnesota Patent." The words "Minnesota" or "Minnesota Patent" mean that the flour is made under the roller patent process somewhere in Minnesota. The words "Minneapolis," "Minneapolis, Minn.," "Minneapolis, Minnesota," signify to the trade that the flour was made at a Minneapolis flouring mill. A dealer in Chicago, Ill., obtains from mills at Milwaukee, Wis., an inferior grade of flour, which he labels "Best Minnesota Patent, Minneapolis, Minn.," and advertises as made at Minneapolis, Minn., with the result that the public is deceived into buying this flour under the belief that it is made at Minneapolis, and is defrauded, and the business of the Minneapolis millers is damaged. *Held*, that a court of equity may grant relief by prohibiting the fraud and preventing damage to the business of the Minneapolis millers. 82 Fed. 816, reversed.

**6. SAME.**

The fact that one of the mills belonging to one of the Minneapolis millers is situated 10 miles from the city is not important when it is shown that such mill is an integral part of a Minneapolis milling plant, has the same machinery, is run in the same manner, grinds the same grade of wheat, and has always been considered as one of the Minneapolis mills.

**7. SAME.**

Such objection, if important, should be taken by plea in abatement for the misjoinder of parties, and furnishes no good ground for not granting relief as to other complainants.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

Frank F. Reed, for appellants.

Edward O. Brown, for appellee.

Before WOODS and JENKINS, Circuit Judges, and BUNN, District Judge.

BUNN, District Judge. This suit is brought by the complainants, who, for many years, have been engaged in the manufacture of flour on a large scale at the city of Minneapolis, Minn., against the defendants, who are engaged as wholesale and retail grocers in the sale of flour at Chicago, Ill., to enjoin the defendants from using as a part of their brand placed upon their barrels and sacks containing flour the words "Minnesota Patent," or "Minneapolis, Minnesota," or "Minneapolis, Minn." The allegations of the complainants' bill, which are fully sustained by the evidence, are substantially these: The complainants are corporations, all, except one, organized under the laws of Minnesota. The Pillsbury-Washburn Flour Mills Company, Limited, is a corporation organized under the laws of Great Britain. These seven corporations separately own and operate, and have for many years, flouring mills situated in Minneapolis, numbering in all at the present time some 22 or 23 mills. The first mill was built in 1859, when the city had a population of less than 6,000 inhabitants. Since then the growth of the milling interest has kept pace with that of the city, so that, while the population of the city in 1896 was about 200,000, the product of the mills was 60,000 barrels per day, or some 13,000,000 barrels per year. The Pillsbury-Washburn Company alone own and operate five mills, with a daily capacity of 25,000 barrels ground, packed, and put up ready for shipment, and with an annual output of about 4,000,000 barrels of flour. These mills all use in their manufacture only the highest grade of hard spring wheat grown in Minnesota and the Dakotas, and for the purpose of storing and handling the wheat own and operate many hundreds of elevators in Minneapolis and other parts of Minnesota and the Dakotas. They early adopted and employed the process of high grinding, and subsequently the roller grinding or Hungarian patent process, which is especially adapted to hard wheat. By this roller patent process, which is a development and extension of the high grinding process with improved machinery, the wheat is subjected to the operation of successive graduated rollers whereby the external portion, the wheat kernels are disintegrated, removed, and successively carried away, so as to leave the interior or core of the wheat containing the nutritive gluten for disintegration separately and last, the process being to first remove by the action of the rollers the outside hull of the wheat, and then the starchy portions, thus preserving as nearly as possible the gluten for separate grinding. In this way obtaining a wheat flour which is from 40 to 50 per cent. of gluten and the balance starch, and which is known as "Patent" or "Patent Process" flour, and is highly nutritious, and makes a fine white quality of bread, the flour commanding the highest price in the market. That the different operators and owners have used upon the sacks and barrels containing the flour manufactured at their respective mills various trade-marks and brands of two distinct kinds known as "mill brands" and "customers' brands," the latter being subdivided

into foreign and domestic. Mill brands consist of names, marks, and symbols peculiarly arranged, indicating by assertion or association the mill, establishment, or combination of mills producing the flour contained in the receptacle exhibiting and employing such brands. Customers' brands consist of names, marks, and symbols peculiarly arranged, and put on the flour receptacles, indicating sometimes by statement and implication and sometimes by association the flour jobber, wholesale or retail merchant, selecting and standing sponsor for the flour in the exhibiting sack or barrel, and frequently simply the place of manufacture, as being "Minneapolis, Minn." Nothing resulting from use, exploitation, association, or otherwise was, as a rule, used to identify the flour sold under these customers' brands as the product of any particular mill or mills; but the place of manufacture of the flour was usually indicated. The flour jobber or wholesale or retail merchant who exploits, introduces, and owns the brand, may, with perfect propriety, and frequently does, secure the flour for his particular brand from different mills operated by different persons. As a matter of fact, however, almost all the brands of flour, both mill and customers', used and employed at any time upon flour made at any of complainants' mills, have contained and distinctly and prominently exhibited thereon the words "Minneapolis," "Minneapolis, Minn.," or "Minneapolis, Minnesota." Many of said brands have also contained the words "Minnesota" or "Minnesota Patent" in addition to the word "Minneapolis," and a few brands have omitted the word "Minneapolis," and employed the words "Minnesota" or "Minnesota Patent" instead. The use of these last-named words, "Minnesota" or "Minnesota Patent," means, and is understood by the trade, buyers, and consumers to mean, that the flour in the receptacle exhibiting them is made under the patent process as above described somewhere in the state of Minnesota. The words "Minneapolis," "Minneapolis, Minn.," or "Minneapolis, Minnesota," in flour brands signify universally to jobbers, wholesale, and retail merchants, flour traders, and dealers, buyers and consumers that the flour in the receptacle imprinted therewith was made at a Minneapolis flouring mill, and, because of the location, methods, and reputation of Minneapolis, that the flour is "Minnesota Patent" flour made at "Minneapolis, Minnesota." That the location of the said city of Minneapolis upon the Mississippi river is highly advantageous and desirable for flour milling. The states of Minnesota and North and South Dakota produce the highest grades and best qualities of hard spring wheat in enormous quantities, and the immense acreage therein devoted to this product is strong assurance that there will at all times be an ample wheat crop for supplying the Minneapolis mills, while the capital invested and population interested and employed in this hard spring wheat growing industry, and the adaptation of soil and climate to the production of such wheat, insure competition, and the progressive development of the industry, increase in production, and improvement in quality. Minneapolis is situated at the extreme southeast of this hard wheat region, and is a natural outlet of the wheat grown therein for shipment, either as grain or flour, through-

out the United States, and especially to the manufacturing populations in the Central and Eastern states, where the consumption of hard spring wheat flour is extensive, and to the seaport cities for export. Principally because of the grain and flour trade, Minneapolis has become both a terminal point for many important railroads which concentrate there from points throughout the hard wheat growing district, and the initial point of many trunk lines terminating at points along the Great Lakes and in the Central, Southern, and Eastern states and seaports. The locality and the fine water power induced the establishment of mills at Minneapolis early in the development of the country northwest thereof, and from 1859 until the present the growth of the flour industry there has been constant and rapid. This industry has always been the leading one of Minneapolis, and through it the place has in 37 years increased in population from less than 6,000 to about 200,000 inhabitants. Over 5,000 men find work in and about the flour mills and business, and as many more in connection with buying, selling, storing, and handling grain. Minneapolis has long been styled throughout the United States and also abroad the "Flour City." From the inception of the flour-milling business there in 1859, there has been among and between all the mills located there the keenest competition as to quality and quantity of flour made and sold, and early in the history of the milling industry at Minneapolis there was adopted the custom between millers of frequently examining and comparing the methods and machinery employed in the various mills, and of frequently examining and comparing the flour produced. All wheat used at the Minneapolis mills has for years been systematically inspected and graded by competent and disinterested persons appointed for that purpose by the state of Minnesota. The machinery in the mills is made almost entirely by two establishments. This comparison of mill products by the mill owners and operators has been made daily for over 12 years. Each day each mill submits to an expert two pounds of its high-grade flour, who examines, tests, and bakes it, and reports the result. These methods, and the close proximity of the mills, produce the greatest uniformity and identity in the flour made at the mills. Practically these mills have always been run on the same systems and methods, and with exactly similar machinery and appliances, employing the same grades of hard spring wheat grown in the same territory, and subjecting it to the same kind of inspection, and, as the necessary consequence, the flour ground at all the mills has been practically of the same classes, kinds, qualities, and reputations. As a result of this method and the continued and extended use of the words "Minneapolis," "Minneapolis, Minn.," and "Minneapolis, Minnesota," in and upon the brands, both mill and customers', and in advertisements, circulars, and announcements relating to the flour and brands, there has grown up, and for a long time has existed, and now exists, throughout the United States and in many foreign countries, a great reputation and demand for flour made in Minneapolis, Minn., and the flour made at the mills of complainants is known generally as "Minnesota Patent" flour, and also especially as "Min-



neapolis Flour," and is classified and listed upon markets, and is in both the trade among flour dealers, wholesale and retail, and whole-sale and retail grocers, and by purchasers and consumers, asked for, identified, bought, and sold by the style of "Minneapolis Flour" as a particular and superior kind or grade of "Minnesota" or "Minnesota Patent" flour, and thus the words "Minneapolis," "Minneapolis, Minn.," or "Minneapolis, Minnesota," upon or in connection with flour, signify to and are understood by traders, purchasers, consumers, and the public generally to mean that the said flour was made and put up at some one of complainants' mills, and have acquired and do possess this secondary meaning and significance in the trade.

The complainants and their predecessors in business in the operation of said mills have sold and do sell in Chicago large quantities of flour bearing said trade-marks and names, and there known and dealt in both at wholesale and retail as "Minnesota Patent" flour and "Minneapolis" flour, and by the latter term identified as coming from some one of complainants' mills. The use of the words "Minnesota," "Minnesota Patent," "Minneapolis," "Minneapolis, Minn.," and "Minneapolis, Minnesota" upon, in, and in connection with such flour brands, both mill and customers', employed in connection with flour made at complainants' mills, has caused such brands of flour to become known upon the market, and to be listed, tabulated, and classified as that variety of Minnesota patent flour manufactured at Minneapolis; that is, flour coming from the complainants' mills is styled in common with all other flour made in the state of Minnesota under the roller process, "Minnesota" and "Minnesota Patent" flour, and also more exclusively "Minneapolis" flour. The term "Minneapolis" alone upon flour thus means and is understood by the public to mean "Minnesota Patent" flour manufactured and put up at some one of complainants' mills at Minneapolis, in that state. That the defendants are doing a retail and wholesale grocery business at Nos. 68 and 70 Wabash avenue, Chicago, and as a part of such business deal in and sell flour at wholesale and retail. That prior to 1893 defendants adopted as a trade-mark for flour put up and packed for and sold by them the brand "H. R. Eagle & Co.'s Best Minnesota Patent, Minneapolis, Minn." That the words "Minnesota Patent, Minneapolis, Minn." were added because of the reputation of that city and state for superior flour, and that the method employed by defendants at the outset was to procure flour at the mills of complainants to be packed in sacks or barrels, and stenciled or marked with such brand, and then shipped and delivered to defendants at Chicago. That such flour was genuine Minneapolis flour, and properly and truthfully labeled "Minnesota Patent, Minneapolis, Minn." That a high and uniform grade of flour was furnished and put up under said brand and sold by the defendants, and thereby and by reason of the reputation of Minnesota patent flour made at Minneapolis, Minn., soon acquired a reputation and demand upon the market. Thereupon, about 1893, defendants, in order to take and continue the advantage of the representation that the flour was Minnesota flour made at Minneapolis,

Minn., and at the same time to procure inferior flour at a less price, and palm and foist off the same upon the public and purchasers and consumers as genuine "Minnesota patent" flour made at Minneapolis, Minn., ceased to obtain the flour sold under said name and brand at mills in Minneapolis, Minn., and have since procured all, or the greater portion, of the flour put up and sold under said brand and name from various flour mills at Milwaukee, Wis.; first from the mills known as the "Phoenix Mill," and then since, and at the present time, from the mills in Milwaukee, Wis., operated by J. B. A. Kern & Sons, and known as the "Eagle Mills." This flour is made from wheat of a different grade, and in an entirely different locality, by flour mills conducted and operated in methods variant from the mills in Minneapolis, and often contains a large percentage of winter wheat, and is in quality, reputation, and value inferior to the genuine "Minnesota Patent, Minneapolis, Minn." flour, and is worth and commands a less price upon the market when truthfully and honestly sold as Milwaukee flour. Nevertheless, the said defendants have made no alteration in the style of their brand used upon Milwaukee flour, but have the same packed at the Eagle Mills in Milwaukee, Wis., and there branded "H. R. Eagle & Co.'s Best Minnesota Patent, Minneapolis, Minn.," and so shipped and delivered to defendants at Chicago, Ill. Such spurious and falsely branded flour is then, with full knowledge on their part of the fraud, advertised and sold by said defendants as and for genuine "Minnesota Patent, Minneapolis, Minn." flour in sacks and barrels containing and conspicuously exhibiting the words "Minnesota Patent, Minneapolis, Minn.," and with the positive assurance, both in advertisements, circulars, and oral representations, that the flour is made in Minnesota, and at Minneapolis. The consequence of this false branding, advertisement, and assertion by the defendants is that inferior flour, manufactured at a locality concealed from, and not desired by, the purchaser, is fraudulently and deliberately palmed off upon the deceived public and purchasers for another and higher priced and more reputable flour, and the public is thereby cheated and defrauded, and complainants are injured by being deprived of a regular, established, and valuable trade, and also by having an inferior flour represented and sold as and for flour made by complainants, and originating at the city to which complainants, by their joint efforts and methods, have given a valuable reputation for flour, which inflicts direct and irreparable injury upon the reputation of complainants' flour, and injuriously affects the trade therein and the demand therefor. The defendants' dealings in such inferior, spurious flour so branded as genuine "Minnesota Patent, Minneapolis, Minn." flour are extensive, and the sales thereof amount to about 4 car loads, or 500 barrels, of flour a week. It is principally by means of a false statement upon the barrels and sacks, "Minnesota Patent, Minneapolis, Minn.," and the reproduction of this statement and fac simile of the brand in advertisements, that the belief is induced on the part of buyers that the flour is "Minnesota Patent, Minneapolis, Minn." flour. The milling establishment of J. B. A. Kern & Sons carefully conceals the fact that this flour so branded

is ground, packed, and shipped by it under such brand and names, and H. R. Eagle & Co. also carefully hide the truth, and persistently assert to buyers that the flour is made in Minneapolis, Minn., and the result is benefit to J. B. A. Kern & Sons and H. R. Eagle & Co., and injury to the public and to complainants.

The defendant H. R. Eagle alone appears, and denies that he has any knowledge of any such person as Wallace R. Eagle, and the principal issue tendered by defendant's answer relates to the signification of the terms "Minnesota Patent," "Minneapolis, Minnesota," or "Minneapolis, Minn.," as used by the complainants and by him upon their flour sacks and barrels, the defendant denying that these words so used have the meaning ascribed to them by the complainants, or that they are understood by traders, purchasers, consumers, and the public generally to mean that the flour is made and put up at the mills of the complainants, or that the words "Minnesota" or "Minnesota Patent," used in connection with flour, are understood by dealers in flour, or purchasers and consumers, or by the public generally, to denote that the flour was ground in the state of Minnesota; and denies that the complainants have any exclusive right to the use of the words "Minneapolis," "Minneapolis, Minn.," or "Minneapolis, Minnesota"; but, on the contrary, alleges that the word "Minneapolis" is and has been generally used and understood to designate flour manufactured by the patent, or roller, or Hungarian process, from the fact that the use of that process in the manufacture of flour first became generally known in the United States in connection with the city of Minneapolis, having been there first introduced. The defendant asks the court to take notice that by the admission of the bill of complaint, one of the complainants, the Pillsbury-Washburn Flour Mills Company, Limited, is now using the word "Minneapolis" in connection with the flour manufactured by it elsewhere than at Minneapolis, the flour being sold under such name with the knowledge of all the other complainants, and without objection on the part of any of them; and is justifying such use by the assertion that the flour is made by the same methods, and with the same precautions, and under the same tests as are used in the mills situated in the said city of Minneapolis.

Upon the one principal issue made by the answer respecting the proper signification and meaning of the words "Minnesota Patent," "Minneapolis, Minnesota," and "Minneapolis, Minn.," as used upon sacks and barrels of flour, either alone or in connection with other flour brands and marks, the testimony is conclusive and overwhelming in favor of the complainants. Numerous affidavits, taken in the principal flour markets of this and other countries, prove beyond any doubt or cavil that these words so used signify to the dealer, the purchaser, and the consumer that the flour is made by the roller or patent process at Minneapolis, in the state of Minnesota, and that it is this fact which has given to the flour so branded its uniform great credit for excellence in the markets of the world, not alone in this country, but in South America, Europe, China, Japan, South Africa, and wherever flour is imported from this country.

The defendant admits all the allegations of the bill in regard to first purchasing his flour of complainants, and putting it up at Minneapolis, and marking it as "Minnesota Patent, Minneapolis, Minnesota" flour, and afterwards purchasing in Milwaukee, and putting up and selling under the same brands, but denies that the complainants have a right to invoke the interposition of this court to prevent him from the continued use of such brands; and it only remains to be seen whether the complainants have any such right, and whether this court has any power to grant the relief sought. The principal allegations of the bill being either conceded or proven, the injunction ought to go if the complainants make a case, and the bill is not demurrable. The application for an injunction was denied by the court below, but it is difficult to see wherein the facts lack anything of making a good case in equity. Upon the evidence the fraud is open and palpable, as is also the damage to the complainants' business and to the public resulting from it. This being the case, are the hands of a court of equity tied by any controlling circumstance or iron rule which forbids it to grant relief? We think not. Just when it first came into the defendant's mind that the terms "Minnesota Patent" and "Minneapolis, Minnesota" related only to the roller patent process which might be carried on in any part of the world, and had no reference to the place of manufacture, is not clear from the record; most probably, however, it was after, as he admits, partly by his own business enterprise, and partly by the use of these brands, he had succeeded in building up a prosperous business, and when he had conceived the idea of getting his flour elsewhere, but at the same time continuing the use of the old brands, which had been so successful. But, however this may be, when the defendant failed utterly to make good his defense in regard to the alleged proper meaning of the words used as a part of his brand, there was left small ground for him to stand upon. He was fairly beaten in his defense by the testimony. After that to still say that the court has no jurisdiction or power to grant relief is to fly in the face of the well-grounded principle running through all the cases that fraud accompanied by damages is actionable at law, and that, where one person has so dressed out his goods as to deceive the public into the belief that they are really the goods of another person, and so put them upon the market, to the manifest injury of that person and of the public, an action at law will lie for the deceit, and, to save a multiplicity of suits, and prevent irreparable injury, equity will restrain such unfair and fraudulent competition. This rule is so well established, is so general and elastic in its application, and so consonant to the general principles of equity jurisprudence, that it would be difficult to frame a case coming fairly within its spirit and meaning in which a court of chancery will not find a way to afford the proper relief. This principle is affirmed in many of the leading cases.

In the recent English case, quite analogous to this, of *Saxlehner v. Apollinaris Co.*, 13 Times Law Rep. 258, plaintiff was the owner of a spring in Hungary named "Hunyadi Janos." Defendant, once the exclusive agent in England for the sale of the spring water, on

expiration of the contract, began selling water from a spring near Budapest, which was styled "Uj Hunyadi." The injunction went, and Mr. Justice Kekewich said:

"The plaintiff's case, as thus opened, was brought distinctly within the authority of *Reddaway v. Banham* [1896] App. Cas. 199, which, be it observed, was decided by the house of lords some time before writ issued. It is important to note what that authority really is. There is no novelty in the principle stated, and even the language finds a counterpart in many older cases, such as *Seixo v. Provezende*, 1 Ch. App. 192; but yet the law is so clearly put on a simple and intelligent basis that one necessarily makes it the starting point in consideration of questions of this class. I have studied the case with this view, and it seems to me the entire doctrine is summed up in one sentence in the first paragraph of the lord chancellor's speech moving the judgment of the house, 'Nobody has any right to represent his goods as the goods of somebody else.' Observe that the proposition is perfectly general. There is no limit as regards name, origin, honesty of manufacture or sale, or otherwise; and, although there are elsewhere to be found learned and useful disquisitions on the facts of the particular case, the application of the law to them, and criticism of earlier authorities, there is no departure from what the lord chancellor states to be 'the principle of law.' It matters not, therefore, how a plaintiff's goods come to acquire a particular value, or how the defendant's goods have come to adopt that value. If, in fact, the defendant is selling his goods as those of the plaintiff, he is doing what the law will not allow, and the plaintiff is entitled to relief against him."

In *Newman v. Alvord*, 51 N. Y. 189, also much like to this in principle, the trade-mark used by the plaintiffs was the word "Akron" in designating a cement made by them near the village of Akron, in Erie county, state of New York. This word had been used by the plaintiffs and their predecessors in business about 13 years, to designate the origin and quality of their cement. The defendants, who manufactured cement in Onondaga county, near Syracuse, knowing that the plaintiffs had for years used the word "Akron" as a trade-mark to designate the origin and place of manufacturing their cement, applied the word to designate their cement by calling it "Akron Cement." The plaintiffs' barrels were labeled as follows: "Newman's Akron Cement, manufactured at Akron, N. Y. The hydraulic cement known as the 'Akron Water Lime.'" The defendants labeled their barrels: "Alvord's Onondaga Akron Cement or Water Lime, manufactured at Syracuse, N. Y." They placed the word "Akron" upon their label for precisely the same reason that the defendant in this case placed the words "Minnesota Patent, Minneapolis, Minn." upon his flour sacks and barrels, to increase their sales, and avail themselves of the reputation acquired by plaintiffs' cement. The label, as said by Earle, J., who delivered the opinion of the court of appeals, was calculated to induce ordinary buyers to believe that they were purchasing either plaintiffs' cement, or cement of the same kind and value. The sole question to be determined, as stated by the learned justice, was whether the plaintiffs, who were the only persons engaged in manufacturing and selling the Akron cement which was known and had a reputation in the market as such, could be protected in the use of the word "Akron" against the defendants, who used it to defraud the plaintiffs and deceive the public. And the court thought the plaintiffs were entitled to the injunction. The principle upon which the relief was granted, as stated in the opinion, is that the defendants shall

not be permitted, by the adoption of a trade-mark which is untrue and deceptive, to sell their own goods as the goods of the plaintiffs, thus injuring the plaintiffs and defrauding the public. The plaintiffs, as the court held, had given a reputation to the Akron cement in market. They had always been its principal manufacturers and sellers, and at the time of the commencement of the suit the sole parties who could be injured by the fraudulent use of the trade-mark by the defendants; and hence they were clearly entitled to the protection which they sought. This case, which is quite analogous in principle to the case at bar, has been cited and approved by the supreme court of the United States in *Canal Co. v. Clark*, 13 Wall. 311, and *McLean v. Fleming*, 96 U. S. 245. In the former of these cases the distinction between a trade-mark proper as indicating an exclusive right, and the use of a geographical name, as in the case at bar, where no exclusive property can be had, is clearly indicated. In speaking of the case of *Newman v. Alvord*, after stating the facts of the case, the court say:

"It [the defendants' cement] was not in fact Akron cement (for Akron and Syracuse were a long distance from each other), and the purpose of calling it such was evidently to induce the public to believe that it was the article made by the plaintiffs. The act of the defendants was, therefore, an attempted fraud, and they were restrained from applying the word 'Akron' to their manufacture. But the case does not rule that any other manufacturer at Akron might not have called his product 'Akron Cement' or 'Akron Water Lime.' On the contrary, it substantially concedes that the plaintiffs, by their prior appropriation of the name of the town in connection with the words 'cement' and 'lime' acquired no exclusive right to use it as against any one who could use it with truth."

So in the case at bar, the complainants can have no exclusive right to the use of the geographical names of "Minneapolis" or "Minnesota." They are not the subject of a trade-mark proper. Any one or more of the two hundred thousand inhabitants of Minneapolis may use that word upon their flour. The defendant or any other person from any state may go there, and establish a mill, and brand his flour "Minnesota Patent" and "Minneapolis, Minnesota." The defendant might have continued to buy Minneapolis flour, and branded it "Minneapolis, Minn.," and had all the benefit which these marks would give him in the market, because he would be adhering to truth and fair dealing. But when he placed these same brands upon another flour, manufactured in Wisconsin, he departed from the truth, and placed a lying brand upon his goods, which was intended to deceive, and could not but deceive, the public, and result in injury to the complainants' business. If the defendant could do this, all other persons could do the same thing, and so the public would be defrauded, and the good will and business of complainants, which has taken 39 years to build up, would be greatly impaired, if not destroyed. If this could be permitted, there would not be much incitement to provide the public with a high grade of flour, such as the complainants have been manufacturing for many years, and which the evidence shows has led the markets of the world, if, by all manufacturers using the same brand, the complainants' flour may be confounded with all lesser grades and kinds made from all sorts and grades of wheat. It must be conceded that, if the private interests involved are great, the public

interests are no less so. In the examination of scores of cases referred to in the briefs of counsel, we find very little difference in opinion on this subject. The distinction, both in the English and American cases, is between those where a geographical name has been adopted and claimed as a trade-mark proper, and those where, as in the case at bar, it has been adopted first as merely indicating the place of manufacture, and afterwards, in course of time, has become a well-known sign and synonym for superior excellence. In the latter class of cases, persons residing at other places will not be permitted to use the geographical name so adopted as a brand or label for similar goods for the mere purpose by fraud and false representation of appropriating the good will and business which long-continued industry and skill and a generous use of capital has rightfully built up. It will be of no avail in such cases, where the facts are admitted or proven, to allege a want of power in a court of equity to find a remedy. The court has always exercised this jurisdiction, and must continue to do so.

In *Lee v. Haley*, 5 Ch. App. 155, the plaintiffs had for a series of years carried on business as coal dealers in Pall Mall, London, under the name of "The Guinea Coal Company," and they were frequently called the "Pall Mall Guinea Coal Company." The defendant, who had been their manager, finally set up a business in the same street under the same style of the "Pall Mall Guinea Coal Company"; and, while it appeared that there were other Guinea coal companies in London, so that the plaintiffs did not have the exclusive right to use the trade-mark "Guinea Coal Company," yet the court held that they were entitled, as against the defendant, to be protected in the use of the name. Lord Justice Gifford, delivering the opinion of the court, says:

"I quite agree that the plaintiffs have no property in the name, but the principle upon which the cases on this subject proceed is, not that there is property in the word, but that it is a fraud on a person who has established a trade, and carries it on under a given name; that some other person should assume the same name, or the same name with a slight alteration, in such a way as to induce persons to deal with him in the belief that they are dealing with the person who has given a reputation to the name."

Of course, this case goes further than it is necessary to carry the rule in the case at bar, because the words "Pall Mall Guinea Coal Company" could be truthfully used by both parties. They both sold coal in Pall Mall at a guinea a ton. But here the defendant could not truthfully call his flour "Minneapolis, Minn." flour, and his using these words was a fraud upon the complainants and upon the public.

In *Southern v. Reynolds*, 12 Law T. (N. S.) 75, William Southern established a clay-pipe factory at Brosely, Shropshire, and the product obtained a great repute as "Southern's Brosely Pipes." He died, and two brothers—William and Edward—carried on the business at separate establishments, both using the name "Southern Brosely," distinguishing their different factories by prefixing their initials. The pipes were made from a peculiar vein of clay used by both brothers, and the products of both of their factories were

known indifferently as "Southorn Brosely Pipes." Defendant, who had no establishment at Brosely, began to make "Reynolds' Purified Clay Pipes, made by Southorn from Brosely." It appeared that he had employed a former workman in one of the factories at Brosely whose name was Southorn. One of the brothers only brought suit for an injunction to restrain the use of the names "Southorn Brosely." The court held that a clear case of fraud and misrepresentation was made, and granted an injunction.

In *Manufacturing Co. v. Gato* (Fla.) 7 South. 24, the court, in stating the case, said:

"The complainant engaged in and commenced the manufacture and selling of cigars at Key West, Florida, in 1875; used exclusively Havana tobacco at his factory; and he established among purchasers, dealers, etc., a high reputation for his cigars, and his cigars still maintain said high reputation; and the climate at Key West is more favorable to the manufacture of Havana cigars than points north of that place; caused to be stamped or branded on his cigar boxes the words 'Key West,' and the words 'Key West,' 'E. H. Gato,' or 'Eduardo H. Gato,' and used the distinctive words 'Bouquet,' 'La Estrella,' and the words 'Key West' and 'E. H. Gato' and 'Eduardo H. Gato,' upon the boxes of his cigars and labels, etc., as trade-marks, and to distinguish his cigars in the market from cigars made and put upon the market by other manufacturers, long before the defendants made use of the said distinctive words upon boxes of cigars, labeled and printed thereon as hereinafter stated and complained of. Defendants, or one or more of them, about the year 1882, commenced to manufacture cigars at Jacksonville, Florida, under the name and style of the firm of 'El Modelo Cigar Manufacturing Co.' or 'Company,' and made their cigars of seed tobacco, a much inferior quality of tobacco to the Havana tobacco, in the estimation of dealers, and is in point of fact a greatly inferior tobacco to the Havana tobacco, and well known to all manufacturers. The defendants, well knowing the superiority of plaintiff's cigars, brand and stamp upon the boxes containing their cigars manufactured at Jacksonville, and print upon the labels, pictures, and paper upon said boxes, the words 'Key West' and 'G. H. Gato,' in conspicuous places upon said boxes, and in form and size of letters identical with or similar to the form and size of letters employed and used by complainant upon his boxes of cigars and labels and pictures thereon."

It was held that, "when a man manufactures his goods at a particular place, and uses the name of that place in combination with other words as a trade-mark to distinguish the origin or ownership of his goods, no other person will be permitted to use the name of the same place, upon goods manufactured by him at another and different place,"—citing *Canal Co. v. Clark*, 13 Wall. 325; *Congress & Empire Spring Co. v. High Rock Congress Spring Co.*, 45 N. Y. 291; *Newman v. Alvord*, 51 N. Y. 189; *Manufacturing Co. v. Hall*, 61 N. Y. 226; *Sawyer v. Horn*, 1 Fed. 24; *Gilman v. Hunnewell*, 122 Mass. 139; *Robertson v. Berry*, 50 Md. 591, 33 Am. Rep. 337, note 1. And that, after the complainant, whose factory was located at Key West, had adopted his own name in combination with the words "Key West," "La Estrella," and "Bouquet," and certain brands, labels, and pictures, as his trade-marks, the defendants did not afterwards have the right to adopt the name G. H. Gato in combination with the words "Estrella," "Bouquet," and "Key West," and certain brands, labels, and pictures, in combination with the name G. H. Gato, as their trade-marks, where the words so adopted by them so clearly resembled the trade-marks so adopted by the complainant as to enable them to palm off upon and induce an ordinary pur-



chaser to buy their cigars for those of the complainant, whereby the defendants might be profited, and the complainant might be injured.

In *City of Carlsbad v. Kutnow*, 68 Fed. 794, the city of Carlsbad, as proprietor of the Carlsbad springs, had for years evaporated the waters into salts, which were sold as "Carlsbad Sprudel Salz." Defendants, who were New York druggists, made a similar salt, without the use of the genuine Carlsbad water, and sold it under the name "Improved Effervescent Carlsbad Powder." Judge Wheeler, in granting the injunction, said:

"If any artificial salts have come to be known by the name of 'Carlsbad Salts,' from similarity or otherwise, of course the defendants have the same right to sell such salts by that name that they have to sell anything by the name by which it is known. But there is no real evidence to that effect. And if the defendants procured genuine Carlsbad waters or salts, and put them up in different forms, or with other ingredients, to improve their taste or vary their effects, these words would be truthful, and they would seem to have a clear right to use them in such preparations; but the plaintiffs' proof tends to show that the defendants' salts are not, in substance, genuine Carlsbad salts, in any form, and the leading defendant has been a witness, and has not assumed to state—and, although the proof must be within their reach, none has been produced to show—that their salts come direct, in any form, from the Carlsbad springs. The impression left by the evidence is that they do not, but are artificial. No proof has been brought showing that the plaintiffs have used the name of 'Carlsbad' upon any but genuine Carlsbad Sprudel Salts. As the case stands here, the defendants appear to be using the name 'Carlsbad' upon artificial salts having no connection with that name, and to be using it only because of its connection with the genuine Carlsbad Sprudel Salts. Carlsbad, with its springs, is far away. This use of the name in connection with a preparation so similar to this well-known product of them is some representation that it is a genuine product of them. Calling the powder 'Improved Carlsbad' is a direct representation that genuine Carlsbad powder has been taken to be improved upon; and calling it also 'effervescent' is a representation that the improvement is in the effervescence. This is putting the plaintiffs' mark, to some extent, upon the defendants' salts, and is calculated to lead customers to think they are the salts of the plaintiffs. Such deception would be actionable at law, and is preventable in equity. *McLean v. Fleming*, 96 U. S. 245; *Menendez v. Holt*, 128 U. S. 514, 9 Sup. Ct. 143; *Improved Fig Syrup Co. v. California Fig Syrup Co.*, 4 C. C. A. 264, 54 Fed. 175; *Von Mumm v. Frash*, 56 Fed. 830. Allusion has been made to this word being the name of the city, to which ordinarily an exclusive right cannot be acquired; but it is also the name of these peculiar springs, and gives the name to their products."

And on appeal (35 U. S. App. 750, 18 C. C. A. 24, and 71 Fed. 167) the court, in affirming the order, by Judge Lacombe said:

"The Carlsbad Sprudel Salts in either form, therefore, is a natural product, and well known as such; and there is no proof in the case that the complainants have used the name 'Carlsbad' upon anything but genuine Carlsbad Sprudel Salts. And we concur with the circuit judge in the finding that there is no evidence in the record that any artificial salts have, from similarity or otherwise, come to be known by the name of 'Carlsbad,' as is the case with the Epsom salts, a term now generally applied to sulphate of magnesia whether such sulphate of magnesia comes from Epsom or not. Under these circumstances the complainant, the city of Carlsbad, has the right to indicate the origin of these natural salts by its own name, and would be entitled to the aid of a court of equity to prevent any one from using that name to induce the public to accept as genuine artificial salts not the product of the Carlsbad springs."

In *Kinney v. Basch*, 16 Am. Law Reg. (N. S.) 596, plaintiffs manufactured cigarettes, and used a label with a field of divergent rays and the word "St. James" and the symbol "1/2." The cigarettes

were distinguished on the market as "St. James." Defendants employed a label of the same size, differing slightly in color, containing the words "St. James Perique Cigarettes," with the symbol "1/2." It was shown there was a St. James parish in Louisiana, and St. James perique tobacco was a common article. The symbol "1/2" meant mixed goods, and was so used by the trade. In regard to the right of the plaintiff to the use of the word "St. James" and the figures "1/2," the court said:

"It has been urged upon the part of the defendants that geographical names cannot be the subject of a trade-mark; neither can numerals, which only serve to indicate the nature, kind, and quality of an article. It is true that the cases cited by the defendants sustain these propositions, but the later cases have proceeded upon different and more equitable principles in defining the grounds upon which courts of equity interfere in cases of this description. This interference, instead of being founded upon the theory of protection to the owner's trade-marks, is now supported mainly to prevent frauds upon the public. If the use of any words, numerals, or symbols is adopted for the purpose of defrauding the public, the courts will interfere, and protect the public from such fraudulent intent, even though the person asking the intervention of the court may not have the exclusive right to the use of these words, numerals, or symbols. This doctrine is fully supported by the latest English cases of *Lea v. Haley*, 5 Ch. App. 155; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; and also in the case of *Newman v. Alvord*, 51 N. Y. 189."

In *Association v. Piza*, 24 Fed. 149, complainant, doing business at St. Louis, Mo., had been accustomed to export beer in bottles with a label bearing the words "St. Louis Lager Beer." It had an established market for this product in South America and Panama. Neither defendant nor any other person in the export trade had been accustomed to use the words "St. Louis Lager Beer." Defendant shipped beer from New York in competition with complainant. It was shown that at Panama and in South America "St. Louis Lager Beer" was in demand. Defendant's beer was made in New York, and his bottles were so labeled as to represent that the beer was made at St. Louis, and that his firm were the sole agents for the St. Louis lager beer. Defendant insisted that buyers did not discriminate between complainant's article and other beer in the United States, but bought it simply because they supposed St. Louis beer was produced in the United States, as distinguished from German and English beer; but the court said:

"This may be true; but, if it is, it does not seem to be conclusive against the right of the complainant to the injunction which he seeks. As the goods of the parties go to the same market, it can hardly fail to happen that the complainant will lose sales, and the defendant will get customers, in consequence of defendant's acts. Although the complainant cannot have an exclusive property in the words 'St. Louis' as a trade-mark, or an exclusive right to designate its beer by the name 'St. Louis Lager Beer,' yet, as its beer has always been made at that city, its use of the designation upon its labels is entirely legitimate; and if the defendant is diverting complainant's trade by any practices designed to mislead its customers, whether these acts consist in simulating its labels, or representing in any other way his products as those of complainant, the latter is entitled to protection. It is no answer for the defendant, when the complainant asks for protection, to say that it has no exclusive right to designate its product in the manner it has, although this might very properly be asserted by a competitor selling beer made at St. Louis, or who, by reason of any circumstances, might be entitled to represent his product as originating there. *Canal Co. v. Clark*, 13 Wall. 322. It is unnecessary, for present purposes, to

consider whether the complainant has a valid trade-mark, or can have a technical trade-mark, in the name 'St. Louis.' It is sufficient that it was lawful for the complainant to use that name to designate its property, that by doing so it has acquired a trade which is valuable to it, and that the defendant's acts are fraudulent, and create a dishonest competition, detrimental to the public."

In *Lead Co. v. Cary*, 25 Fed. 125, complainant, a manufacturer of white lead in St. Louis, stamped upon the upper end or head of its kegs the words "Southern Company, St. Louis." These words encircle the head of the keg, "St. Louis" forming the lower half of the circle, and "Southern Company" the upper half, inclosing the words, "Warranted Strictly Pure White Lead in Pure Linseed Oil." St. Louis had an established reputation for the manufacture and sale of pure white lead, and complainant had maintained for years a large trade at that place as a manufacturer. Defendants manufactured their lead at Chicago, branding it "Southwestern, St. Louis," surrounding the words "Strictly Pure White Lead"; the words "Southwestern St. Louis" appearing in the same form as the words "Southern Company, St. Louis." Defendants also pasted a label on their kegs, stating it was strictly pure. Analysis showed complainant's lead to be pure and defendants' to be adulterated. Gresham, C. J. said:

"I shall not stop to inquire whether the complainant's claim to trade-mark is or is not well founded, as I think it is entitled to an injunction upon another ground. The defendants so brand the heads of their kegs as to naturally mislead and induce persons purchasing for consumption to suppose they are purchasing complainant's lead, when they are getting an inferior article. The brand used by the defendants is so like the complainant's as to induce the public to mistake the one for the other. The defendants sell their goods to retail dealers, and it may be that such dealers are not deceived, but they sell to consumers who are or may be deceived. The complainant is entitled to relief if the brand used by the defendants sufficiently resembles the complainant's brand to be mistaken for it, and the defendants adopted their brand for the purpose of selling their kegs as the kegs of complainant, or for the purpose of enabling retail dealers to do so, and the complainant has been injured by this fraud, or is likely to be injured by it. The complainant manufactures its genuine white lead at St. Louis, and its reputation is already established as a manufacturer and dealer of this character. The defendants manufacture their adulterated and greatly inferior lead at Chicago, and stamp upon their kegs a false brand in imitation of the complainant's brand. Why is this done unless it be in the hope of deceiving the public and injuring the complainant? Realizing that they could not engage in open, manly competition with the complainant, the defendants resort to a palpable trick. If this resulted in no injury to the complainant, or was likely to result in no injury to it, the bill would have to be dismissed. But the affidavits show that the defendants' kegs can and have been sold as the complainant's."

Judge Blodgett, in *Lead Co. v. Coit*, 39 Fed. 492, made the same ruling upon the same facts.

In *A. F. Pike Mfg. Co. v. Cleveland Stone Co.*, 35 Fed. 896, it was sought to protect the names "Green Mountain," "Willoughby Lake," "Lamoille," and others as designating scythe stone, which had been used by complainant and its predecessors for a number of years. Defendants acquired a quarry adjacent to complainant's, and branded theirs in the same way. It was urged, first, that the brands employed by defendants did not infringe. Defendants used the exact words "Lamoille," "Green Mountain," and others, but in place of "Willoughby Lake" employed the title "Willoughby Ridge." It was ruled that

the titles employed were infringements. It was next urged that the brands as applied to scythe stones indicated the quality or grit of the stones. The court said that they did not designate alone quality, but also indicated selection and care in the manufacture, and finally:

"It is urged that 'Lamoille' and 'Willoughby Lake' are geographical terms. The defendants quarry stones 200 miles from Lamoille county and Willoughby Lake, and apply the names 'Lamoille' and 'Willoughby Ridge.' Assuming that complainant cannot have a valid trade-mark in these names, which I do not decide, it seems to be well settled that a manufacturer will be protected in the use of a geographical name as against one who does not carry on business in the district so designated. *Blackwell v. Dibrell*, 3 Hughes, 160, Fed. Cas. No. 1,475; *Newman v. Alvord*, 49 Barb. 588, 51 N. Y. 189."

The same doctrine was upheld in *Northcutt v. Turney* (Ky.) 41 S. W. 21. The complainants were the owners of what are called and known as the Upper and Lower Blue Lick springs in Nicholas county, Kentucky, and brought suit to enjoin Northcutt from using the words "Blue Lick" in connection with his advertisement and sale of water from an artesian well in Campbell county. The court, in affirming the right to an injunction, said:

"It is substantially alleged and admitted that water from the two springs of appellees have been for a century known, sold, and used throughout the United States and many foreign countries as medicinal water, and also that they and those under whom they claim have, by long use and legal adoption, acquired exclusive right to the use of the words 'Blue Lick' as their trade-mark. Though Upper and Lower Blue Lick springs are some distance apart, and belong to two distinct firms, the water from them seems to be composed of the same ingredients, and to possess the same kind and combination of medicinal qualities. And, as the trade-mark 'Blue Lick Water' has been heretofore appropriately and legally adopted and used by each representative owner without objection of either, they have a common interest in preventing a third party illegally appropriating and using it, and, consequently, have a right to jointly maintain this action. Appellant states in his answer that he and those who preceded him have been selling and shipping water from said artesian well for a period of at least sixteen years; that for about one year of that time the trade-mark or brand used in the sale of said water was 'The Campbell County Blue Lick Water,' and for about fifteen years last past the trade-mark or brand used by him and the former owners and proprietors in sale of said waters has been 'Kentucky Blue Lick Water.' And the two defenses based upon this alleged statement of fact are: First, that appellees, having knowledge thereof, and acquiescing in such use of the words 'Blue Lick Water' by appellant and his predecessors, is now estopped to deny their right or interfere with the exercise of it by them; second, that the action is barred by the statute of limitation. That appellees acquired exclusive right to use as their trade-mark the words 'Blue Lick Water' is not only apparent from the facts stated in their petition, and conceded in the answer of appellant to be true, but has been definitely decided by this court in the case of *Water Co. v. Hawkins* (Ky.) 26 S. W. 389. Such being the case, the use and attempted appropriation of the same words by the predecessor of appellant, in advertising and selling water from the artesian well, was manifestly illegal and fraudulent."

Since the case of *Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151, was decided, holding that the word "Columbia" placed upon flour sacks could not constitute a proper trade-mark word so as to give the person using it an exclusive right, no one would be so hardy as to claim that an exclusive right to the use of a geographical name could be acquired as a trade-mark proper. Indeed, the doctrine of that case was not new in 1893, but has been the leading doctrine on the subject both in this country and England for many years, as is clearly shown

by the cases already cited. There is no inconsistency between that case and the previous decisions of the state and federal courts in this country, including the decisions of the United States supreme court before cited, to the effect that "wrongs of this description, whereby, through an artifice of any sort, the goods of one manufacturer become confused in the public mind with goods of some other manufacturer, may be redressed in a court of equity." *Merriam v. Clothing Co.*, 47 Fed. 411.

In the case of *Pillsbury v. Mills Co.*, 24 U. S. App. 395, 12 C. C. A. 432, and 64 Fed. 841, which, like this, was a case of unfair and fraudulent competition, Jenkins, Circuit Judge, speaking for the court, says:

"In the consideration of this question we have not overlooked the case of *Mill Co. v. Alcorn*. That was the case of a trade-mark pure and simple, in which it was held that one cannot acquire the right to the exclusive use of the word 'Columbia.' \* \* \* There the proof failed to establish that the brand was calculated to mislead or deceive. Here the proof is overwhelming to the effect that the brand used was designed to mislead, and actually did deceive and mislead."

Since the case of *Mill Co. v. Alcorn* was decided, a question arose in the United States circuit court for the district of New Jersey in *Envelope Co. v. Walton*, decided in 1897, and reported in 82 Fed. 469, in reference to the use of the same word "Columbia" in connection with certain symbolical representations of Columbia by different dealers who had placed it upon their packages of tissue paper. The complainants brought their bill to restrain the use of the word "Columbia" and the allegorical representation, alleging that they had used it for more than 10 years continuously to distinguish their manufacture of a superior quality of tissue paper, and charging the defendants with the use of the same words and representations upon a tissue paper manufactured by them, and in such a manner as to constitute unfair and fraudulent competition. The defendants were allowed, besides answering, to file a cross bill, by which they set up that they had employed the word "Columbia" and a symbolical or allegorical representation of "Columbia" upon their packages for a period of 17 years and longer before the complainants had employed them. The court, in deciding the case in favor of the defendants, granting the injunction asked for in the cross bill, says:

"There cannot be any question that under these circumstances there is grave danger that the goods may be mistaken the one for the other. If the question presented were only the one raised by the complainants' bill, I should not hesitate to grant them the relief asked for; but the prior application by the defendants of the word 'Columbia' to the same product changes the situation of the parties. It cannot be said that *Walton & Co.* acquired a technical trade-mark in the word 'Columbia,' in view of the decision of *Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151; but that they were the first persons, so far as the records shows, to apply the word to this article of production, cannot be disputed. By such application and continued use their paper became known to the trade and the public generally. It acquired a reputation for quality, and the name was a distinctive mark of excellence. The figure of 'Columbia' afterwards added by the complainants cannot be regarded as more than a mere amplification of the word 'Columbia' previously appropriated. It conveys no fur-

ther or other idea than the word, and can be regarded only as a different way of expressing it. It is apparent that, inasmuch as none of the wrappers in controversy bear the names of the makers, the packages must be known and designated and called for by the users as 'Columbia paper,' whether the word 'Columbia' be expressed in letters alone, or in a figure typifying 'Columbia.' So it would happen that, whether a purchaser wanted the package of the complainants or the defendants, he must ask for Columbia paper. It would be impossible for the seller to know which of the manufactured articles was desired, and the public would be rendered liable to have imposed upon it goods which they did not want. Such a condition must inevitably lead to confusion in the trade, disappointment to the general public, deception of ultimate purchasers, and be productive of unfair competition in trade. *Orr v. Johnston*, 13 Ch. Div. 434; *Sawyer v. Horn*, 4 Hughes, 239, 1 Fed. 24. One cannot be permitted to practice deception in the sale of his goods as those of another, 'nor to use the means which contribute to that end.' *Perry v. Truefitt*, 6 Beav. 66. Irrespective of the question of trade-mark, inasmuch as Walton & Co. appear to have been the first to put up their paper with the distinguishing mark 'Columbia,' and as their goods were the first to become known to purchasers as 'Columbia Paper,' no other person should be permitted to use that name as the sole distinguishing mark of a like article, whether expressed in letters or by figure, and in that manner mislead the general public into buying his goods as those of his competitor. If the word could not be used as a trade-mark, it is to be treated as a descriptive term, to the benefit of which they are entitled. *Wilson v. T. H. Garrett & Co.*, 47 U. S. App. 250, 24 C. C. A. 173, and 78 Fed. 472."

The following are some other of the leading cases which we have examined, and which affirm the same general principle: *Reddaway v. Hemp-Spinning Co.* [1892] 2 Q. B. 639, 9 Rep. Pat. Cas. 503; *Powell v. Brewing Co.*, 11 Rep. Pat. Cas. 563, 13 Rep. Pat. Cas. 235; *Paine v. Daniell*, 10 Rep. Pat. Cas. 217; *Hine v. Last*, 7 Law T. 41; *Braham v. Beachim*, 7 Ch. Div. 848; *Knott v. Morgan*, 2 Keen, 214; *Magnolia Metal Co. v. Atlas Metal Co.*, 14 Rep. Pat. Cas. 389; *Society of Accountants v. Corporation of Accountants*, 20 Scot. Sess. Cas. (4th Series) 750; *Dunnachie v. Young*, 10 Scot. Sess. Cas. (4th Series) 874. In this last case the following remarks of Lord Craighill seem peculiarly applicable to the case at bar:

"'Glenboig,' as used by the respondents, and without any explanation of the sense in which the word was used, could not but be a description almost certainly leading to a deception. The lord ordinary appears to me to have been insensible to this consideration. He thinks that because *Dunnachie* made 'Glenboig' a part of his trade-mark, the word must be held to be *publici juris*,—misreading the Case of *Seixo*, as I think. But *Dunnachie* was on *Glenboig*; the clay he used was raised and manufactured there; and in putting the name of the place into his trade-mark he was only following the course ordinarily pursued. The respondents, however, are not on *Glenboig*. In taking that word they took it only because it denoted goods known in the market to be of high quality; and, if they are to find virtue in it, this will only be because those who at first or second hand are the purchasers of their goods read the word as indicating that the goods are the product of a manufactory other than *Heathfield*. The respondents try to justify their assumption of *Glenboig*, first, on the ground that their clay is of the same seam; and, second, that the word 'Glenboig,' as used by them, is qualified by the word 'Young's,' and so misapprehension, not to say deception, is prevented. The fact assumed in the former of these grounds has, I think, been established, but it is insufficient as a justification. The least that can be said on the subject is that the word, as used, is ambiguous. That, in my opinion, would be enough. Why should the respondents use a word that may mislead,—that may lead people to buy their goods as the goods of the complainants? If all the respondents desired to suggest is that their bricks are made of the clay of the *Glenboig* seam raised on *Heathfield*, a word or words could be introduced by which this could be communicated."

Every case, as has often been adjudged, must rest upon its own circumstances; but this case and many others already quoted seem quite indistinguishable on principle from the case in hand. The result of all the cases is that the question must come down to one of fair or fraudulent competition. *Thread Co. v. Armitage*, 67 Fed. 897, affirmed 74 Fed. 936; *Merriam v. Publishing Co.*, 49 Fed. 944; *Seixo v. Provezende*, 1 Ch. App. 192; *Lead Co. v. Masury*, 25 Barb. 417; *Wotherspoon v. Currie*, L. R. 5 H. L. 508; *Myers v. Buggy Co.*, 54 Mich. 215, 19 N. W. 961, and 20 N. W. 545; *Keller v. Goodrich Co. (Ind. Sup.)* 19 N. E. 196; *Companie General v. Rehder*, 5 Rep. Pat. Cas. 61; *Free Fishers & Dredgers of Whitstable v. Elliott*, 4 Law T. 273; *Thompson v. Montgomery*, 41 Ch. Div. 35. This last case is very analogous to the case at bar. The plaintiff had established a brewery at a place called "Stone," where he had long carried on business, and whence his ale, under the denomination "Stone Ale," had acquired a reputation. Lord Lindley, in reversing the order denying an injunction, said:

"The plaintiff's rights are to prevent anybody from passing off his goods as the goods of the plaintiff, which is indeed the very substance and kernel of the cases on this subject. *California Fig Syrup Co. v. Taylor Drug Co., Limited*, 14 Rep. Pat. Cas. 341."

In *McAndrew v. Bassett*, 4 De Gex, J. & S. 380, the plaintiffs were large manufacturers of licorice. They styled this licorice "Anatolia." Anatolia was the name applied to a whole tract of country wherein licorice root is largely grown. At the time plaintiffs began to use the word there was no other manufacturer of licorice stamping it with this word. Subsequently, in response to an order for Anatolia licorice, defendants caused a stamp to be prepared containing the word "Anatolia," and put it on the goods, and afterwards continued to use it. The court below granted a perpetual injunction restraining the use of the word "Anatolia" by the defendants on licorice. In response to the argument that the word "Anatolia" was common to all, the court said:

"That argument is merely a repetition of the fallacy which I have frequently had occasion to expose. The property in the word for all purposes cannot exist, but property in that word, as applied by way of stamp upon the particular vendible article as a stick of licorice, does exist the moment the article goes into the market so stamped, and there obtained acceptance and reputation, whereby the stamp gets currency as an indication of superior quality, or some other circumstance, which renders the article so stamped acceptable to the public."

In *Van Horn v. Coogan* (N. J. Ch.) 28 Atl. 788, plaintiff and its predecessors had, at Newark, N. J., for a great many years, manufactured and sold stoves and ranges under the style of "Portland Stoves and Ranges." Defendants carried on business very close to plaintiff, and began to make, advertise, and sell "Famous Portland Ranges." It was insisted that there could be no trade-mark in the word "Portland" because it was a geographical name, and on this point the court said:

"But it is contended that a geographical name, like 'Portland,' cannot be a trade-mark, nor to be so used as to give the dealer who first adopts it an exclusive property in it. This, I think, may be conceded, without impairing in the slightest degree the complainant's right to the protection it asks; for, as

was said, in substance, by Lord Langdale, in the case just cited, the question, in cases like this, is not whether the complainant has a property in the name by which his goods are distinguished in the market; but, on the contrary, the pertinent inquiry is, has the defendant a right to use the name by which the complainant's goods are known, for the purposes of deception, and in order to attract to himself that custom which, without the improper use of such name, would have flowed to the complainant? And the answer to the inquiry is that the defendant has no such right. The supreme court of the United States in *Coats v. Thread Co.*, 149 U. S. 562, 566, 13 Sup. Ct. 966, recently said, speaking by Mr. Justice Brown, that there can be no question as to the soundness of the proposition that, irrespective of the technical question of trade-mark, one trader has no right to dress up his goods in such manner as to deceive an intending purchaser, and induce him to believe he is buying the goods of a rival trader. 'Rival manufacturers may lawfully compete for the patronage of the public in the price and quality of their goods, in the beauty and tastefulness of their inclosing packages, in the extent of their advertising, and in the employment of agents; but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals.'

The same rule prevails in the French and German law, and is comprehensively thus laid down in Kohler, Trade-Marks:

"Much more important is a second kind of fraudulent competition,—so important that many legislatures especially single it out, and have passed particularly severe rules regulating it. It is one of the most common practices to designate the products of a place, if these products be of a particularly celebrated character, by the name of their place of origin. For commerce in cultivated plants this form of designation is a vital question, and in the same way for mineral products, for mineral waters, and so forth; and also for industrial and manufactured goods this designation has an eminent meaning, since the products of certain countries have their peculiar advantages and peculiarities, which come either from the peculiar quality of the raw material of a country, from the customary skill of the workmen, or perhaps from a special method of production long in vogue. The great popularity of such goods in demand, the ready sale which they find, and the profits which their production brings, are temptation enough for many traders to mark their goods also with the name of this locality, entirely foreign to them, in order to realize the advantages which this demand produces. Such practices often inflict the most deplorable damage upon the genuine and reputable products of those places, not only in that they rob them of a good part of the revenue directly, but the greatest damage consists in the depreciation which the indifferent wares, entirely foreign to the nature of the place from which they are said to come, inflict upon the entire locality, which they bring into bad repute. Before the public notices the deception, it has become disgusted with the inferior goods, and a flourishing branch of industry is ruined at a blow. In glowing colors, and without exaggeration, the terrible effect which such practices have upon industry has been depicted in the report of Lemoine des Mares in the French law of 1824. It states there particularly that several branches of industry 'owe to them the loss of their relations with foreign countries which closed their markets to them from the moment that they saw the most common product arrive under a name which heretofore they had been in the habit of respecting and honoring.' Pouillet, p. 707. It is just the trade with foreign countries that is most injured by these practices, because there the deception is far more difficult to detect, and the foreigner is easiest deceived in his perception of the true nature of the goods."

The cases in which a person has been enjoined from using his own name in connection with other labels or brands upon his goods proceed upon the same general ground of deceit and unfair competition in trade. If a person may be restrained from the use of his own name upon his own goods because such use, in the circumstances, will deceive the public into purchasing his goods believing them to be the goods of another, to the injury of the public and the good



will and business of such other person, so, also, on the like principle, may he be restrained from using any other proper or geographical name when such use will produce like results. *Garrett v. T. H. Garrett & Co.*, 24 C. C. A. 173, 78 Fed. 473; *William Rogers Mfg. Co. v. Rogers & Spurr Mfg. Co.*, 11 Fed. 495; *R. W. Rogers Co. v. William Rogers Mfg. Co.*, 17 C. C. A. 576, 70 Fed. 1017; *Landreth v. Landreth*, 22 Fed. 41; *Pillsbury v. Mills Co.*, 24 U. S. App. 395, 12 C. C. A. 432, and 64 Fed. 841; *Tarrant v. Hoff*, 22 C. C. A. 644, 76 Fed. 959; *Meyer v. Medicine Co.*, 18 U. S. App. 372, 7 C. C. A. 558, and 58 Fed. 884; *Walter Baker & Co. v. Baker*, 77 Fed. 181; *Brinsmead v. Brinsmead*, 101 Law T. 606; *Melachrino v. Melachrino*, 4 Rep. Pat. Cas. 215; *Barlow v. Johnson*, 7 Rep. Pat. Cas. 395; *Huntley v. Biscuit Co.*, 10 Rep. Pat. Cas. 277. It is hardly necessary to cite authority for the doctrine that in cases where the question is simply one of unfair competition in trade it is not essential there should be any exclusive or proprietary right in the words or labels used, in order to maintain the action. This has been decided by the United States supreme court both before and since the decision of *Mill Co. v. Alcorn*. See *Coats v. Thread Co.*, 149 U. S. 562, 13 Sup. Ct. 966; *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002. In the former of these cases the doctrine is distinctly and broadly announced that, "irrespective of any question of trade-marks, rival manufacturers have no right, by imitative devices, to beguile the public into buying their wares under the impression that they are buying those of their rivals."

In the defendant's brief and argument much reliance is placed upon the fact that one of the mills belonging to the Pillsbury-Washburn Co. is situate outside the city limits of Minneapolis. But, upon examination, this defense, much like the other defenses in the case, vanishes into "unsubstantial air" when viewed in the light of the evidence. The objection, if good at all, would go to show a misjoinder of parties; that is to say, that the Pillsbury Flour Mills Company should not have been joined with the six other corporations, all of whose mills are situate at the Falls of St. Anthony, within the city limits of Minneapolis. It would furnish no good reason for not granting the relief asked for as to the other complainants. The objection, if of any value, should, no doubt, have been taken by plea in abatement for the misjoinder of parties. A plea to the merits is held to be an admission not only of the competency of the plaintiffs to sue, but to sue in the particular action which they bring. *Society for Propagation of Gospel v. Town of Pawlet*, 4 Pet. 480. But upon the merits there is but little substance to this objection. The evidence shows that this Anoka mill has always been an integral part of the great Minneapolis milling plant belonging to the Pillsbury Flour Mills Company; that it has the same machinery, is run by the same proprietors, in the same manner, grinds the same grade of wheat, is subject to the like interchange of flour and tests; that the business of the mill has always been conducted in Minneapolis by the same parties in connection with that of their other mills, and has always been considered and treated as one of the Minneapolis mills. It is situated on a tributary of the Mississippi river, about 10 miles outside the city limits, in a small suburb of the city, only because there happened to be a water power

at that place. For these reasons, the public has not been deceived, because this, which is one of the smallest mills, has been practically for all purposes a Minneapolis mill, and part and parcel of the Pillsbury flouring plant in that city. There is nothing unusual, and it does not seem to be a material circumstance, that large manufacturing concerns carrying on business in a city should have some portion of their works outside the corporate limits; and it hardly requires the citation of authorities to the point that, where this is done, such business will be considered entitled to the same measure of protection as if carried on wholly within the corporate limits. See *Kohler, Trade-Marks*, 291; *New York & R. Cement Co. v. Coplay Cement Co.*, 45 Fed. 212, where it is said that all cement manufacturers in Rosendale and vicinity may rightfully call their manufactured article "Rosendale Cement"; *Stone Co. v. Wallace*, 52 Fed. 431.

As we read the opinion of the court below (see 82 Fed. 816), the injunction was refused not only because the several complainants could have no exclusive interest in the words, the use of which by defendant is complained of, as a trade-mark, but on the further ground that the misuse of these words by the defendant cannot injuriously affect any one particular complainant, because they do not imply that any one in particular of the complainants manufactured the flour sold by the defendant. We think this ground not tenable. If the complainants were consolidated into one great business concern, this objection would be obviated, because then one corporation would manufacture all the flour made at Minneapolis, as now the several corporations complainant do. But, if such a corporation would be entitled to relief, we take it that any one or more of the complainant corporations having a common interest in preventing the fraud will also be entitled to maintain the action. In the judgment of the court it is the common every-day case of several persons having a common interest in the prevention of an irreparable injury joining together to obtain the desired relief. Though their interests are different in degree, they are of the same quality and kind. Any number of landowners may join together to enjoin the assessment and collection of an illegal tax upon real estate, or one or more may sue on their own behalf, and for the benefit of all others similarly situated. One landowner may own a thousand acres, and another but one. That makes no difference so long as their grievance is of the same character, though differing in degree, as affecting different persons. So, if a person attempts to erect a nuisance of any kind upon a block of land in a city where the lots to be affected are owned by different owners, any one may sue, or one or more may join together in asking for relief by injunction. The same principle is illustrated in the cases of common of pasturage or common of fishery, and the same rule prevails. The test is whether the parties have an interest in common in the subject-matter of the suit as well as in the question involved; whether, to use the language of Mr. Justice Nelson in *Cutting v. Gilbert*, 5 Blatchf. 259, 261, Fed. Cas. No. 3,519, approved by the supreme court in *Scott v. Donald*, 165 U. S. 107, 116, 17 Sup. Ct. 262, "there is a community of interest growing out of the nature and condition of the right in dispute; for, although there may not be any privity between the nu-

merous parties, there is a common title out of which the question arises, and which lies at the foundation of the proceeding." In all of these cases, and many more of like kind, any one may separately, but not jointly with another, maintain an action at law, or any one or any number together, to save multiplicity of suits, and prevent irreparable injury, may maintain a bill in equity to enjoin. The doctrine is too common to require the citation of authorities.

In the examination of the cases upon the subject of fraudulent competition in trade we have found many like this, where both individuals and corporations having a common interest have united together to maintain the action in equity, only one or two of which we will refer to. In the case of *Society of Accountants v. Corporation of Accountants*, 20 Scot. Sess. Cas. (4th Series) 750, the Society of Accountants in Edinburgh, the Institute of Accountants and Actuaries in Glasgow, and Society of Accountants in Aberdeen, three several and distinct societies, all incorporated by royal charter, as well as the individual members of each, joined in a suit to prevent the Corporation of Accountants, Limited, and certain of its members, from using the letters "C. A." (chartered accountants). From the date of the incorporation of complainants these letters had been used to designate their members, and were so understood by the public. Each of the complainant societies consisted of a body of professional men who had associated themselves for the purpose, *inter alia*, of keeping up a high standard of professional education and efficiency. The court, in granting the interdict, said:

"Here each of the corporations is not only incorporated, but each has a distinct patrimonial interest in enforcing its conditions of membership,—an interest attaching both to the corporations as such, but also to its individual members. But, if this be so,—if a wrong is done,—and a title to sue exists where there is only one corporation, does it make any difference that there are here three corporations, and that the injury consists in conduct which involves a false representation of membership of one or other of the three? I do not, I confess, see that this makes a difference in principle—at least assuming that, as here, the three corporations jointly complain. There may be a difference in degree,—that is to say, there may be a difference in the degree of the injury to each body individually,—but I think that that is all, and I am not able to hold that that is enough. Each corporation suffers a legal wrong, greater or less, and, that being conceded, the question becomes one merely of title to sue."

The case upon appeal was unanimously affirmed. The same rule was recognized and adopted in *Northcutt v. Turney* (Ky.) 41 S. W. 21. The order of the court below is reversed, and the case remanded, with instructions to grant the injunction as prayed.

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#### BATCHELLER v. THOMSON.

(Circuit Court, S. D. New York. April 15, 1898.)

#### TRADE-MARK—USED BY TWO FIRMS IN DIFFERENT COUNTRIES.

Where a trade-mark is used by a manufacturer in England and also by a firm in the United States in which he is a partner, and its use began in both places at about the same time, and it came to identifying the article manufactured by the United States firm by use in its business for many

years, and the English manufacturer retired from the United States firm, the right to use it passed to his successors as part of the business, and he will not be allowed to use it in this country in a separate business of the same sort.

S. D. Cozzens, for complainant.

Hamilton Wallis, for defendant.

WHEELER, District Judge. Here are two suits and a cross cause which turn upon the right to use the words "Thomson's Glove-Fitting" as a trade-mark for corsets. Prior to 1867, Thomson and his brother were in business in France under the name of Thomson Freres, and in England under the name of W. S. & C. H. Thomson & Co.; and he, Charles H. Langdon, and Batcheller were in business in New York under the name of Thomson, Langdon & Co. A peculiar style of corsets was patented for Thomson Bros. in France, and called "Thomson's Corset Gant," meaning glove; and for Thomson, Langdon & Co. in the United States, and called "Thomson's Glove-Fitting." Thomson's brother died, and the English firm became W. S. Thomson & Co., and was continued, and he remained a member of the firm of Thomson, Langdon & Co. in New York until December 31, 1878. This trade-mark was used in its business at considerable expense, and with great success; and it became very important and valuable to the firm, in the United States, and its use there was not interfered with. Thomson retired under a written agreement with Langdon dated October 31, 1878, whereby he assigned to him:

"Also all interest and claims of said Thomson of, in, and to any and all trade-marks of any description whatever heretofore used by said Thomas, Langdon & Co. in the United States, with the full privilege and liberty to use the same during his lifetime in such manner as said Langdon may deem best; and also the full and undisturbed right to use, in any and all business in which said Langdon may be hereafter engaged, the business designation of Thomson, Langdon & Co., so long as said Langdon shall be personally engaged in the business in the United States now carried on by the said firm."

A written agreement between them, and agreed to by Batcheller, securing Thomson on the business of the firm for what Langdon was to pay Thomson, and a further written agreement between the three for the same purpose, contained a provision that:

"The said Langdon and Batcheller also both agree, and each for himself agrees, that so long as the new firm of which they two shall be partners shall continue to use for the new firm the business designation of Thomson, Langdon & Co., or stamp the name of Thomson upon their goods, the said new firm will entirely abstain from selling any goods manufactured by said new firm, of which the London business house of W. S. Thomson & Co. now make the same or similar goods to or for the markets of Canada or Great Britain."

On October 29, 1893, by an agreement signed by Langdon and delivered to Thomson, all accounts between Thomson and Thomson, Langdon & Co. were to be considered as settled, and the writing contained this further clause:

"(4) That in case I shall have any interest in any new co-partnership which may be formed after the expiration of the present co-partnership on the 1st January, 1885, or at any earlier date, for the transaction of business in corsets, busks, crinolines, or goods of that character, then Mr. William A. Nettleton shall be a partner in said business, and shall have for his services an interest therein

of 25% without the necessity of furnishing any capital to the same; and, in case I retire from the business, I hereby agree that the contract and agreement made between us on the 31st October, 1878, shall in that case become null and void, and that all the rights and privileges ceded by you to me shall then revert to you."

A new partnership was formed January 1, 1885. Nettleton became a member of it, and remained until 1888, having 25 per cent. of the profits, and Langdon remained till January, 1893, when Batcheller bought his interest, and has continued the business ever since; and Langdon is still living.

Thomson now claims that he originated this trade-mark in England, that it has been used in the business of the New York firm by his license, and that it is still within his control. Batcheller claims that it originated in the New York business, has always belonged to it, and came with it to him. Exactly how its use began is not clear; but it began in the New York firm and the English firm at about the same time. It came to identifying the corsets of the New York firm by its use in the business of that firm, and its importance and value as such an identifying mark must have grown up from such use there. It would belong with that business as it grew, and could not be legitimately used in a separate business of the same sort within the range of that business. Such other use would, to be of value, make it misrepresent other goods to be those of this business. When Thomson sold to Langdon he sold his interest in this trade-mark in this business, which was all that he assumed to, or could, sell, and which was his interest in the right to use it in the business of the New York firm in New York and the United States.

The agreement of Langdon of October 29, 1883, much relied upon to show a reversion of the right to Thomson, could not, in this view, operate to reconvey or transfer any right to this trade-mark separate from this business; and, as no interest in the business was thereby changed, there was nothing for the trade-mark to follow. Besides this, the provisions of that clause of that agreement seem to hinge upon what should be done upon the expiration of that partnership on January 1, 1885, or before, in respect to Langdon's remaining, and taking in Nettleton, and not upon Langdon's eventually retiring. Langdon remained, and Nettleton was received, as partners, and the contingency upon which there was to be a reversion to Thomson did not take place.

Langdon's right to the use of the trade-mark in this business seems to have followed his interest in the business on the sale to Batcheller, as good will would; and the right to the trade-mark now seems to belong to him with the business, as a part of it, where only it can lawfully as such a trade-mark belong. The trade-mark was registered by both, but as the right now passed upon relates only to use within the United States, and not in foreign commerce, the registrations are deemed to be wholly immaterial.

Decree for plaintiff in original bills, and dismissing cross bill.

PERRY et al. v. REVERE RUBBER CO.  
(Circuit Court, D. Massachusetts. January 7, 1898.)

No. 469.

**1. PATENTS—NOVELTY AND INVENTION.**

Dowels, and couplings in the nature of dowels, being common to all the arts, the presumption of want of invention in the application of a dowel to any particular art cannot be overcome by mere proof of novelty, or by the presumption arising from the issue of a patent, or by indecisive proofs that it met a long existing want which persons skilled in the art had not been able to overcome, or by all these combined.

**2. SAME—STEAM-JOINT PACKING.**

The Perry patent, No. 462,278, for a steam-joint packing, consisting of a hollow core of cotton duck or other woven fabric, a covering of elastic material, and a coupling the ends of which enter the ends of the packing, is void for want of invention.

This was a suit in equity by Edward L. Perry and others against the Revere Rubber Company for alleged infringement of letters patent No. 462,278, granted November 3, 1891, to Edward L. Perry, for a steam-joint packing.

Edwin H. Brown and Edward P. Payson, for complainants.  
Henry M. Rogers and Alex. P. Browne, for defendant.

PUTNAM, Circuit Judge. The patent in issue relates to steam packing, or gaskets, and contains a single claim, as follows:

"A steam-joint packing consisting of a hollow core of cotton duck or other woven fabric, a covering of elastic material, and a coupling the ends of which enter the ends of the packing, substantially as and for the purpose specified."

Questions have arisen as to the true construction of the patent, growing mainly out of inconsistent expressions found in the specification. As originally applied for, it contained several claims, of which only one, and that in an amended form, was allowed to remain. The phraseology of the specification was not meanwhile amended, and this accounts to some extent for its confused expressions. The proceedings in the patent office show that the examiners entertained and expressed certain views as to the construction of the claim in issue, but they were not of a character to operate as an estoppel, and cannot be accepted as of any effect; and the true construction must be determined from the face of the patent.

One question relates to the nature of the coupling. This, as shown in the drawings annexed to the application, is hollow; and the specification proceeds as follows:

"In order to secure the compression of the packing more readily, the core, B, is made hollow, which also provides means for attaching the ends of the hollow coupling tube, C, to join the two ends of the packing together, after which the joint thus made is covered with a piece of suitable material. The coupling tube is preferably of metal, but other material may be used, and is made hollow to enable it to be compressed with the packing. Although it is considered materially advantageous to have the coupling in the form of a hollow tube, a solid coupling may be used, but possibly not with as good results."

In view of its connection, the word "materially," found here, preceding the word "advantageous," cannot be accepted in its proper sense; because, if so construed, the coupling which is made an

element of the claim would necessarily be hollow. The word "materially" must therefore yield to what follows it, and we must hold that the coupling which forms an element of the claim may be either hollow or solid.

The complainants maintain that, even though a solid coupling may be used, yet, by the terms of the claim as interpreted in the light of the patent, it must be compressible. By this, of course, the complainants do not intend compressible in every possible sense, but compressible in a practical sense, as applied to the purposes for which the proposed invention is intended. This proposition, however, cannot be maintained on the proper construction of the claim in connection with the specification. The specification, by saying, in effect, that the coupling may be "made hollow to enable it to be compressed with the packing," and by omitting from what follows all reference to compressibility, compels the court to construe the coupling to include a solid one, not compressible in the practical sense to which we have referred.

The parties also, in part directly and in part indirectly, have given certain limitations to the patent which it does not contain. The respondent has discussed the possibility that the core of the tubing of the patent, "consisting of cotton duck or other woven fabric," has reference to some peculiar quality of certain materials of that class; and it contends that, unless it be so, there is nothing patentable in the alleged invention, and that, if it be so, it does not infringe. But it is entirely plain that reference is impliedly made, as ordinarily in such cases, to the well-known state of the art, and that persons skilled in the art may properly be assumed by the patentee to understand the nature of the material suitable for the core. Therefore there is nothing novel so far as the component parts of the tubing are concerned.

The complainants seek to explain that there is in their patented product a certain relation between the size of the coupler and the thickness of the walls of the tubing; that the walls are too thick, and the center hole too small, to have had in anticipation tubing used as a pipe or conductor; that the patented gasket has a very small bore; and that the alleged prior tubings vary accordingly in this latter particular. All this, however, must be held to relate to the complainants' gasket as actually put on the market, because the claim contains nothing as to these particulars; and, indeed, by express terms, the specification states that the tubing may be of any shape or cross section, and of any diameter found most desirable, adding, "Such changes coming within ordinary mechanical skill."

It follows, therefore, that no function claimed for the complainants' gasket, arising out of the alleged compressibility of the coupler, or of the relative proportions of the parts, can be availed of to sustain the patent, and that the claim in issue covers a gasket formed by a combination of any size of tubing found suitable, with any kind of coupling which can enter the ends of the tubing, provided only that the covering of the tubing is of an elastic material and the core is of a fabric suitable to give strength.

The specification points out that the tubing is arranged for use as a gasket by cutting it to a suitable length according to the particular need of each case, bending it in a circle, and uniting it by a coupling which operates as a dowel. The function claimed for this product is that it answers for a tubular gasket, ready to be made of any desired size, and capable of being so coupled by the person applying the same as to be substantially jointless. It is pointed out that, inasmuch as it can be put on the market in the form of tubing of any length, ready to be cut as needed, and with it any desired number of couplings, it has been found very convenient, and has received a large sale. The complainants maintain that the patented product revolutionized the market, but the evidence in the record fails to sustain this proposition. Indeed, it appears that some of their own witnesses, who were men of large experience, had never heard of it, and were still using gaskets of other styles.

It is shown beyond doubt, and is a matter of common knowledge, that the tubing called for by the claim, as we construe it, contains nothing novel. It is also shown beyond question that the use of tubing as a gasket, by bending it in a circle, and by uniting the ends in various ways, was also much known before the alleged invention in issue. Much evidence was also offered tending to show that several persons skilled in the art, on various occasions before the alleged invention, had united the ends of elastic tubing, for use as gaskets, by inserting various materials to serve as couplings or dowels. The complainants contravene the proofs of the respondent in this particular, but they apparently rely more on the contention that the use thus proven was incidental than on an attempt to directly gainsay the evidence offered.

It is clear beyond question that the only novelty which the complainants can presume to maintain is the use of the coupling, or dowel, in connection with the tubing. It is not easy to perceive that such a use is within the range of patentable invention. Dowels, and couplings in the nature of dowels, are common to all the arts, and this application to any particular art cannot, therefore, be regarded as indicating inventive faculty unless the circumstances are more peculiar than those found in the case at bar. The propositions relied on by the complainants, that the earlier applications of the dowel to these purposes were incidental, so far, under the circumstances, from strengthening their case, weakens it; because it indicates that various persons, when the emergency arose, laid their hands promptly on this as an available resource, so that its use was simply an exhibition of ordinary skill in the art to which it appertains. The presumption of the want of the inventive faculty in the application of a dowel to any particular art cannot be overcome by mere proof of novelty, or by the presumption arising from the issue of a patent, or by proofs of the indecisive character which we have here, to the effect that it met a want which had long existed, but which persons skilled in the art had not been able to overcome, or by all combined.

Let there be a decree entered according to rule 21, dismissing the bill, with costs.



**THOMSON-HOUSTON ELECTRIC CO. v. UNION RY. CO. et al**

(Circuit Court of Appeals, Second Circuit. April 7, 1898.)

No. 110.

**PATENTS—INVENTION—ELECTRIC RAILWAY DEVICES.**

The Van Depoele patent, No. 495,443, for a traveling contact for electric railways, must be construed, as to claims 2 and 4, as including, by implication, means for maintaining the contact device and the conductor in their normal working relations, and, so construed, are void, as being for the same invention as letters patent No. 424,495, to the same inventor.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was a suit in equity by the Thomson-Houston Electric Company against the Union Railway Company and others for alleged infringement of claims 2 and 4 of the Van Depoele patent, No. 495,443, for a traveling contact for electric railways. The circuit court granted a preliminary injunction (78 Fed. 363), and the respondents have appealed.

William S. Kenyon and Charles E. Mitchell, for appellants.  
Frederick H. Betts, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

**PER CURIAM.** This appeal involves the question whether claims 2 and 4 of letters patent No. 495,443, for a "traveling contact for electric railways," granted April 11, 1893, to the administrators of Charles A. Van Depoele, assignors to the complainant, are void because they are for the same invention which had been previously patented in letters patent No. 424,495. The invention, to adopt the language of an expert witness for the complainant in a former suit brought upon the patent, "consists generally in an electric railway, having an overhead conductor, and a car for said railway, provided with a contact device carried by the car so as to form a unitary structure therewith, and consisting of a trailing arm hinged and pivoted to the car so as to bridge the space between it and the conductor, and move freely both laterally and vertically, and said arm carrying at its outer end a contact device capable of being pressed upward, by a suitable tension device, into engagement with the under side of the conductor." The essential features of construction involve the location of the supply conductor above the track and line of travel of the car, and contact with its under side, the arrangement of the contact device on a trailing arm, and the maintenance of a constant upward pressure by means of a tension device operating upon a hinged arm. The two claims in controversy are:

"(2) The combination of a car; an overhead conductor above the car; a contact device, making underneath contact with the conductor; and an arm carried by the car, and carrying the contact device, and pivoted so as to swing freely around a vertical axis." "(4) The combination of a car; an overhead conductor above the car; a contact device, making underneath contact with the conductor; and an arm on the car, movable on both a vertical and a transverse axis, and carrying the contact device."

The patent contains 16 claims. The characteristics of the invention, and the scope and validity of many of the claims, were consid-

ered by this court in *Thomson-Houston Electric Co. v. Hoosick Ry. Co.*, 27 C. C. A. 419, 82 Fed. 461, where we held that claims 6, 7, 8, 12, and 16 were for the same inventions which had been previously patented; and a reference to the opinion in that case will dispense with the necessity for any extended discussion now. Referring to some of those claims, we said:

"It would be a waste of time to dwell upon the verbal differences in these claims. The changes in phraseology import nothing of substance into their respective combinations. They describe the same thing in different language."

It is insisted for the appellants that the two claims now in controversy are for the same combination specified in some of the claims which were then held to be void. The appellee contends that they are not, because they omit to specify any means for holding the contact device in underneath contact with a conductor, and consequently can be construed as covering a subcombination in which such means are not employed, or, if such means must be read into the claims by implication, the claims are not limited to the means described in the specification, and that upon either construction they are not the claims of the earlier patent. The court below adopted this view. If the appellants are right, no other question need be considered. It will be seen that these claims are for identical combinations, except that the arm is differentiated in each by functional characteristics. The specification describes a traveling arm carried by a post on top of the car, "which is hinged, and should in most instances be also pivoted, to the top of the post, although a reasonable amount of looseness in the hinged joint will answer the purpose of the pivot." When pivoted, "it swings freely around a vertical axis," and meets the terms of claim 2. When hinged and loosely jointed, it is "movable on both a vertical and transverse axis," and meets the terms of claim 4. We do not entertain any doubt that there must be incorporated into these claims, by implication, means for maintaining the contact device and the conductor in their normal working relations. Without them, there is really no "traveling" contact device, and no operative combination, and the claims would cover merely an aggregation of devices which do not co-act unless assisted by some instrumentality which must be discovered and supplied. The function of the arm, as constructed and arranged, is to establish "moving contact," while maintaining a positive mechanical connection between the vehicle and the conductor. It was devised because, as previously mounted, the contact device was found to be deficient in capacity to follow the sinuosities and deflections of the conductor while the car was in motion. It can only perform this function by the aid of some instrumentality which holds it constantly in the proper relations to bridge the space between the car and the conductor, and keep the contact device and the conductor in electrical connection. As pointed out in the specification, this consists of a tension device operating upon the arm, and maintaining a constant upward pressure, thus holding the contact device to the conductor. This tension device, or its equivalent, is an indispensable element of the respective combinations. That the proper construction of the claims is as thus indicated is evidenced by the proceedings upon interference in the patent office. Claim 2 is a literal statement of the issue defined

and formulated by the patent office between what was then claim 1 of the application and the claims of two interfering applications. Claim 1 was as follows:

"In an electric railway, the combination, with a suitable contact, and the supply conductor suspended above the track, of a car provided with a swinging arm, carrying a contact device in its outer extremity, and means for imparting upward pressure to the outer portion of the arm and contact, to hold the latter in continuous working relation with the under side of the supply conductor, substantially as described."

In formulating the issue the office omitted, as unnecessary, because necessarily implied, the elements enumerated in claim 1 of the application which are not enumerated in claim 2 of the patent. One of these elements was "means for imparting upward pressure to the outer portion of the arm and contact." This element was apparently thought to be as indispensable to the operativeness of the combination of the claim as was "a suitable track," an element also omitted. The appellee concedes that the claims are for combinations specified in other claims of the patent, which by our former decision were held to be void, if they require the construction which we have placed upon them. Indeed, claim 6, which we held to be void, is identical in terms with claim 1 of the interference proceedings,—the claim which the patent office regarded as embodying the invention covered by present claim 2. The rule of construction which usually obtains, whereby the several claims of a patent are to be differentiated so that effect may be given each, cannot be reasonably invoked in behalf of this patent, where so many of the claims are duplicated. The order granting a preliminary injunction is reversed.

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SHEPARD et al. v. KINNER.

(Circuit Court of Appeals, Second Circuit. March 2, 1898.)

No. 47.

PATENTS—LICENSES—REVOCATION.

A patent owner executed a license, with a stipulation that the royalty provided for should not be payable so long as a certain contemporaneous agreement remained in force, and was observed by all the parties thereto, but that, if it became inoperative without fault on the licensor's part, then the licensee should pay royalties. The other agreement, to which the licensor and licensee were parties, was one whereby several makers of the article in question pooled their interests for the purpose of sustaining prices. After a time, one of the parties withdrew from this association; and later, through increased competition, and failure of some members to regard the agreement, prices were much reduced, meetings of the association ceased to be held, and reports of sales were no longer made to it by the members. Thereupon the licensor gave notice that he would not consent to sales at such prices, and should insist on payment of royalties. *Held*, that the agreement ceased to be operative, in the meaning of the stipulation in the license, when it was no longer effectual to maintain prices, and the licensor, not being in fault, was entitled to royalties from the time of such notice.

Appeal from the Circuit Court of the United States for the District of Connecticut.

John P. Bartlett and Chas. E. Mitchell, for appellants.  
W. E. Simonds, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. The assignments of error present the single question whether the court below erred in adjudging that the license granted by the firm of William B. Curtis & Co. to the defendants to manufacture and sell the wire hat frames of the patent in suit was not in force when the suit brought to restrain infringement of the patent was commenced.

By an instrument executed December 12, 1885, between William B. Curtis & Co., as parties of the first part, and the defendants, as parties of the second part, the defendants were licensed by William B. Curtis & Co. to make and sell the patented hat frames until the expiration of the patent, "subject to the payment of royalty." It contained also the provisions as follows:

"Said parties of the second part shall not be bound to pay any royalty under the license just stated, so long as the said other agreement of even date herewith, hereinbefore referred to, shall remain in force, and be observed by all the parties thereto. But after said other agreement shall cease to be operative, and in the case said other agreement does not become nonoperative through the violation thereof by said parties of the first part, then said parties of the second part shall pay royalty to said parties of the first part upon all drooping wire frames for hat brims of round wire made and sold by said party of the second part at the rate of ten per cent. upon the proceeds of all sales of such wire frames for hat brims made and sold by said parties of the second part,—sworn monthly accounts of such sales to be rendered to said parties of the first part as of and for the last secular day of each month, and the payment of royalty thereof to be made within fifteen days thereafter; and, in case the said parties of the second part shall not render accounts and pay royalties as herein provided for, then said license shall be revocable at the option of said parties of the first part."

The "other agreement" mentioned in the license was of the same date, and was made between William B. Curtis & Co., as party of the first part; George B. Sherman, as party of the second part; the defendants, as parties of the third part; and Charles S. Andrews, as party of the fourth part. The parties to this agreement had been competitors in the manufacture and sale of hat frames. Sherman was a licensee of William B. Curtis & Co., and the defendants and Andrews had been making and selling the patented article, and a suit for infringement of the patent had been prosecuted by William B. Curtis & Co. against the defendants. The object of the agreement was to adjust the difference between the parties, and combine their interests, and in that behalf to establish a uniform selling price for the articles, and pool and apportion the profits of all sales. The cost of manufacture was estimated to be  $10\frac{1}{2}$  cents per dozen, and the agreement contemplated fixing a minimum selling price which would yield a profit of 13 cents per dozen. The agreement provided for monthly meetings of the parties, at which statements under oath of all sales during the preceding month were to be delivered by each. It provided that each of the parties at such meetings should pay into a common fund 13 cents for each dozen of the article sold, and that the fund should be divided between them in specified proportions. Further provisions were as follows:

"This agreement shall be perpetually binding upon all said parties hereto, and, if one of the parties hereto shall in two instances substantially violate this

agreement, then each of the other parties to this agreement is, at the option of said party last mentioned, released herefrom. No one of said parties hereto shall sell bat wires at less than twenty-five cents per dozen, minus a discount of six per cent., excepting existing contracts already made by party of the fourth part; but this selling price may be changed by the agreement of three of said parties hereto, and any such change shall be binding upon all parties hereto, without otherwise affecting this agreement. In any matters mentioned in this agreement as determinable or changeable by action of the parties hereto, each of said four parties shall have one voice or vote, and no more, in making any such determination or change."

For a time the terms of this agreement were adhered to by all parties. In November, 1890, Andrews withdrew from the combination. Owing to competition and other causes, the minimum selling price of the patented article was from time to time reduced, all parties consenting. Eventually, the profits payable into the common fund became comparatively insignificant, informal conferences were substituted for regular meetings, and after the spring of 1893 no accounts were rendered, and no conferences were held. According to the evidence for the complainant, after the minimum selling price had been established at 12 cents, and 6 per cent. discount, per dozen, he refused to consent to any further reduction. According to the evidence for the defendants, for a considerable period before the parties ceased rendering accounts there had been no established selling price, and the cost price was estimated at 10 cents per dozen, and each party sold at the best price he could get, reporting only sales at prices above cost price; and after the spring of 1893 no sales were reported, and nothing was divided, because the selling price did not exceed the cost price.

In September, 1892, the complainant became sole owner of the patent. Early in September, 1893, he demanded a statement of account from the defendants; and one was rendered by them, showing sales from May 1 to September 1, 1893, at prices ranging from 6 to 10 cents per dozen. The complainant thereupon notified the defendants, in substance, that he would not consent to sales at such prices, and that he should stop them if he could. December 26, 1893, he served defendants with notice of revocation of the license. The present suit was commenced in February, 1894.

Upon the evidence in the record, it seems entirely clear that after the spring of 1893 the so-called pooling agreement had become merely a rope of sand. There was no concerted action under it. The defendants and Sherman insisted that, as modified, it meant one thing, and the complainant that it meant another; and each of the parties was acting according to his own construction. The defendants and Sherman claimed the right to sell the patented article below cost of manufacture, if they chose, and were constantly doing so. They were contributing nothing to the common fund, and were pursuing a course which would necessarily prevent the complainant from maintaining prices, but were yet insisting that, if he made any sales at a profit, he should be accountable to them for their pooling proportion.

The license contemplated that the William B. Curtis Company should receive an equivalent for the privilege granted to the defendants under the patent. It provided that they should pay roy-

alty at the rate of 10 per cent. upon the proceeds of their sales of the patented article, whenever, without fault of the licensors, the original pooling agreement should cease to be operative. That agreement did cease to be operative when it was no longer effectual to maintain the selling price for the patented article as between the parties to it.

After Andrews withdrew from the combination, the concurrence of all the remaining parties was necessary to authorize a reduction or change in the minimum selling price. That the complainant ever consented to a reduction by which the minimum selling price was to be less than the cost of the article is highly improbable, and we do not for a moment believe it to be true; but if he did, and each party except the complainant was at liberty to sell for any price he pleased, and was selling at prices less than cost, and paying nothing into the common fund, there was nothing of substance left of the original agreement. Under such circumstances it was only operative to deprive the complainant of any royalty or rights as the owner of the patent. Undoubtedly, the complainant is estopped from asserting that the pooling agreement was not operative during the period when he saw fit to treat the situation as one which was consistent with the meaning and purpose of the agreement. But the estoppel extends no further. We are satisfied that he did not violate the agreement himself, and that he had ample justification for refusing to regard it as longer in force. The defendants were informed of his position in September, 1893. If, after this, they had rendered monthly accounts, and offered to pay the royalty reserved by the license, they would have had a defense to the present suit. As it is, there was no defense, and the decree of the circuit court was right.

The decree of the circuit court is affirmed, with costs.

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WILLIAMS v. AMERICAN STRING-WRAPPER CO. et al.

(Circuit Court of Appeals, Seventh Circuit. March 10, 1898.)

No. 433.

1. PATENTS—ANTICIPATION.

Anticipation should not be found in prior devices in the art to which a patent belongs, unless they are of such a character as to have furnished clear, if not unmistakable, suggestion of the improvement in question; and if the anticipatory suggestion comes from another art it should have less significance, proportioned inversely to the distance from which it is brought.

2. SAME—INVENTION—STRING WRAPPERS.

The Williams patent, No. 538,244, for an improvement in string wrappers, consisting in cutting into the wrapper on both sides of the end of the string, so that the wrapper may be easily opened without tearing or injuring the newspaper or other article wrapped therein, presents a patentable invention. 28 C. C. A. 325, 84 Fed. 197, reversed.

On rehearing.

For former report, see 28 C. C. A. 325, 84 Fed. 197.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. For a statement of this case reference is made to the opinion handed down at the last session of this court wherein it was held that the patent in suit, No. 558,244, issued on April 14, 1896, to Benajah Williams, for a wrapper for newspapers, etc., in view of patent No. 519,185, granted to P. J. Ogle on May 1, 1894, was lacking in patentable novelty. A petition for a rehearing was presented showing, on the undisputed evidence in the record, that before Ogle had conceived of his design Williams had made samples of the wrapper for which his patent was afterwards granted, and, the rehearing having been allowed, the question is whether, the Ogle design out of view, the Williams wrapper was patentable. We are of opinion that it was. Its utility is proved and not disputed. It is different from anything before it, and is not an obvious or natural suggestion of what had preceded it in the art. Stress was laid at the argument upon the Zimmerman patent, one of the drawings of which is in appearance substantially like the Ogle design, but that patent is for improvements in key-opening metal cans, and is described as showing a detached strip terminating in a free tongue at one edge of the blank sheet of which the can is made. The making of metal cans is another art, and, if in a conceivable degree akin to the art of making of wrappers for newspapers and periodicals, is so remotely related that it ought not to be considered. Anticipation ought not to be found in prior devices in the art to which a patent belongs unless they are of such a character as to have furnished clear, if not unmistakable, suggestion of the improvement in question; and if the anticipatory suggestion comes from another art it should, of course, have less significance, proportioned inversely to the distance from which it is brought. The device in question, simple as it is, was a happy thought, and we hold it to have been a patentable discovery because it was not directly suggested by anything which preceded it in the art to which it belongs, and was not fairly or logically deducible from any or all of the prior forms of construction. The decree below is therefore reversed, with directions to proceed in accordance with this opinion.

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IRWIN v. HASSELMAN et al.

(Circuit Court, D. Indiana. April 4, 1896.)

No. 9,397.

**PATENTS—CONSTRUCTION OF CLAIM—INFRINGEMENT.**

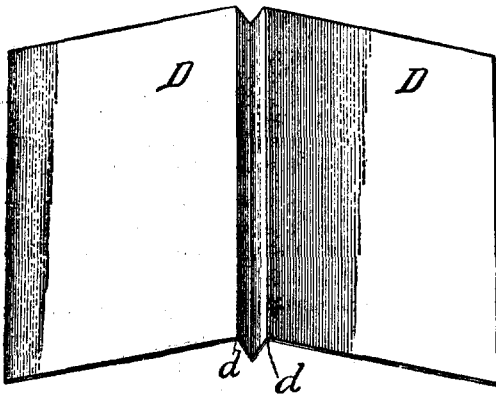
The Ryan patent, No. 379,334, for an improvement in book binding, alleged to consist in having the leaves in small bunches or sections secured to the back separately and flexibly, the leaves being rendered flexible by creasing them parallel to and a short distance from the back, construed in view of the patentee's acquiescence in the rejection of broader claims, and held to be entitled only to a narrow construction, and not to secure the exclusive right to use creased leaves in the manufacture of books.

This was a suit in equity by James M. Irwin against Otto H. Hasselman and others for alleged infringement of a patent for an improved method of binding books.

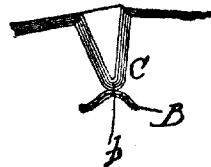
Paul Bakewell and James P. Baker, for complainant.  
Addison C. Harris, for defendants.

BAKER, District Judge. This is a suit to restrain the alleged infringement of letters patent No. 379,334, granted to Michael Ryan, the assignor of the complainant. The patent is for the purpose of securing certain new and useful improvements in bookbinding. The object of the invention is stated to be "to provide a method of binding books, particularly blank books and books of record and reference, in such a manner that, when a book shall be opened at any point, the leaves may fall and be substantially flat, and the pages thus exposed present, as nearly as possible, a level surface, for convenience in writing and ruling thereon." The patent shows, describes, and claims two ways of carrying the invention into effect. In this case we are concerned only with the form of the invention illustrated by Figs. 2 and 3 of the drawing, and covered by claim 1 of the patent. Hence we shall refer here only to those parts of the specification and drawings of the patent which relate to this form. The form in question here is that illustrated by Figs. 2 and 3 of the drawings here reproduced:

*Fig. 2.*



*Fig. 3*



Referring to the above illustration, the specification states:

"D, Figure 2, is a sheet forming two leaves, which have been folded to form the creases d, d."

After stating the object of the invention, as before quoted, the specification proceeds (reference being here made only to Figs. 2 and 3, *supra*):

"This object I accomplish by forming a hinge joint in the leaf at a line parallel to, and a short distance from, the binding (which distance would vary according to the size of the book and weight of the paper), \* \* \* by a crease made by folding as shown in Figure 2, \* \* \* which will render the leaf flexible at that point."

The specification also describes and illustrates, by reference to Fig. 3, how the leaves (such creases being made as illustrated in Fig. 2) are



made into sections or bunches, and such sections or bunches are bound to the back by stitching. Fig. 3 is thus described in the specification:

"Figure 3 is a sectional view showing the bunch, C, attached to the flexible back, B, and a leaf of one half the bunch turned over upon the other half."

**Claim 1 of the patent (the only claim involved in this suit) is:**

"A book composed of sections or bunches of a small number of leaves, in which each section is secured to the back separately, and thereby flexibly thereon independently of the others, and in which the leaves are rendered flexible at a line parallel to and at a sufficient distance from the back, to allow each to lie flat upon the others when open, substantially as set forth."

The complainant, testifying as an expert in his own behalf, says that the difference in the manufacture of books according to the first claim of the Ryan patent and the old and familiar method of manufacture consists solely in the use of the creased leaves; that both kinds of books are of the same class and weight of paper, made up in bunches or sections exactly alike, sewed in the bands exactly in the same manner, except that a book of the old and familiar make has not the feature consisting of the creased leaves illustrated and described in the first claim of the Ryan patent. It is thus conceded that the sole novelty consists in the use of the creased leaves. This feature Ryan attempted to secure in various ways by the four claims contained in his application for a patent. These claims were:

(1) "A book having leaves rendered flexible at a line parallel to and a short distance from the back, substantially as and for the purpose set forth."

(2) "A book having leaves perforated at a line parallel to and a short distance from the back, substantially as and for the purpose set forth."

(3) "A book whose sections or bunches are composed of a small number of leaves fastened together at a line parallel to and a short distance from the back, substantially as and for the purpose set forth."

(4) "A book in which the leaves composing each half of each section or bunch are stitched together along a line parallel to and a short distance from the back, whereby they are both perforated and fastened to facilitate folding, substantially as set forth."

Each of these claims was rejected by the patent office on the ground of anticipation by former patents which were cited. The claimant acquiesced in such rejection, and, without making any change in his specification, filed the three new claims which were allowed, and constitute a part of the present patent, the first of which is the only one involved in this suit. There was no novelty in the individual steps in the manufacture of a book according to the rejected claims, except in respect of the creasing of the leaves. Acquiescence in the rejection of a claim distinctly covering this step raises a conclusive presumption that it possessed no novelty. *Richards v. Elevator Co.*, 159 U. S. 477, 486, 16 Sup. Ct. 53. The patentee having once presented claims in such form as distinctly to secure to him the alleged novel feature of creasing the leaves, and the patent office having rejected them, he, having acquiesced in such rejection, is, under the repeated decisions of the supreme court, now estopped to claim the benefit of his rejected claims, or such a construction of his present claim as would be equivalent thereto. *Morgan Envelope Co. v. Albany Perforated Wrapping-Paper Co.*, 152 U. S. 425, 429, 14 Sup. Ct. 627, and cases there cited.

In view of the action of the patent office, the claim in suit must

be narrowly construed. The elements of the claim are (1) a book composed of sections or bunches of a small number of leaves, (2) in which (book) each section is secured to the back separately, and thereby flexibly thereon independently of the others, (3) and in which (book) the leaves are rendered flexible, i. e. creased at a line parallel to and at a sufficient distance from the back to allow each to lie flat upon the others when open. The first and third of these elements are embraced in the rejected claims, and hence we are led to the conclusion that the introduction of the second element in the claim in suit was understood by the patent office to introduce some new and patentable element in combination with the first and third elements of the claim. The evidence shows that in the old and familiar art, as well as in that practiced by the defendants, no section or bunch of leaves is secured to the back independently of the others, but that each section or bunch is secured to the back in such manner that it is united to all the others, and that, if this union is destroyed, the book would come to pieces. The novelty in books made in accordance with the Ryan patent must consist, then, in one or both of these particulars: (1) That each bunch of leaves is secured to the back independently of the others; (2) that the leaves are creased before being formed into bunches. As to the first particular, it suffices to say that the defendants are not shown to have made any book in which each bunch of leaves is secured to the back independently of the others. The patentee, Ryan, acquiesced in the decision of the patent office that, in view of the prior art, he was not entitled to claim the creasing of the leaves as his invention. It follows, therefore, that the defendants were entitled to use leaves which had been creased in the manufacture of books, and, as every step practiced by the defendants in the process of manufacture is in exact accordance with the old and familiar art of bookmaking, it is not apparent why the defendants may not practice the old art using creased leaves. If the old art and the right to use creased leaves are open to them, surely they cannot be treated as infringers simply because the resulting book is similar to that of the complainant. If the right to use creased leaves is open to the public, as we think it is, it is difficult to understand why any one may not use them in the manufacture of books, when each step in the process is identical with the old and familiar art. The court is of opinion that the exclusive right to use creased leaves in the manufacture of books is not secured to the complainant, and that the defendants have not infringed by making books in the old way, in which creased leaves are used. The bill will be dismissed for want of equity. So ordered.

**DRINNEN et al. v. WESTERN WHEELED SCRAPER CO.**

(Circuit Court of Appeals, Seventh Circuit. March 23, 1898.)

No. 352.

**PATENTS—CONSTRUCTION—INFRINGEMENT—ROAD GRADERS.**

The Welch patents, Nos. 379,550 and 380,068, for new and useful improvements in road graders, consist of a combination of old elements to produce a machine in which vertical, horizontal, and angular adjustments of the scraper blade may be made without stopping the machine, and are so limited by the prior state of the art as to claim 1 of the former patent and claim 2 of the latter that they are not infringed by a machine made according to the Houser patent, No. 454,048. 77 Fed. 194, reversed.

**Appeal from the Circuit Court of the United States for the Southern Division of the Northern District of Illinois.**

The Western Wheeled Scraper Company exhibited its bill in the circuit court alleging infringement by the defendants of certain patent rights secured by letters patent as mentioned in the opinion below. Among the devices shown in the prior art, the following were dwelt on by counsel in their arguments in this court: The patent to McCall, Watkins & Scott, No. 160,535, for a road scraper; the patent to M. E. Lasher, No. 242,659, for a grading, ditching, and levelling machine; the patent of G. W. Taft, No. 276,093, for a machine for making and repairing roads; the patent to M. E. Cook, No. 296,138, for a road scraper; the patent to S. Pennock, No. 344,197, for a road grader; the patent to M. E. Cook, No. 359,848, for a road scraper; the patent to H. G. Moats, No. 363,342, for a road grader; the patent to G. and O. E. Moats, No. 370,806, for a road grader; the patent to Paulson and Lathrop, No. 370,655, for a road grader; the patent to Barraclough and Pritchard, No. 160,253, for a fifth wheel; the patent to D. D. Hayes, No. 202,169, for an extension ladder; the patent to Cyrus Smith, No. 120,337, for an improvement in lubricating car wheels; the patent to P. Smith, No. 17,525, for a steering apparatus for ships; and the patent to B. F. Opp, No. 287,709, for a road engine. The opinion of the judge who presided at the hearing in the circuit court is in 77 Fed. 194.

R. S. Taylor, for appellants.

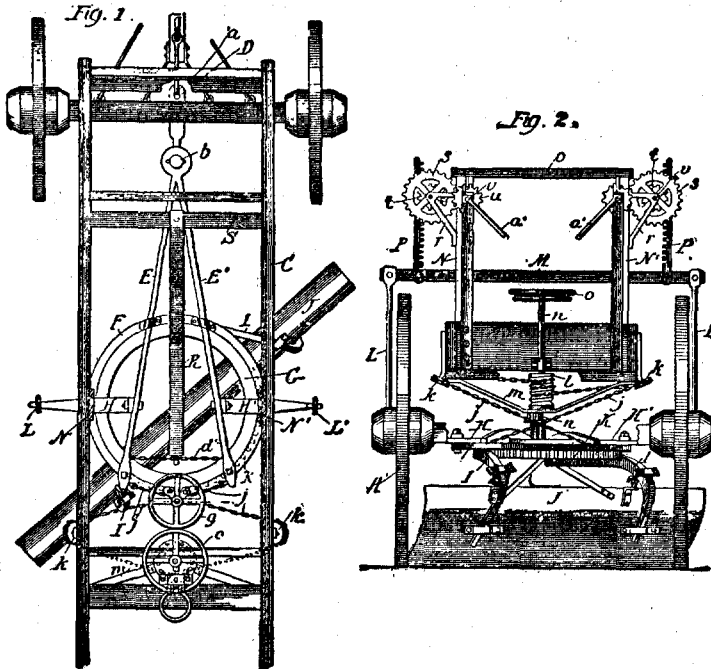
L. L. Bond, for appellee.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

**SHOWALTER, Circuit Judge.** This is an appeal from a decree wherein appellants were adjudged infringers of the first claim of letters patent of the United States No. 379,550, issued March 13, 1888, and of the second claim of letters patent of the United States No. 380,068, issued March 27, 1888. S. F. Welch (assignor to appellee) was the patentee in each instance. Each of these patents is for a "new and useful improvement in road graders." In the specification of the first, the patentee says:

"My invention relates to that class of road graders in which the scraper is supported by a frame mounted on wheels, and in which it can be adjusted vertically and laterally, and can be set at different angles of diagonal adjustment to the roadbed."

Following are two of the drawings forming part of the specification of this patent:



These drawings show much more than the combination of the claim sued on, but from them that combination can be readily understood. The claim reads:

"(1) In a road grader, the combination of a frame supported by wheels; a draft bar for the scraper, as E, E', pivotally supported at its forward end; a ring, F; a ring, G; a rack, K, secured to said ring G; a scraper blade supported by the ring G, and a pinion engaging with said rack; substantially as and for the purposes specified."

Fig. 1 is a plan view, showing a portion of the rigid frame of the wagon, also the forward wheels and axle. Fig. 2 is a rear elevation, with the rear end of the wagon frame and the rear axle cut away. The curved scraper, J, is best seen from its convex side, as in Fig. 2. It is rigidly attached by the curved arms, I, to the under surface of the ring G. This ring is best seen in Fig. 1. It fits into the ring F somewhat as a stove lid fits into the hole made for it in the upper face of the stove; that is to say, these rings are interflanged. They are of the same thickness, and the smaller ring turns freely in the larger. Assuming a horizontal position for these rings, a vertical central cross section would show the line of junction between them as, first, a vertical line extending across the outer edge of the flange of the inner ring, thence a horizontal line crossing the plane of contact between the flanges, then a vertical line to the under surface of the two rings. The draft bar is divided like the letter V into two prongs, marked E and E', pivotally attached at the junction of the prongs to

the front axle at b, and rigidly secured at four points of connection to the larger of the two rings, that marked F. The teeth or indentations, shown in Fig. 1 as projecting from a rearward segment of the inner ring, indicate the location underneath the outer ring of a segmental rack bar which is securely fastened on the underside of the rear portion of the inner ring. This rack bar is best seen in Fig. 2. Underneath the hand wheel marked g, in Fig. 1, and concealed from view by that handwheel, is a pinion, the shaft of which turns in a bearing secured to the larger ring. This pinion engages with the rack bar mentioned. By turning the handwheel, g, the ring G, with the scraper blade attached, is turned to any desired angle with the line of draft. The structure here described, and which is the subject-matter of the combination of the claim, is underneath the frame of the wagon, and entirely disconnected therefrom except by the pivotal attachment at b; that is to say, the claim in suit is not concerned with the chain connection to bar, R, for additional support, or the chain connection for lateral movement, or the rod connection for vertical movement, described in the specification; but the structure of the combination has the capability of being moved up or down or laterally, and the scraper blade may be adjusted angularly to the line of draft.

A characteristic feature of the structure above described, it will be noticed, is that the draft ring, F, is not connected to the scraper-blade ring at their common center, but only at the periphery of the smaller ring, the bearing or impact when the machine is in operation being between the rearward halves of the two rings; that is to say, the connection whereby the draft bar pulls the scraper blade is the bearing between the rearward half of ring G and the rearward half of ring F. The rack and pinion of the claim, it may be here added, combine to the one function of turning ring G on ring F to secure angular adjustment of the scraper blade. Suppose the factors of the claim, leaving out the rack and pinion, to be united as shown, and that a bar be fastened to and across ring G, that a vertical shaft be planted firmly in this bar at the center of ring G, and that a handwheel be fixed horizontally on the upper end of this shaft; by turning this handwheel, ring G would be revolved in ring F, and the angular adjustment of the scraper blade effected. The crossbar, shaft, and handwheel together would have the only function of that sub-combination in the patent which includes the rack, pinion, shaft, and handwheel, g. The rack is functional in the combination of the claim in suit only as joined with the pinion, and the pinion only as joined with the rack. The rack and pinion constitute one factor of the combination. Would not a crossbar, shaft, and handwheel be the corresponding factor in the combination above suggested, and would not such a combination infringe the claim?

Many devices of the prior art illustrating road scrapers of various kinds are disclosed in the record. The machine shown in a patent (No. 363,342) issued May 17, 1887, to H. G. Moats, will be sufficiently understood from Figs. 1 and 2 of the drawings of that patent, which appear on opposite page:

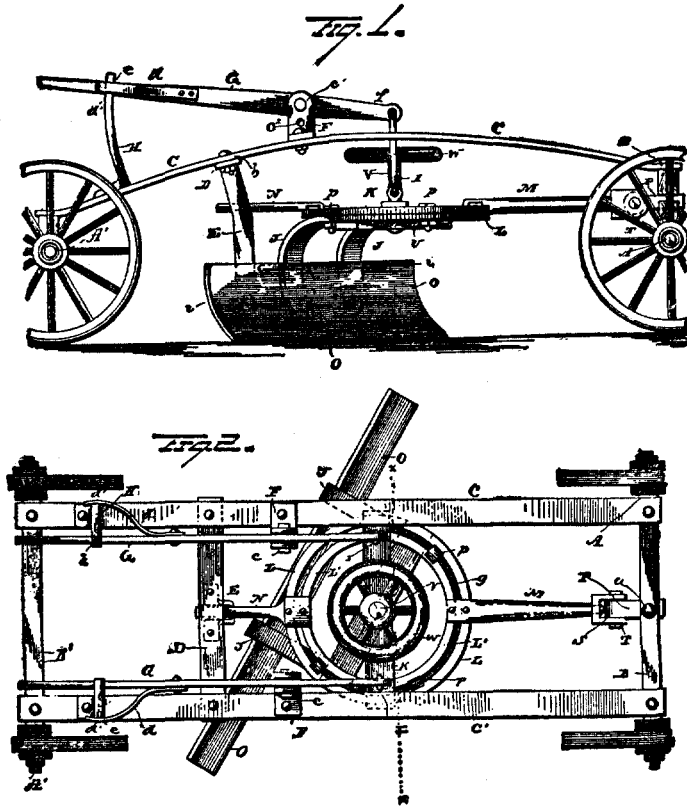


Fig. 1 is a side elevation and Fig. 2 is a plan view. C is the frame of the wagon. The downward projection, E, as seen in the first figure, is the one in sight of two parallel guides between which the beam, N, projects and moves freely up and down, but not laterally, the purpose being to prevent lateral movement of the scraper blade and its connections. If we suppose these guides to be cut away, or the end of the beam, N, to be cut off, and detach the links carried by the forward ends of the levers, G, then the scraper, with its immediate mechanism, as seen in Fig. 2, will have no other connection with the wagon frame than at the forward end of the draft bar, M, which connection, as will be seen from Fig. 2, has the capability of a universal joint. The draft bar is firmly fixed at its rear end to the two concentric horizontal rings marked, respectively, L and L'. These rings, which have an annular space between them, are held rigidly in position by bolts through the draft bar, M, bolts through the beam, N, and bolts through the crossbar, K, as will be seen in the figure. The curved scraper blade, seen best and from its concave side in Fig. 1, is attached to the arms, J, J. These arms are the downwardly bent ends of a single flat bar, curved at its central portion to form the half of another flat ring which lies immediately under, and is concentric with, rings L and L', and is held in place by vertical bolts through the annular space between rings L and L'. The flattened heads of

these bolts engaging the upper surfaces of rings L and L' are marked p. The wooden crossbar, K, as will be seen in Fig. 1, lies above the rings, L, L'. It aids in holding these two rings in position. Underneath the loop or horizontal ring portion of the flat metal bar which terminates in the arms, J, J, and bolted to the opposite sides of said loop where the curvature in a horizontal plane ceases, and below the crossbar, K, and the center of rings, L, L', extends another crossbar, seen in both figures, and marked U in Fig. 1. From the center of this bar, U, extends "loosely through crossbar, K," a vertical shaft, V, upon the upper end of which is fixed horizontally a handwheel, W. This shaft, V, is firmly planted in bar U. Its vertical position is not maintained or aided by any compact bearing against the sides of the hole in bar K, through which it passes. Apart from the clamping action of nuts on the lower ends of bolts, p, which holds the upper surface of the scraper-blade loop against the lower surface of rings L' and L, the backward pull of the scraper blade in operation is against the forward portion of the periphery of ring L'; not against the vertical shaft, V, by impact from the rearward side of the hole in bar K. The function of bar U, shaft V, and handwheel W, as here combined, is to slide the upper surface of the half ring or loop which carries the scraper blade and the bolts, p, in the annular space concentrically against or over the under surface of rings L and L', and so effect the angular adjustment of the scraper blade. If we suppose a curved rack bar to be fastened to the under surface of the forward portion of the segment or loop formed by the arms, J, J, and if we suppose the end of the draft bar, M, to be extended slightly beyond the inner ring, and a perpendicular shaft to be passed through such extension, having a pinion on the lower end and a handwheel on the upper, then the wheel, W, shaft, V, and bar, U, may be dispensed with in this machine, and the handwheel above proposed, in connection with the pinion and the rack, may be used to turn the lower or half ring, for the angular adjustment of the scraper blade. A rack and pinion is a common and well-known mechanical expedient, and, as the record shows, has been repeatedly used in making the angular adjustment of the scraper blade in grading machines.

In the forward movement of the Moats machine the bearing of the loop or half ring is against the forward portion of ring L' by means of the bolts, p. The operation would be the same if the boltheads did not extend over ring L, but only over ring L'; nor would the action be changed if the bolts, as to the portions thereof which pass through the annular space, were extended to fill the entire annular space, and the portions of the boltheads which pass over ring L' were likewise extended along the outer edge of ring L', even into a complete circle. The horizontal extension within the annular space of any one bolt is not limited otherwise than by said annular space, or the presence therein of other bolts. Or, putting the matter in another way, there is in the Moats machine no limit on the number of bolts, p, other than the annular space in which they must be placed. The portions thereof in the annular space may, therefore, form a continuous segment surmounted

by a continuous horizontal projection over the edge of ring L', and there is no reason why this segment and projection, parting from the arms, J, J, where their curvature in a horizontal plane ceases, may not extend to a complete circle. The mode of operation in the Moats machine would be in no wise altered by such structural modification. Ring L' would then be in a groove of that ring to which the arms, J, J, are attached, instead of being in several short segments of that groove. The latter ring would then be supported by and turn on ring L'. It would be drawn forward pulling the scraper blade in the operation of the machine, as already said, by the bearing or impact of its forward half against the forward half of the ring L'. The portions of the upper horizontal surface of the scraper-blade loop or half ring extending from the bolts towards the center of ring L', the portions of the bolts extending upward through the annular space, and the portions of the boltheads extending over ring L' form segments of a groove engaging the forward portion of ring L', whereby, when ring L' is drawn forward, it pulls the scraper blade, and whereby the loop or half ring may be made to turn on ring L', and concentrically with it for angular adjustment of the scraper blade. If ring L be left out of the combination, or if it be thought of as merely a means aiding the rigidity between ring L' and the draft bar, then ring L' would seem to have the function of ring F of the patent in suit, the scraper-blade loop or half ring with its bolts and boltheads, p, would seem to have the function of ring G of the patent in suit, and crossbar U, in combination with shaft V and handwheel W, would seem to have the function of the rack bar and pinion of the combination in suit. A structural difference is that in the Moats machine the draft ring is within the scraper-blade ring, whereas in the patent in suit the latter ring is within the former, and the bearing or impact, as the machine of the patent is pulled forward, is between the rear half circles instead of between the front half circles, as in the Moats machine. Again, in the latter machine neither the draft ring nor the ring attached to the scraper blade has flanges as in the machine of the patent in suit. They are not interflanged, but the bolts and boltheads, p, on the scraper-blade ring, make, in connection with that ring, segments of a groove wherein is contained the forward portion of the draft ring. Again, in the Moats structure the ring attachment to the scraper blade is not a complete circle, but it remains concentric with the draft ring, and its action is the same as though it were a complete ring with the arms, J, J, bolted to its underside. And, still further, the draft bar is not divided into V-shaped prongs from its place of connection with the front axle; but ring L may be thought of as a mere expansion of the draft bar, and the four connections between the two rings as the connections between ring L' and the draft bar so prolonged and expanded at its rear end. The imagination will be aided on this last suggestion if we suppose that portion of the draft bar, M, which lies above the annular space between rings L' and L to be cut away. It may be added in this connection that ring L, thought of as an extension, expansion, or bifurcation of the draft bar, holds the bolts and bolt-





as seen in Fig. 2. The scraper blade is rigidly attached by curved arms, A, to this interior ring. A rack segment is formed, as seen in the figure, on the inner upper surface of the rearward portion of the interior ring. Above this toothed segment, and engaging with it, is a pinion on the end of a horizontal shaft, which shaft turns in a bearing fastened to the exterior ring. The handwheel, W, with the pinion and rack, is the means whereby the inner ring is rotated and the angular adjustment of the scraper blade secured. It will be seen that the same mechanical principles are involved broadly in each of the structures already described. In the Houser patent the rings are not flanged structurally as in the patent in suit. The exterior ring, being integral with the draft bar, is incomplete, as is the lower ring, being integral with the scraper-blade arms, J, J, in the Moats machine. The exterior ring pulls forward in the one machine, while the ring attached to the scraper blade pulls backward in the other. If we are to say that the loop, D, of the Houser device, is the ring F of the combination in suit, then why is not the ring G of the combination in suit the same thing as the horizontal loop (with its bolts and boltheads, p) of the Moats patent? Do the projections, L, of the Houser patent, any more distinctly replace the flanges of the rings in the combination in suit than do the latter, the boltheads, p, or said boltheads in combination with the portions of the bolts within the annular space between the fixed rings in the Moats device? The bearing or impact when the scraper blade is pulled over the ground is between the rear half rings in both the machine of the patent in suit and the Houser machine, while said bearing or impact is between the front half rings in the Moats machine. In the Moats machine, unlike each of the others, the draft bar is not forked from its forward end; but the analogy between ring L of the Moats machine, thought of as an extension to the draft bar with four points of attachment to ring L', and the forked draft bar of the patent in suit, has been pointed out. Bolt or rod, C, in the Houser patent, it may be worth while to notice, clamps together the vertical surfaces of the draft ring and scraper-blade ring, while the bolts, p, by means of nuts on their lower ends, are adapted to clamp together the horizontal surfaces of the draft ring L' and the scraper-blade ring of the Moats machine. In the two later machines the subcombination of rack, pinion, shaft, and handwheel takes the place of Moats' crossbar U in combination with shaft V and handwheel W, for angular adjustment of the scraper blade. But if we are to disregard structural differences, and construe the combination in suit as broadly covering the machine of the Houser patent, then why would not the Moats machine, upon similar reasoning, cover the combination in suit? In the Moats patent the ring L' seems to be in function the ring F of the combination in suit. The draft bar M (especially when combined with ring L) seems to be the same in function as the bifurcated draft bar, E, E', of the combination in suit. The loop formed by the extension of the arms, J, J, in combination with bolts and boltheads, p, seems to be the same in function as the ring G of the claim in suit. The scraper blade is the same, and attached in the same way. The handwheel, W, of the Moats machine, and the shaft, V, planted

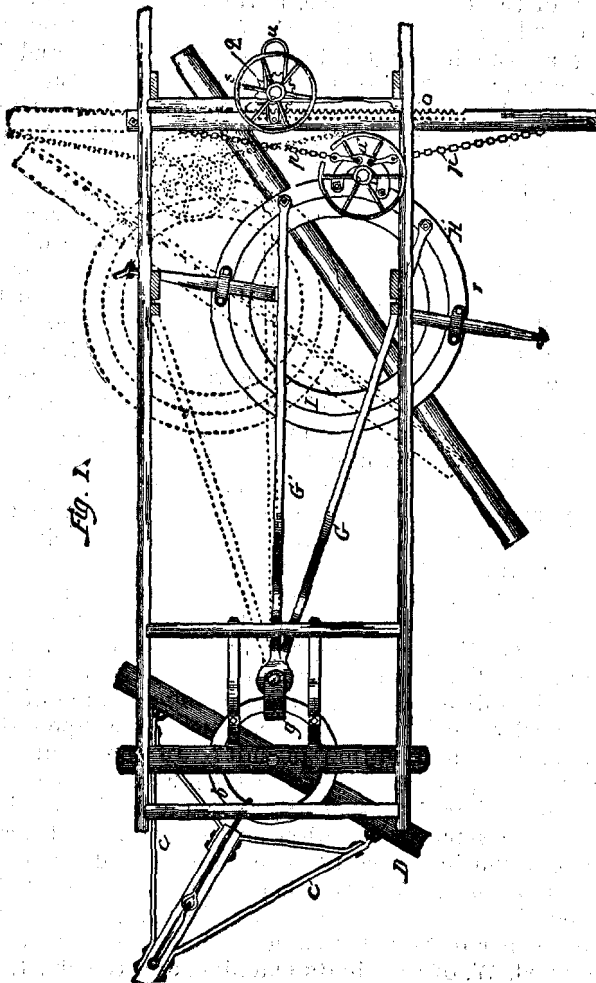
in the cross-piece, U, perform in combination the same function as the rack bar and pinion in the patent in suit; and the "frame supported by wheels" of the patent in suit is the wagon frame and wheels of the Moats machine.

The combination of the claim in suit appears to us so far limited by the prior art that the machine of the appellants does not infringe. We are unable to say that the combination in suit is valid without saying at the same time that there is no ring F, or no interflanged rings F and G, in the appellants' machine.

The claim of patent No. 380,068, which is here in controversy, reads:

"(2) In a road grader, the combination of a frame supported by wheels, a draft bar for the scraper, rings H and I, a scraper blade supported by the ring I, a sliding rack bar, M, pinion, q, and chains connecting the rack bar M and ring H, substantially as and for the purpose specified."

The following diagram, being Fig. 1 of this patent, shows the combination of this claim:



The purpose of the combination is the lateral movement of the scraper mechanism. A chain, *p*, is attached at one end to the extremity of the sliding bar, *O*, and at the other to the rearmost portion of the ring, *H*, called ring *F* in the former patent. From the same point of attachment on ring *H* a similar chain passes to a fastening at the other end of the sliding bar. The movement of the bar in either direction is accomplished by a pinion and rack, as will be obvious from the diagram. The scraper mechanism is pulled in one direction or the other by the one chain or the other, as the case may be. By reference to Fig. 2 of the former patent to Welch, it will be seen that a combination for the same lateral movement of the scraper blade is found in that patent. A single chain attached to ring *F* of the scraper mechanism at one end passes diagonally upward and around the pulley on the side of the wagon frame; thence back to the middle of the wagon frame, where it coils around a drum; thence to the opposite side of the wagon frame, and around another pulley; and thence back to ring *F*. By the operation of the handwheel, marked *O* in Fig. 2 of that patent, this chain is pulled from one end or the other in one direction or the other, bringing with it the scraper mechanism. In the later patent the sliding bar with the rack and pinion takes the place of the drum, the pulleys on either side, and that portion of the chain which is coiled around the drum, and extends on either side to the two pulleys. It will be seen by further inspection of Fig. 2 that on either side of the structure, looking from the rear, there is a vertical rack bar operated by a pinion to move up and down. This rack bar is attached at its lower extremity to, and near one end of, a crossbar, from the end of which a rod, marked *L* in Fig. 2, passes down to the projection marked *L* in Fig. 1 of the same patent. The purpose of this rack bar and pinion, with the allied mechanism, is the vertical movement of the end of the scraper upward or downward, as may be desired. It will be further seen from an inspection of the two figures that the vertical rack bar, marked *P*, with its pinion, is essentially the same thing as the horizontal rack bar made use of in the later patent. In brief, a rack bar and pinion with two chains is substituted for the drum, the pulleys on either end, and the one continuous chain of the former patent. In the device complained of the horizontal rack bar with a pinion and handwheel is made use of, but the chains, *p*, *p*, are not used. In their place a single rigid rod from one end of the horizontal bar to its place of attachment on the outer ring is substituted. This rigid rod pulls the scraper mechanism in one direction and pushes it in the other. The operation of this rod is obviously different, to a certain degree, from that of the two chains, *p*, *p*, of the patent in suit. When the scraper mechanism is lifted by unevenness of the ground, the two chains will become slack, and the scraper mechanism will not be controlled or held in position. The rod, however, controls the scraper mechanism in all positions. It is testified, also, that two rigid rods, one in place of each chain, would lock the rack bar, and make the combination inoperative. This would indicate another and a marked difference between the rod and the two chains. If there

be a patentable difference between the structure for lateral adjustment made use of in the first patent, as shown in Fig. 2 of that patent, and the structure made use of in the second patent, especially in view of the rack bars and pinions already contained in the former device, then there is certainly a patentable difference between the structure of the claim in suit and that complained of as infringing. Each of the two rack bars, P, of Fig. 2 of Welch's first patent, it may be added, imparted movement in opposite directions alternately to a rigid rod one end of which was attached, in effect, to the end of such rack bar.

Upon the construction which we think must necessarily be put upon claim 2 in order to distinguish it from combinations found in the former patent, the device complained of does not infringe. The decree appealed from is reversed, and the cause remanded, with directions to dismiss the bill for want of equity

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THE HARVEY AND HENRY et al.

SELOVER v. SCHOELLKOPF et al.

(Circuit Court of Appeals, Second Circuit. March 2, 1898.)

No. 43.

1. MARITIME CONTRACTS.

Contracts to be entirely performed on land are not maritime contracts, though they may be preliminary to possible contracts for maritime transportation.

2. SAME—ADMIRALTY JURISDICTION.

A contract between the owner of canal boats and brokers engaged in procuring freight, by which the brokers agree to keep an office in the city of Buffalo, and solicit freight for the canal boats, and provide such freight to the boats in the order of reporting at the broker's office, and the boatman agrees to report there whenever in Buffalo, but does not agree to go there, so that all the contract is to be performed on land, is not a maritime contract, and is not cognizable in the admiralty courts.

This cause comes here upon an appeal from a decree of the district court, Northern district of New York, in favor of libelants for damages arising from a breach of contract made between them and the owner of the canal boats. Libelants proceeded in rem in admiralty upon the theory that the contract was a charter party.

Harvey L. Brown, for appellants.

John W. Ingram, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. A charter party is a "contract in writing, by which an entire ship, or some principal part thereof, is let for the specified purposes of the charterer during a specified term, or for a specified voyage, in consideration of a certain sum of money per month or per ton, or both, or for the whole period or adventure described." Macl. Shipp. (4th Ed.) p. 354. Controversies arising upon charter parties are cognizable in admiralty because they are maritime contracts; but there are many contracts relating more or less to navigation and commerce which are not cognizable in ad-

miralty. "The distinction between preliminary services leading to a maritime contract and such contracts themselves has been affirmed in this country from the first." *The Thames*, 10 Fed. 848. An insurance broker's contract to procure insurance upon a vessel for a contemplated voyage is not maritime. *Marquardt v. French*, 53 Fed. 606. Neither is a freight agent's contract to solicit freight, nor a ship broker's contract to secure a charterer for a ship. *The Crystal Stream*, 25 Fed. 575; *Torices v. The Winged Racer*, 39 Hunt, Mer. Mag. 458, Fed. Cas. No. 14,102; Ben. Adm. § 212. "Undertakings which are merely personal in their character, or which are preliminary or leading to maritime contracts, do not seem ever to have been recognized as within the admiralty jurisdiction." *Cox v. Murray* (Betts, J.) Abb. Adm. 342, Fed. Cas. No. 3,304. In *Plummer v. Webb*, 4 Mason, 388, Fed. Cas. No. 11,233, Judge Story says: "In cases of a mixed nature it is not a sufficient foundation for admiralty jurisdiction that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime." See, also, *Diefenthal v. Steamship Co.*, 46 Fed. 397, and cases there cited.

The contract sued upon was entered into May 14, 1896, between the libelants, parties of the first part, and one Charles Selover, party of the second part. It recites that "the parties of the first part are engaged in the brokerage business at the city of Buffalo, N. Y., engaged as brokers for the procuring of freight for boats navigating the Erie canal"; that Selover is the owner of three canal boats named therein, navigating the Erie canal, and is "desirous of procuring freight for his said boat from the city of Buffalo, Tonawanda, and North Tonawanda, to points on said canal or east of Albany," and is "desirous of having his boat loaded in turn with other boats whose owners or managers may employ the parties of the first part as brokers." By the contract Selover agrees that "during the season of 1896 he will report his boat to the parties of the first part at their office in the city of Buffalo, or such other place as they may designate, upon his arrival in the city of Buffalo, when ready for loads, and that he will accept all loads offered to him for the boat by the parties of the first part, at the then going rates of freight." Incidentally it may be noted that Selover agrees to report and accept only when he comes to Buffalo. He does not agree to come there, and is left entirely free to take freight at Tonawanda or North Tonawanda, without availing at all of the services of libelants. Selover further agrees that he "will not, without the written consent of the parties of the first part, accept loads for his boat from Buffalo during the canal season of 1896 from parties other than the parties of the first part." This clause contains, in the printed form, the words "Tonawanda and North Tonawanda," but a marginal note in writing, duly signed, provides that "it is agreed and understood that this contract does not apply to Tonawanda and North Tonawanda." Selover further agrees that, in case he should accept loads from outside parties, he would pay \$100 as liquidated damages; and that "if, after reporting his boat ready to load, he should refuse to ac-

cept the load provided for his boat by the parties of the first part, he would pay for each such refusal \$100 as liquidated damages." On the other side, the parties of the first part agree that they will keep an office or place where Selover "and other boat owners doing business on the Erie canal" may report to them as ready to load; that they will keep a book in which such reports shall be entered in their regular order; and that "they will solicit freight for all boats so reporting to them, and \* \* \* will provide such freights to the boats of the party of the second part, and other boat owners reporting to them for loads \* \* \* in the order in which said boats shall report; \* \* \* said freights to be furnished to said boats at the then going rates; and in case said parties of the first part shall fail or refuse to furnish \* \* \* loads for his boat, when they shall have such loads, in his regular order as shown by the books," they will pay \$100 as liquidated damages for each refusal. Finally, it was agreed that the parties of the first part "will solicit loads for boats other than those of the party of the second part, and that such boats will be registered with [his] when ready to load, and that all of said parties will receive the same attention and treatment." It will be observed that nothing which this contract requires to be done is to be done on the water. If it had even required Selover to bring his boats to Buffalo, it might be suggested that so much of it was maritime. But he is under no such obligation. He is to report when he comes to Buffalo, but need not come unless he chooses. So, too, the obligations of the parties of the first part are to be discharged on land. The maintaining of an office, the keeping of a book, the solicitation of freights, and the tendering of such as they may obtain to the listed boats in regular order are none of them maritime transactions, although they are preliminary to possible contracts for maritime transportation. Under the authorities above cited, it would seem that a controversy arising upon such a contract is not cognizable in the admiralty courts. The decree of the district court is therefore reversed, and the cause remitted, with instructions to dismiss the libel, with costs of both courts.

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THE JOSEPH B. THOMAS.

WATTS et al. v. JENSEN.

(Circuit Court of Appeals, Ninth Circuit. February 7, 1898.)

No. 385.

1. NEGLIGENCE—PERSONAL INJURIES—LIABILITY OF MASTER AND OWNERS OF VESSEL.

It is the duty of the master of a vessel to provide a stevedore with a safe place in which to work, and to exercise ordinary and due care in keeping the premises reasonably secure against danger; and he is liable for an injury which is the result naturally to be expected from an act of his employé which could have been foreseen and guarded against by the exercise of ordinary care.

**2. SAME.**

Where an employé on a vessel placed an empty keg on the hatch covers, in such a position that an accidental jar caused it to fall in the hatchway and injure a stevedore, the master and owners are liable.

**3. SAME—PROXIMATE CAUSE.**

The negligent placing of a freshly-painted keg on a pile of hatch covers to dry, in a position where a slight jar, caused by some one stepping on the hatch covers, causes it to fall down the hatch and injure a stevedore, is the proximate cause of such injury, so as to make the ship liable, notwithstanding that the hatch covers were negligently piled by the stevedore.

Appeal from the District Court of the United States for the Northern District of California.

Andros & Frank, for appellants.

Frank P. Prichard, for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

HAWLEY, District Judge. This is a libel in rem against the ship Joseph B. Thomas to recover the sum of \$10,000, as damages for personal injuries alleged to have been sustained in consequence of the negligence of the master of the vessel, and of those intrusted by the owners of said vessel with its care and management. The undisputed facts are that the libelant was one of a gang of stevedores engaged in loading the ship at the port of Philadelphia, and was injured while at work in the lower hold of the vessel, under the forward hatch; that at the time of the accident most of the men, including the libelant, were at work in the lower hold, under or near the forward hatch, engaged for the most part in tearing up a stage which had been put up in the hold in order to render the work of loading more easy; that the hatch covers, consisting of three pieces, had been taken off that morning, and were piled one on top of the other, forward of the forward hatch on the main deck; that these hatch covers were somewhat curved; that the hatch coamings were about 9 or 10 inches high, and the covers, piled one on top of the other, were nearly flush with the hatch coamings; that a keg belonging to the ship, which had been freshly painted, was placed by some one on these hatch covers to dry; that this keg was knocked over into the hatchway, and, in its fall, struck the libelant on the head, inflicting severe injuries; or, in other words, to quote the language of one of the witnesses:

"There was a little keg standing on one corner of the hatch cover,—on the port corner of the hatch cover; and one of the men happened to touch the top hatch cover on the starboard side, and through that it started the keg off the hatch cover, and the keg went down through the hatch, and struck the man."

The disputed facts are substantially confined to two questions, viz.: (1) Was it a stevedore or a sailor who trod upon the hatch covers? (2) Were the hatch covers improperly piled? The court below, after an extended review of the testimony, came to the conclusion that it was one of the young men belonging to the ship, and not one of the stevedores, who stepped on the hatch covers, upsetting the keg; that, so far as the evidence discloses, the hatch covers were piled



in the usual and proper manner. The conclusions of the trial court upon disputed questions of fact, where the witnesses were present at the trial, are, as a general rule, accepted by the appellate court. *The Albany*, 48 Fed. 565; *The Alijandro*, 6 C. C. A. 54, 56 Fed. 624; *The Lucy*, 20 C. C. A. 660, 74 Fed. 572; *The Glendale*, 26 C. C. A. 500, 81 Fed. 635. But the reason in favor of that rule does not exist, and cannot be applied (at least, not to the same extent), in a case like the present, where all of the testimony was taken before an examiner. *The Glendale*, supra. The object of arriving at a correct conclusion as to the disputed facts in this case is only material in so far as the result reached thereon might bear upon the legal questions to be considered,—as to whether the injury which appellee received was occasioned in whole or in part by the negligence of one or more of his fellow servants, or was occasioned in whole or in part by the negligence of the agents and servants of the appellants. There is no question raised as to any contributory negligence of the appellee. He is clearly shown to be entirely free from any fault or negligence in the premises. The legal contention of the appellants is that upon the facts, as found by the district court, the judgment should have been in their favor. Their argument is that the injury to appellee occurred from the immediate act of the person who trod upon the covers; that such person was a fellow servant of the appellee, one of the employes of the stevedore who was loading the vessel, under a contract with the owners thereof, and over whom appellants had no control; that the proximate cause of the injury to appellee was the fact that the hatch covers were piled one upon another, in such a manner that when the employe trod upon them the covers tilted and overturned the keg, and it fell through the hatchway into the hold. The legal contention of appellee is that, if the facts should be found by this court as claimed by the appellants, the judgment of the court would nevertheless be correct. In other words, his argument is that it was negligence on the part of the officers and employes of the ship to place an empty keg upon a pile of covers, the top of which was flush with, and adjacent to, an open hatchway, and to allow the keg to remain in that position, where any jar or movement of the covers would have the effect of precipitating it into the hold below, and that this negligence was the proximate cause of the injury. What are the principles of law applicable to this case?

1. What duty did appellants owe to appellee? Their duty was to provide him a safe place in which to work, and to exercise ordinary and due diligence and care in keeping the premises reasonably secure against injury or danger. This is the pith and substance of all the decisions upon this subject, as expressed in a great variety of cases, each having reference to the special facts and surroundings of the evidence relating thereto. In *Gerrity v. The Kate Cann*, 2 Fed. 241, 246, where a stevedore was injured by the fall of dunnage and plank upon him, the court said:

"There was a relation between the shipowner and the libellant, arising, not out of the mere presence of the libellant on board the ship, but out of the service he was then engaged in performing, the necessity of that service to the shipowner, and the circumstances of the libellant's employment to perform that

service. The libelant had therefore a right to be where he was, and it follows that there was a duty on the part of the owner to see to it that the dunnage and plank stowed above him were so secured as to prevent its falling upon him of its own weight."

This case was affirmed upon appeal in 8 Fed. 719.

In *The Frank and Willie*, 45 Fed. 494, 496, where a seaman was engaged unloading cargo from the hold of the vessel, and had his leg broken by the fall of lumber against him, the court said:

"The duty to provide reasonable security against danger to life and limb, by at least the usual methods, when these dangers are brought home to the knowledge of the proper officers, is manifestly a general one. It attends the seaman wherever he is required to go on shipboard in the performance of his duties, and applies as much to a dangerous condition of the cargo as to defective rigging or a rotten spar."

In *Leathers v. Blessing*, 105 U. S. 626, 629, where the libelant went upon board a steamboat, expecting a consignment of cotton seed, to ascertain whether it had arrived, and was injured by the fall of a cotton bale, the court, after stating the facts, said:

"This makes the case one of invitation to the libelant to go on board in the transaction of business with the master and officers of the vessel, recognized by them as proper business to be transacted by him with them on board of the vessel at the time and place in question. Under such circumstances, the relation of the master and of his co-owner, through him, to the libelant, was such as to create a duty on them to see that the libelant was not injured by the negligence of the master."

See, also, *White v. France*, 2 C. P. Div. 308; *The Max Morris*, 24 Fed. 860; *The Carolina*, 30 Fed. 199; *The Phoenix*, 34 Fed. 760; *Johnson v. Bank*, 79 Wis. 414, 421, 48 N. W. 712.

2. Was it negligence on the part of appellants in placing, or allowing its servants to place, an empty keg on the hatch covers, in such a position that an accidental jar or disturbance would naturally cause it to fall in the hatchway, and thereby endanger the life and limbs of the stevedores at work in the lower hold of the vessel? Was it such negligence on the part of appellants as will justify the court in holding them liable in damages for the injury received by appellee? Was it the proximate or efficient cause of the injury? We do not understand appellants to deny that the keg was placed on the covers by one of their servants connected with the vessel. It belonged to the ship, and was used as a receptacle for drinking water. It had been freshly painted, and was placed upon the covers to dry. There is no evidence tending in the slightest degree to show that it was placed there by any person other than an employé of the appellants. The argument of appellants is to the effect that the keg was not placed in such close proximity to the hatchway that, if accidentally jarred or moved, it was liable to roll or fall; that its position was not one of impending danger; that there was no probability of the injurious consequences attached to the placing of the keg on the covers; that its position was seen during the day by the stevedores and others, who never spoke of its being in a dangerous position; and that for these and other reasons it ought not to be held that appellants did not use reasonable care. Counsel do not, and, under the facts, could not, claim that there was not some possible danger. The result shows,

beyond controversy, that the keg was placed in such a position that it was liable to roll over and fall, upon any disturbance, be it slight or great. It did fall when a person inadvertently or accidentally stepped upon the hatch covers. This, in the very nature of things, was liable to occur, and did occur. There is no need of indulging in conjectures or probabilities as to what was or was not liable to happen if the covers were stepped upon. The placing and leaving of the keg on top of the hatch covers, whether within one foot or four feet of the hatch, cannot, in law, be said to be the exercise of ordinary care or reasonable diligence. If the covers were, as claimed by appellants, improperly piled, it would not of itself relieve appellants from liability. It was the duty of the employé, when he placed the keg on the covers, to observe their position, and to see that the place was safe. Moreover, if, as appellants claim, the insecurity of the hatch covers was plainly visible and apparent to the eye, then the mate of the vessel, who testified to this fact, and saw the keg on the covers, was certainly guilty of negligence in not removing it from a place of danger. It is true that negligence is not to be presumed from the mere fact of an injury having been received. Negligence, like any other fact, must be proven. But it often happens that the evidence which shows the injury, and the manner in which it occurred, also establishes a *prima facie* case of negligence, and raises such a strong presumption as to cast upon the opposite party the necessity of introducing proof of other facts in order to show that there was no negligence. In *Sheridan v. Foley* (N. J. Sup.) 33 Atl. 484, where the injured party was engaged in laying a sewer pipe at the foot of one of the walls of a building then in the course of construction, and was struck upon the head by a brick from above, it was held to constitute *prima facie* evidence of negligence on the part of the contractor, and that, in the absence of any explanation by the contractor, it would be presumed that the injury occurred from want of reasonable care on his part, and that he was liable for the injuries inflicted. The court said:

"While it is true, as a general principle, that mere proof of the occurrence of an accident raises no presumption of negligence, yet there is a class of cases where this principle does not govern,—cases where the accident is such as, in the ordinary course of things, would not have happened if proper care had been used. In such cases the maxim, '*Res ipsa loquitur*,' is held to apply; and it is presumed, in the absence of explanation by the defendant, that the accident arose from want of reasonable care."

And after quoting from *Kearney v. Railway Co.*, L. R. 5 Q. B. 411, L. R. 6 Q. B. 759, and *Byrne v. Boadle*, 2 Hurl. & C. 722, and citing *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. 190, and 23 Atl. 167, it concluded as follows:

"The facts in the present case bring it within the application of this principle. The bricks were in the custody of the defendant's servants at the time when this one fell, and it was their duty to so handle them as not to endanger others who were engaged in other work upon the same premises. This brick could not have fallen of itself; and the fact that it fell, in the absence of explanation by the defendant, raises a presumption of negligence. If there are any facts inconsistent with negligence, it is for the defendant to prove them."

In other words, there are cases where the fact that the accident happened, under given conditions, and in connection with certain cir-

cumstances, will amount to evidence of negligence sufficient to charge the defendant. *Scott v. Docks Co.*, 3 Hurl. & C. 596; 2 *Thomp. Neg.* 1227 et seq.; *Mullen v. St. John*, 57 N. Y. 567; *Hogan v. Manhattan R. Co.*, 149 N. Y. 23, 43 N. E. 403; *Dixon v. Plums*, 98 Cal. 384, 388, 33 Pac. 268; *Howser v. Railroad Co.*, 80 Md. 146, 30 Atl. 906; *McCauley v. Norcross*, 155 Mass. 584, 30 N. E. 464; 1 *Shear. & R. Neg.* §§ 58-60.

The case at bar is, in its facts, as strong as any of the cases above cited, and as to some of them much stronger. Here the case does not rest upon the mere fact that the keg fell down the hatchway, but all the facts tending to show negligence were specifically proven. The placing of the keg on the hatch covers, its close proximity to the open hatch, its liability to lose its equilibrium and be upset by any person who might, by accident or otherwise, tread upon the hatch covers, all tend to show, and do show, that there was negligence. These facts are certainly of such a nature as to raise a presumption of negligence, according to the maxim, "*Res ipsa loquitur.*" In *Shear. & R. Neg.* (4th Ed.) § 59, the authors say:

"In many cases the maxim, '*Res ipsa loquitur,*' applies. The affair speaks for itself. It is not that in any case negligence can be assumed from the mere fact of an accident and an injury; but in these cases the surrounding circumstances, which are necessarily brought into view by showing how the accident occurred, contain, without further proof, sufficient evidence of the defendant's duty, and of his neglect to perform it. The fact of the casualty, and the attendant circumstances, may themselves furnish all the proof of negligence that the injured person is able to offer, or that it is necessary to offer. The accident, the injury, and the circumstances under which they occurred are in some cases sufficient to raise a presumption of negligence, and thus cast upon the defendant the burden of establishing his freedom from fault."

But counsel argue that the negligence of the servant of appellants in placing the keg in the position stated was not the proximate cause of the injury; that it was the negligence of the stevedore in piling the covers, and the negligence of the stevedore in stepping on the covers, that was the proximate cause of the accident that occurred. Of course, if the man or boy had not run against or stepped upon the covers, there might not have been any accident at that particular time. But it was not the covers, nor the person that stepped on the covers, that was the real cause of the injury. You can twist and turn the facts in any direction which the ingenuity and ability of counsel may suggest, but the mind is inevitably forced to the conclusion that it was the negligent placing of the keg in a dangerous position that constituted the efficient and controlling cause of the injury. It was the natural result, which, in the light of the attending circumstances, the appellants ought reasonably to have foreseen might occur when the keg was put upon the covers; and one which, by the exercise of ordinary care and prudence, they should have guarded against. They were required to use such precautions to avoid danger as a person of ordinary prudence would use for his own protection. It makes no difference whether it was a man or a dog that ran against or stepped upon the covers, or whether it was a jar occasioned by the falling of a heavy box, or a gale of wind. It was the placing of the keg in such a position that it was liable to be upset from any of these causes that

constitutes the negligence, and creates the liability, notwithstanding the fact that there were other causes which may have immediately or remotely contributed to the accident. Negligence may be the proximate cause of an injury of which it is not the sole or immediate cause. If appellants' negligence concurred with some other event (other than the fault of appellee) to produce the injury, so that it clearly appears that but for such negligence the injury would not have happened, and both circumstances are closely connected with the injury in the order of events, the appellants would be responsible, though their negligent act was not the nearest cause in the order of time. The rule is given in 1 Shear. & R. Neg. (4th Ed.) § 31, as follows:

"The mere fact that another person concurs or co-operates in producing the injury, or contributes thereto, in any degree, whether large or small, is of no importance. \* \* \* It is immaterial how many others have been in fault, if the defendant's act was an efficient cause of the injury."

In 16 Am. & Eng. Enc. Law, 440, it is said:

"It is no defense, in an action for a negligent injury, that the negligence of the third person, or an inevitable accident, or an inanimate thing, contributed to cause the injury of the plaintiff, if the negligence of the defendant was an efficient cause of the injury. In such cases the fact that some other cause operates with the negligence of the defendant in producing the injury does not relieve the defendant from liability. His original wrong concurring with some other cause, and both operating proximately at the same time in the production of the injury, he is liable to respond in damages, whether the other cause was a guilty or an innocent one."

Numerous authorities are there cited in support of this text. See, also, *Pollard v. Railroad Co.*, 87 Me. 51, 55, 32 Atl. 735; *Hall v. Railway Co.* (Utah) 44 Pac. 1046, 1049; *Paulmier v. Railroad Co.*, 34 N. J. Law, 151, 155; *Stetler v. Railroad Co.*, 46 Wis. 497, 509, 1 N. W. 112.

In *The Phoenix*, 34 Fed. 760, where there was some evidence to the effect that the acts of a fellow servant also contributed to the injury, *Simonton, J.*, said:

"But for the negligence of the one, perhaps the action of the other, the accident might not have happened. \* \* \* This, however, does not exonerate the ship. Even in the narrow administration of the common-law courts the negligence of an employé will not excuse the common master for an injury to a fellow servant, if the master himself was negligent. *Railway v. Cummings*, 106 U. S. 700, 1 Sup. Ct. 493. And, in the broad and liberal administration of admiralty, contributory negligence on the part of the libellant himself would not exonerate the ship."

The conclusions we have reached are not in opposition to the principles announced in the authorities cited by appellants, when applied to the particular facts of each case. In *Millie v. Railway Co.* (Com. Pl.) 31 N. Y. Supp. 801, the evidence merely showed that plaintiff fell down the stairs of defendant's elevated railroad, by catching her foot on one of the steps, and that after her fall it was discovered that the rubber covering on one of the steps was loose. The suit was dismissed. Why? Because there was no proof of any negligence on the part of the defendant, and no act or circumstance shown from which negligence could be inferred. There was no evidence that she tripped or caught her foot on the step that was loose, and non constat but the accident might have occurred by her tripping upon one of the

steps that was not loose. This of itself was sufficient to prevent a recovery. The other question of fact, as to whether the evidence showed that the rubber on the step had been out of repair for a sufficient length of time to impart notice to the defendant, has no special application to this case; for here the negligent act of the appellants consisted in placing the keg in the place where, from its position, danger was liable to occur. We have constantly recognized the principle, for which appellants contend, that no one can be held liable for an injury which was not the result naturally and reasonably to be expected from the act of his employé, and could not have been foreseen. *Railway Co. v. Kellogg*, 94 U. S. 469; *Sheridan v. Bigelow*, 93 Wis. 426, 67 N. W. 732; *McGowan v. Railway Co.*, 91 Wis. 147, 64 N. W. 891; *Henry v. Railroad Co.*, 50 Cal. 183; *Motey v. Marble Co.*, 20 C. C. A. 366, 74 Fed. 155. But it logically follows that the converse of this proposition must be true,—that the master should in all cases be held liable for an injury which was a result naturally and reasonably to be expected from an act of his employé, which could have been foreseen and guarded against by the exercise of ordinary care and reasonable diligence. The decree of the district court is affirmed, with costs.

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THE GEORGE W. CLYDE.

COMMERCIAL TOWBOAT CO. v. THE GEORGE W. CLYDE.

(Circuit Court of Appeals, Second Circuit. April 7, 1898.)

No. 101.

**SALVAGE—ADEQUACY OF AWARD.**

An award of \$1,000 to two tugs which went promptly to the assistance of a steamship (in apparent danger of sinking from collision), valued with its cargo at \$50,000, and in 15 minutes, without danger to themselves, beached her in a safe place, will not be disturbed as inadequate.

Appeal from the District Court of the United States for the Eastern District of New York.

Goodrich, Deady & Goodrich, for appellant.

Wing, Shoudy & Putnam, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

**PER CURIAM.** The appellant insists that the award of the court below of \$1,000 for the salvage services rendered by its two tugs to the steamship was inadequate. The tugs happened to be near the steamship when she was so badly injured by a collision with another vessel that there was apparent danger of her sinking immediately, in water 60 to 80 feet in depth. They went to her assistance, and her master requested them to tow her to the shallow water, which was about a quarter of a mile away. They did so, and, in less than a quarter of an hour after the collision, she was beached in safety. The value of the steamship and her cargo was \$50,000. The services involved no risk to the tugs. Those in charge of the steamship discovered, as soon as the towing services

began, that the situation was less critical than they had at first supposed. In fact, she could have reached the place to which she was towed without assistance, and would have done so if it had been necessary. The tugs acted promptly and energetically, but the service was a short one, involving no danger to the persons or property of those engaged in it, and, as it turned out, could have been dispensed with by the steamship. Upon this state of facts, we ought not to disturb the decree. We cannot say that the award was manifestly inadequate. "The allowance of salvage is, necessarily, largely a matter of discretion, which cannot be determined with precision, by the application of exact rules. Different minds, in the exercise of independent judgment upon the same evidence, seldom coincide exactly in their view of the facts, or give the same prominence to the varied elements which make up the case. An approximate concurrence is all that can be expected." *The Baker*, 25 Fed. 771. For this reason, appellate courts are not disposed to interfere in salvage cases, unless the award is manifestly excessive or inadequate, or has proceeded upon some erroneous principle. *The Emulous*, 1 Sumn. 214, Fed. Cas. No. 4,480. The decree is affirmed, with costs.

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#### THE ELLA.

#### REAKIRT v. THE ELLA.

(District Court, D. Delaware. April 9, 1898.)

No. 554.

#### 1. MARITIME LIENS—MARITIME CONTRACTS.

A sale of coal, pursuant to which the coal is delivered to a vessel to be carried as cargo under bills of lading to the purchaser as consignee, the vendor having knowledge that the purchaser is engaged in the business of selling such coal for other than maritime purposes, is not a maritime contract; nor do the facts that the consignee owns such vessel and that a portion of such coal, after having been delivered to the consignee, is supplied by it to such vessel as necessary fuel, serve to create or support a maritime lien.

#### 2. SAME.

The question whether a maritime lien attached for the price of the coal must be determined on the facts and circumstances as they existed at the time of its original delivery to the vessel, and cannot be affected by any subsequent application of the coal by the purchaser.

(Syllabus by the Court.)

Levi C. Bird and A. E. Sanborn, for libellant.

Lewis C. Vandegrift, for claimant.

BRADFORD, District Judge. This is a libel in rem filed September 30, 1896, by Margaret L. Reakirt, of the City of Philadelphia, Pa., trading as Reakirt Brother & Company, against the steamboat *Ella*, to recover the price of coal furnished in that city by the libellant on the credit of that vessel, as is alleged, from April 14, 1896, to August 22, 1896, inclusive, amounting, after deducting certain allowances, to \$707.22, together with interest thereon from the last mentioned date. The *Ella* was owned solely by The Philadelphia and Smyrna Trans-

portation Company, a corporation of Delaware, from 1889 at least until August 21, 1896, on which day that company executed a bill of sale to John H. Hoffecker, the claimant. The claimant asserts that from that time he was the sole owner of the vessel until she was sold, October 19, 1896, by order of this court for the enforcement of a wharfage lien. The proceeds of sale remaining in the registry of the court, after deducting all other demands, are sufficient to cover whatever claim the libelant may have under this libel, together with the costs of suit. By agreement of the proctors for the libelant and claimant respectively, all the testimony in the case of *Building Co. v. The Ella* (recently decided by this court) 84 Fed. 471, is to be considered, so far as material, in this case. The price charged for the coal furnished by the libelant is reasonable, and Philadelphia was a port foreign to the *Ella* in the sense of being a port in a state other than that in which she was owned during the furnishing of the coal. At the time of and for many years prior to the transaction in question the libelant carried on business in Philadelphia as a coal dealer, and F. Albert von Boyneburgk was the general manager of her business. The transportation company was incorporated under the laws of Delaware in 1883 for the purpose of transporting freight by vessel between the town of Smyrna, Del., and Philadelphia, Pa., and elsewhere. For the last six or seven years the claimant has been and now is its president. Pursuant to its charter the transportation company engaged in the carriage of freight by vessel to and from Smyrna and Philadelphia, regular trips being made over the route several times a week. Augustus E. Jardine has been the general manager of the transportation company for many years. That company has for the past eight or ten years dealt, although not exclusively, with the libelant in purchasing coal. The correspondence between the libelant and the transportation company shows beyond doubt that during all that time the furnishing of coal by the former to the latter was the result of direct dealings between them. In addition to the business of transportation, the transportation company was engaged in selling a considerable proportion of the coal bought by it from the libelant and others, to blacksmiths and other persons in or near Smyrna. Von Boyneburgk testified, without qualification, that all coal delivered by the libelant to the *Ella* was furnished upon the credit of that vessel and was charged invariably to "Stmr. E'lla and Owners." The fact that such a charge was made, standing alone, is entitled to but little weight and is wholly inconclusive on the question whether credit was given to the vessel as well as to her owner. Nor could a mere belief on the part of the libelant or of von Boyneburgk that the furnishing of the coal would create a lien on the *Ella* avail the libelant unless the circumstances under which the coal was furnished were such as to justify such belief. The testimony for the libelant strongly tends to support a lien for the whole amount demanded in the libel, but that testimony is inconsistent with the documentary evidence, which is of primary importance in the case. The coal furnished by the libelant to the transportation company, including the coal in question, was, while that company continued to own the *Ella*, all delivered to that vessel; but the documentary evidence shows that while a comparatively small pro-



portion of the coal was supplied for the use of the Ella, the balance of it was delivered and received on board of that vessel as cargo to be transported to the transportation company at Smyrna, there to be disposed of in accordance with the pleasure of that company. Upon the delivery of coal by the libelant in Philadelphia, bills of lading were signed by the pilot of the Ella, acting for and representing her master, for all coal intended to be delivered as cargo at Smyrna, and bunker receipts were signed by the pilot in the same capacity for such coal as was supplied for the use of the vessel. The bills of lading were substantially in the following form:

"Shipped by Reakirt, Bro. & Co., in good order, on board the Stmr. called the Ella of \_\_\_\_\_ whereof \_\_\_\_\_ is Master for this present voyage, and now lying in the Port of Philadelphia, and bound for Smyrna, Del., 28 tons of coal, which I promise to deliver at the aforesaid Port of Smyrna in like good order, (the dangers of the seas only excepted,) unto Phila. & Smyrna Trans. Co. or their assigns, he or they paying freight for the same at the rate of \_\_\_\_\_ Dollars per ton.

"And 24 hours after the arrival at the above named port, and notice thereof to the consignee named, there shall be allowed for receiving said cargo at the rate of one day, Sundays and legal holidays excepted, for every hundred tons thereof, after which the cargo, consignee or assignee shall pay demurrage at the rate of eight cents per ton a day, Sundays and legal holidays not excepted, upon the full amount of cargo, as per this bill of Lading. For each and every day's detention, and pro rata for parts and portions of a day beyond the days above specified, until the cargo is fully discharged; which freight and demurrage shall constitute a lien upon said cargo.

"In Witness Whereof, the Master or Purser of the said Vessel has affirmed to 3 Bills of Lading, all of this tenor and date; one of which being accomplished the others to stand void.

"Dated at Philadelphia, this 14 day of April, 1896.

"28 Tons in the Hold.

"\_\_\_\_\_ on Deck.

"Draws \_\_\_\_\_ feet water, and was built at \_\_\_\_\_ in 189 .

"J. L. Jackson."

The bunker receipts were in the following form:

"No. 18619. Penna. R. R. Pier. Greenwich. 5/29 1896.

"Shipped for account of Reakirt, Bro. & Co., Office 218½ Walnut Street, on board Steamer Ella, 5 tons of Penn coal, for steamers' use. I certify that I have received on board, in good order, the quantity and kind of coal above specified.  
J. L. Jackson, Master."

The bills of lading and bunker receipts were signed in the office of the libelant on her pier at Greenwich. Both the libelant or her manager, von Boyneburgk, and the transportation company had knowledge of the execution of bills of lading and bunker receipts for a number of years preceding the furnishing of the coal in question. Not only bunker receipts but bills of lading were executed in connection with the supply of coal included in the present demand. A sale by the libelant to the transportation company of a cargo of coal not to be used in aid of navigation was not a maritime contract, and could give rise to no lien nor serve as the basis of any lien cognizable by this court. It appears that the coal bought by the transportation company from the libelant and others was placed on the wharf of that company at Smyrna, and that the bunkers of the Ella, while sometimes supplied with coal directly by the libelant, bunker receipts being taken therefor, were usually supplied from the accumulation of coal

on the wharf at Smyrna. It was urged on behalf of the libelant that the supplying at Smyrna by the transportation company of the bunkers with coal had the same effect, under the circumstances disclosed in the case, as if they had been supplied with coal by the libelant in Philadelphia. I regard this position as untenable. No element of fraud on the part of the transportation company is disclosed in this connection. The question whether or not a maritime lien arose must be determined on the facts as they existed at the time the coal was delivered by the libelant to the Ella in Philadelphia. No subsequent application of the coal by the transportation company in Smyrna could create a lien in favor of the libelant. It is also to be noticed, in passing, that it does not appear that the coal belonging to the transportation company and situate on its wharf was all obtained from the libelant. Considered in any aspect warranted by the evidence, the fact that a portion of the coal sold by the libelant to the transportation company as cargoes of merchandise was subsequently applied by that company to aid the navigation of the Ella could not give rise to a maritime lien. I am satisfied that the libel cannot be sustained for the price of the coal for which bills of lading were signed. For the coal, however, which was furnished by the libelant in Philadelphia to the bunkers of the Ella for her use, I am of opinion, in view of all the evidence, that the libelant is entitled to a lien. The correspondence between the libelant and the transportation company, fairly considered, shows that that portion of the coal was furnished on a common understanding that a lien should thereby be acquired. Although the dealings, as shown by that correspondence, were directly between the libelant and the transportation company, the common understanding that the coal was to be furnished on the credit of the vessel, as well as on that of her owner, was sufficient to rebut the presumption of the non existence of a maritime lien. The evidence negatives the allegation that the claimant became, by virtue of the bill of sale of August 21, 1896, or in any other manner, a bona fide purchaser for value of the Ella. It is unnecessary to recapitulate the facts bearing on this point. It is not stated in the libel that the coal was furnished to the Ella in a foreign port or port of a state other than that in which she was owned at the time. No exceptions to the libel were filed; and leave is granted to the libelant to amend the libel in this particular. It appears that the bills of lading, and bunker receipts, if any, for coal furnished by the libelant to the transportation company during a part of June and the months of July and August, 1896, are lost or mislaid; and no evidence has been adduced to prove the amount of coal furnished during that period for the use of the Ella. Upon filing the amendment to the libel above suggested on or before April 23, 1898, an order of reference will be made to a commissioner to report to this court the amount due and owing from the transportation company to the libelant for such portion of the coal included in the schedule annexed to the libel as was furnished by the libelant in Philadelphia to the Ella for her use.

## In re PIPER ADEN GOODALL CO.

(District Court, N. D. California. April 6, 1898.)

No. 11,339.

## 1. SHIPPING—LIMITATION OF OWNER'S LIABILITY—ALTERNATIVE PRAYER.

The owner of an American steamer may, while denying all liability for any damage by reason of a collision, and consequent loss of cargo, make the alternative prayer that, if the court find the petitioner or steamer liable, the petitioner may then have the benefit of Rev. St. §§ 4283-4285, and the acts amendatory thereof, limiting the liability to the interest which the owner has in the vessel and cargo.

## 2. SAME.

Section 3 of the Harter act (27 Stat. 445), which refers to any vessel transporting goods "to or from any port in the United States," applies to vessels engaged in commerce on the Bay of San Francisco, and between different ports on the bay.

This was a petition by the Piper Aden Goodall Company, owner of the steamer Sunol, for limitation of liability.

Charles A. Shurtleff, for petitioner.

DE HAVEN, District Judge. On March 17, 1897, the American steamer Sunol, owned by the petitioner herein, and engaged in carrying freight and passengers between San Francisco and Vallejo, in this state, came into collision with the bark Olympic in the Bay of San Francisco; and as a result the steamer was thrown upon her side, filled with water, and her cargo became a total loss. Subsequently she was righted, and her injuries repaired. The petitioner then instituted this proceeding, in which, while denying all liability for any damage by reason of the collision, and consequent loss of the cargo of the steamer, and "claiming the right in this court to contest any liability therefor, either for itself or said steamer Sunol," the petitioner nevertheless claims the benefits of the provisions of sections 4283-4285 of the Revised Statutes of the United States, and the various acts amendatory thereof and supplementary thereto, providing for the limitation of the liability of shipowners, if the court should find the petitioner or steamer liable on account of said collision and loss of cargo. The alternative prayer of the petition is proper; there being no reason why the petitioner should not, in this proceeding, have the benefit of the statutes limiting its liability, if its contention that it is not liable at all should not be sustained. The evidence shows that the Sunol at the time of the collision was in all respects seaworthy, and properly manned, equipped, and supplied, and the accident was occasioned by fault or error in the management of the steamer. Section 3 of the act of February 13, 1893 (27 Stat. 445), known as the "Harter Act," provides:

"That if the owner of the vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel nor shall the vessel, her

owner or owners, charterers, agent, or master be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies."

In view of this provision of the statute, and the facts of this case as above stated, the only question for decision is whether such provision is applicable to vessels or steamers engaged in commerce on the Bay of San Francisco, and between different ports on such bay. There is no room for doubt or argument on this point. The language of the section just quoted is broad, and applies to the owner of any vessel "transporting merchandise or property to or from any port in the United States of America." This language cannot be construed otherwise than as meaning that the section shall apply to all vessels transporting merchandise to and from any port of the United States, situated upon any navigable waters, inland or otherwise, over which the federal government has jurisdiction. *The E. A. Shores, Jr.*, 73 Fed. 342. The petitioner is entitled to a decree that neither the petitioner nor the steamer *Sunol* is liable for any loss or damage occasioned by the collision referred to in the petition, and that the claimants take nothing in this proceeding.

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THE CHARLES E. WISWALL.

THE CHARLES E. WISWALL v. SCOTT et al.

(Circuit Court of Appeals, Second Circuit. March 2, 1898.)

No. 72.

1. MONOPOLIES—INTERSTATE COMMERCE.

A combination or trust between the owners of tugs operating entirely within the confines of a state is not a combination in restraint of trade or commerce among the several states or with foreign nations, so as to come within the condemnation of the statutes of the United States, although most of the owners held coasting licenses.

2. SAME—TOWAGE CHARGES.

One who requests and accepts the services of a tug for towage purposes cannot escape paying the reasonable value of the services rendered, on the ground that the owners of the tugs were members of an unlawful combination to raise prices. 74 Fed. 802, affirmed.

This cause comes here upon appeal from a decree of the district court, Northern district of New York, in favor of the libelants, twelve in number, who were severally owners of fourteen propellers or steam tugs which had rendered towage service to the dredge and her scows.

The suit was originally begun by the present libelants, and by eight others, who owned, respectively, nine additional steam tugs or propellers; but, it appearing that no services had been rendered by these last-mentioned nine vessels, the libel was amended accordingly, at final hearing. The court found that the remaining libelants were entitled to recover the value of the services rendered by their respective tugs, and referred it to a commissioner to ascertain, determine, and report the values of the services of the respective vessels over and above all payments on account thereof which may be established by the evidence; such values and the amounts of such payments to be determined upon the evidence already taken, and such additional evidence as may be produced and given by the respective parties before such commissioner. Abundant oppor-

tunity was given to all parties by the commissioner to take additional evidence, but none was offered. The commissioner thereafter reported the value of the services of the vessels over and above all payments, separately as to each vessel. He did not separately state the value of the services of each tug, and the amount of the payment thereon, but, inasmuch as it appears conclusively that \$310 was paid, it would seem that he found the total value of the services to be \$1,269.16. The value asserted in the amended libel was \$1,300. Claimant filed exceptions to the report, and, the report and exceptions coming on to be heard, the decree now appealed from was entered.

Worthington Frothingham, for appellant.

Isaac Lawson, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). The record is long and somewhat involved, and the commissioner's report has not set forth his findings with sufficient detail to be of much assistance to the court in determining just what he did find and upon what proof. This appeal may be best disposed of by taking up the assignments of error seriatim.

1. It is assigned as error that the libelants in the original libel and in the amended libel were a combination in the form of a trust or otherwise, or conspiracy in restraint of trade or commerce among the several states and with foreign nations; that libelants were engaged in an attempt to monopolize such trade or commerce; and that all the work alleged to have been done by them collectively or individually was under a contract or combination in such form, and that such contract or combination was void, and the libelants cannot maintain this suit either collectively or individually. We do not find any satisfactory evidence that these boats were "engaged in trade or commerce among the several states or with foreign nations." Most of them held coasting licenses, but there is not a scintilla of evidence to show that they ever did anything except to tow canal boats, barges, and such craft on the waters of the Hudson River above Poughkeepsie, and entirely within the limits of the state of New York. And it seems wholly unnecessary to inquire whether their owners had entered into any unlawful combination under the laws of the state. Finding that the rates of compensation for the services of themselves, their crews and their tugs, were becoming so low as to be unremunerative, uncertain, and irregular, they agreed with each other to charge for all services rendered by each vessel such sums as might be fixed by a tariff which they adopted. They called themselves the "Hudson River Tug-Boat Association," had a so-called superintendent to allot work among them, adopted a system of fines, etc., but they never became a legal entity either as a corporation, a joint-stock association, or a partnership. They made collectively no contract with the claimant, nor were they capable of making such contract. Each piece of towage service rendered was a transaction between the boat towing and the boat towed, with which the other boat owners in the association had nothing to do. Indeed, the libel (original and amended) is obnoxious to the objection of an improper joinder of libelants. Each should have brought a separate libel;

but since this objection was apparently not taken below, and the only result would be to increase the costs to be paid by the defeated party, it need not now be considered. The contracts upon which recovery was had were not with the so-called combination, but severally, with the several tugs rendering the service; the amount of compensation asked and found is the fair and reasonable value of such service; and the existence of the "combination" is no bar to its recovery. The defendant's proposition is that a person who has given work, labor, and services to another, upon that other's employment, may not recover their fair and reasonable value if, during the time that he rendered such services, he had been engaged with other men in like employment with himself in a combination to charge for such services as any of them might render according to some scale agreed upon by them. We know of no principle of law which calls for the adoption of such a rule, and are referred to no authorities which support it. The cases cited on appellant's brief are not applicable. The only contract considered in *U. S. v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 17 Sup. Ct. 540, was the contract between the members of the combination. The action in *Bank v. Owens*, 2 Pet. 538, was brought on the usurious note by the bank that exacted the usury; and the same is true of *Bank v. Lamb*, 26 Barb. 596. In *Leonard v. Poole*, 114 N. Y. 377, 21 N. E. 707, the court refused to take an accounting between two parties to an illegal transaction. In *Association v. Houck* (Tex. Sup.) 30 S. W. 869, it appeared that defendants Houck and Dieter had entered into an unlawful combination with other dealers in beer, which secured control of the trade. Plaintiff, by contract with defendants, bound itself to sell to the latter, and to no other dealer in the city of El Paso,—a contract which gave the combination a monopoly of the sale in the city of El Paso of the product of plaintiff's brewery, and materially assisted the parties to the illegal contract in carrying out their object of controlling the market for the sale of beer in that city. The court held that if the plaintiff, when it made its contract with Houck and Dieter, knew of the existence of the combination, it was not an innocent seller, and could not recover, since its contract "is calculated materially to aid the purchasers in effecting their unlawful design." In *Peck v. Burr*, 10 N. Y. 294, it was held that, where a contract is void because of its illegality, there can be no recovery for services rendered under it upon a quantum meruit. But there is nothing illegal about the several contracts sued upon here, which are to render towage services in consideration of the payment of the reasonable value of such services. In *Arnot v. Coal Co.*, 68 N. Y. 558, it was held that "the agreement of the B. C. Co. (of which plaintiff was an assignee) not to sell to others, it knowing that the object of defendant was to create a monopoly, and that this was one of the means of averting competition, made it a party to the illegal scheme of defendant." This is very far from supporting the proposition that had the Pittston & Elmira Coal Company sold 1,000 tons of the coal thus purchased to a local dealer in New York City, at fair market rates, it could not recover.

On the other hand, the principle is well recognized by the authorities that a promise remotely connected with an illegal act, and founded on a new consideration, is not tainted with the illegality, although it was known to the party to whom the promise was made, and although he was the contriver and conductor of the illegal act. One illustration given in *Armstrong v. Toler*, 11 Wheat. 258, is this:

"The man who imports goods for another, by means of a violation of the laws of his country, is disqualified from founding any action upon such illegal transaction for the value or freight of the goods. \* \* \* But, after the act is accomplished, no new contract ought to be affected by it. It ought not to vitiate the contract of the retail merchant who buys these goods from the importer."

The test, whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If he cannot open his case, without showing that he has broken the law, a court will not assist him. But if he does not claim through the medium of the illegal transaction, but upon a new contract bottomed on independent consideration, he may recover. *Swan v. Scott*, 11 Serg. & R. 155; *Armstrong v. Toler*, 11 Wheat. 258; *McBlair v. Gibbes*, 17 How. 236. In the case at bar libelants clearly did not require the aid of the alleged illegal transaction to establish their case.

2. It is further assigned as error that "there was on the trial no sufficient proofs of the value of the services alleged to have been performed by the libelants or either of them, and no proof excepting of such value as was made and established by the libelants themselves while engaged in such combination," etc. The record shows that as to each item of charge there was evidence that the service rendered was worth the price charged, and, as much of the work done by the different scows was similar in character and quantity, many of the items of charge are supported by the evidence of several witnesses. The witnesses stated that, in testifying to the value of the services, they did not give consideration to the schedule of prices adopted by the association. The mere fact that in some instances the sum testified to as the fair and reasonable value of a particular service and the price for such service named in the schedule were identical is not controlling. It is not inconceivable that men may combine together to ask a perfectly fair price for their work. Co-operation does not necessarily imply extortion. We have not seen nor heard the witnesses, but the commissioner, who had that opportunity, reached the conclusion that their estimate of value was more nearly correct than that of the single witness called by claimant. As the record discloses evidence to support his finding upon this disputed question of fact, the decree should not be reversed on the ground assigned. Appellant's brief refers to an instance where the tug *Andrews* charged five dollars for towing the dredge from Troy to West Troy, when the regular charge was two dollars, the additional three dollars being charged for the reason that Wiswall (the owner of the dredge) had previously towed with a boat outside of the association. There

is no persuasiveness, however, to any such evidence, in view of the fact that the owner of the *Andrews* is not included among the libelants; that no claim on behalf of that tug is made; and that whatever charges are made, testified to, and allowed for towing from Troy to West Troy and vice versa are at the rate of two dollars only.

3. It is further assigned as error that judgment was rendered against the sureties for this claimant in the original libel wherein the Hudson River Tug-Boat Association was libelant, and that such sureties were discharged by the proceeding allowing the libel to be amended and the libelants to proceed therein individually. It appears, however, that the Hudson River Tug-Boat Association was not the libelant in the original libel. Twenty different persons were individually libelants, of whom eight have been removed by amendment, having no claims. In other words, the suit began with twenty individual libelants, and ended with twelve of them, the obligation of the sureties being to answer the decree of the court. The assignment of error is unsound.

4. The last assignment of error (the sixth) is the general one that judgment should have been given for claimants instead of for libelants. It has been disposed of with the other assignments.

The decree of the district court is affirmed, with interest and costs.

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THE LAMINGTON.

DUFF v. MERRITT.

(Circuit Court of Appeals, Second Circuit. April 7, 1898.)

Nos. 74-102.

1. SALVAGE—VALUE OF PROPERTY SALVED—COMPENSATION.

In arriving at the true value of a vessel sold in salvage proceedings, all necessary expenses in repairing and placing her before intending purchasers should be deducted from the amount realized on the sale, and the salvors' compensation based on the remainder.

2. SAME—REDUCTION BELOW QUANTUM MERUIT.

While the courts are anxious to encourage salvage enterprise by liberality, when possible, yet the business is a speculative one, and their compensation is subject to reduction even below a fair quantum meruit when otherwise nothing would be left for the owner.

3. SAME.

Where arduous and expensive services to a vessel stranded on the Long Island coast were rendered by a wrecking company, with a cash outlay of \$5,000 for outside help employed, and the cargo lightered to New York, but by reason of its perishable nature, and the way in which the vessel stranded, the amount salvaged was but \$17,160.32,—a small part of the property,—the measure of success must be considered, in fixing the award, and 50 per cent. of the value of the property salvaged is sufficient.<sup>1</sup> 80 Fed. 159, reversed.

These causes come here upon appeals from decrees of the district courts in the Eastern and Southern districts of New York, respectively, upon the following facts:

On February 4, 1896, the British steamer *Lamington*, 1,224 tons register, inward bound with a full Mediterranean cargo of fruit, stranded on the south shore of Long Island, about a mile east of Blue Point life-saving station. The

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<sup>1</sup> See note at end of case.



news of her disaster reaching New York, the libelants, who maintain an extensive wrecking plant, were requested to repair to her relief. The service which they thus undertook to render was, as one of libelants testifies, "not done under any formal contract, but on the basis of salvage,—no cure no pay." The following excerpt from the opinion of the court in the Eastern district (in the libel against the vessel) sufficiently sets forth the details of the service rendered: "Merritt proceeded to the Lamington with a tug, and arrived shortly after two o'clock in the afternoon of the 5th, and took charge of the operation. An anchor was got out, and strain put upon it, but it was impossible to move the steamer. The weather during the 6th and 7th was severe, and work was impossible. On the 8th the sea had moderated; the steamer having meanwhile been driven over the outer bar onto the main beach. Then the salvors boarded the ship, and commenced to rig spars and cargo gear for the purpose of lightening the ship. From that time until the 25th, when the weather would permit, the salvors were engaged in lightening the ship, and saving such part of the cargo as was worth saving, which was placed in barges brought from the city of New York, and transported therein to the city of New York, and there sold. [But a small part of the cargo was saved. A large part of it was thrown overboard by the salvors where the steamer lay. A large part of the remainder that was brought to New York in the ship had to be sent out to sea again and dumped.] On the 26th, at high tide, the vessel was pulled off the bar, and taken to New York. The labor involved in this service was hard; the weather being very cold, and much of the time very stormy. After the ship grounded on the shore, the labor was, for the most part, confined to lightening the vessel, and transporting to New York such of the cargo as was undamaged." The property belonging to salvors, or hired by them, employed in the service, amounted to nearly \$250,000, but it was not all exposed to risk at the same time. About one-quarter of the salvaged cargo was lightened to New York, and the rest was brought in the ship itself. The whole of the salvaged cargo was entered in the New York custom house, and was sold by auctioneers. The ship was first taken to libelant's wharf at Staten Island, and thereafter to Brooklyn, where she was libeled, and subsequently sold for \$9,100, and proceeds paid into court. It was because of the circumstance that the ship and its proceeds came into the Eastern district, and the cargo and its proceeds came into the Southern district, that libels were filed in both courts. The proceeding against the vessel was the first to come on for hearing. 80 Fed. 159. The court reached its conclusion by considering the proceeds of ship and cargo together, fixing an award which it thought proper for the whole, and dividing that between ship and cargo proportionately to the respective gross proceeds thereof. The amount thus awarded against the vessel as salvage compensation amounts to \$6,550.92. Inasmuch as the total amount to which the court in the Eastern district decided that the salvors were entitled is \$19,020.79, it would follow that the amount thereof chargeable to the cargo would be \$12,469.87. The amount of salvage thus found by the district court is what it determined to be the "value of the services upon a quantum meruit," and in addition thereto the sum of \$1,500 as a "salvage compensation for their risk and their trouble." When the libel against the proceeds of the cargo came on for hearing in the Southern district, that court declined to go into the question of the total amount of salvage award, on the ground that such question had been decided in the Eastern district, and was then on appeal. It found, however, that the gross amount realized from the sale of cargo by the auctioneers was \$17,321.81, that the expenses immediately connected with the auction sale itself reduced this amount to \$14,147.59, and also that, besides the expenses immediately connected with the auction sale, there were numerous expenses, such as unloading, working over cargo, re Coopering, etc., which ought also to be deducted, since without such expenses the cargo either could not be sold at all, or would not have brought the price it did. Deducting these, the court found the total net proceeds available to be \$11,405.46, and decreed the entire amount to salvors, but without costs. The claimants have appealed in both cases.

J. Parker Kirlin, for appellants.

Robert D. Benedict, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). It will be most convenient first to ascertain what is the total amount salvaged as the result of the service rendered. Inasmuch as the libelants have not appealed, it may be assumed that the district judge correctly held as to the expenses which should be deducted in order to determine the amount of cargo actually salvaged. It will be remembered that the ship sold for \$9,100. It was held in the Eastern district (and no one disputes the finding) that the marshal's expenses and commissions should be deducted, leaving the amount \$8,962.80. There are other expenses, however, which are equally a charge against the proceeds, superior to the lien of salvors, for the reason that, if they had not been incurred, this sum would not have been realized at the sale. What the vessel would bring as she lay at libelants' wharf, Staten Island, on February 27th, just as she had been torn off the beach, leaking, and with her holds full of debris, and what she subsequently brought in Brooklyn because of these disbursements, are manifestly two widely different sums. These items are as follows: Inward pilotage, \$78.34, and \$90.54 for dues and fees paid the collector of the port upon entering the vessel at the custom house, do not seem to be disputed; nor does the sum of \$1.90 paid to the British consul upon entry of the vessel. There was paid \$172 for towing required to get the vessel from Staten Island, where she was first taken, to Brooklyn, and into dry dock. There was paid \$12 for running lines from the vessel to the wharf while she was at Brooklyn; \$260 for services of a watchman to keep thieves and others from making depredations, and in order to protect her against loss from other causes; and \$123 for wharfage. It was necessary for her to be alongside a wharf while discharging, and while not on the dry dock. An item of \$1,207.04 paid for the use of dry dock represents the charges for two separate dockings at the Erie Basin. The first docking was necessary in order to stop the leaks which had been caused by her stranding, and to keep the vessel afloat, and to enable temporary repairs to be made. The second docking was necessary in order to place her in a position where her bottom and hull could be examined by intending purchasers after it had been finally determined to sell her; all efforts at an adjustment without suit having failed. An item of \$1,089.08 was paid for the making of temporary repairs, which were necessary in order to keep the ship afloat, and for cleaning the holds, which was necessary in order that the engines and bottom of the vessel could be examined by intending purchasers. There was also paid \$96 for ballast logs, which were required to keep the vessel from capsizing after her cargo had been removed; her ballast not being such, or in such condition, as to prevent this. These items aggregate \$3,129.90, to which the usual commission on disbursements, 2½ per cent. (\$78.24), should be added, making \$3,208.14. There is no dispute as to the reasonableness of the amount of any of these charges, and it would certainly seem that they would have to be made by some one, in order to secure any substantial price for the property offered for sale. They are represented in the \$9,100, and that sum, less these items, was the value of the salvaged vessel as she was brought to libelants' wharf at Staten Island. Logically, they are disbursements

properly to be made by salvors, and repaid to them independent of salvage, as was done with the towage to place of sale in the case of *The William Smith*, 59 Fed. 615. That the money to pay these disbursements was in fact advanced by owners' agents is no ground for declining to repay them in their proper order. And see *The Waterloo*, 1 Blatchf. & H. 114, Fed. Cas. No. 17,257. Deducting from the \$9,100 the marshal's charges (\$137.20) and these additional disbursements (\$3,208.14), there is left \$5,754.66 as the true value of the salvaged property represented by the ship; and, since the district judge in the Southern district has found that \$11,405.66 is the true value of the salvaged property represented by the cargo, it follows that the total amount awarded by the decrees of the two courts (\$6,550.92 + \$11,405.66), viz. \$17,956.58, actually exceeds the total amount salvaged (\$5,754.66 + \$11,405.66), viz. \$17,160.32.

In *The Bay of Naples*, 1 C. C. A. 81, 48 Fed. 737, this court held that the amount of a salvage award might be reviewed and readjusted "if the decree below does not follow in the path of authority, even though no principle has been violated or mistake made," and the award made therein by the district court was materially reduced. In the case at bar the amount awarded seems not only to be excessive, but also to be arrived at by the application of a rule of compensation not warranted by authority. The results of a somewhat comprehensive examination of the salvage cases contained in the reports of the federal courts have been, for convenience of future reference, embodied in a note annexed to this opinion. While it appears most clearly that, since the old hard and fast rule of "50% of a derelict" was abandoned, the award is determined by a consideration of the peculiar facts of each case, it is none the less true that the admiralty courts have always been careful not only to encourage salvaging enterprise by liberality, when possible, but also to recognize the fact that it is, after all, a speculation, in which desert and reward will not always balance. It is unnecessary to rehearse here the various ingredients of a salvage service which are to be considered in determining award. The service was promptly rendered. It was arduous, long continued, and meritorious. It involved the salvors in considerable expense, not only for the wages and support of their regular crews, but also for the hire of other assistance, to the amount of \$5,000. It exposed valuable property to risk. It was skillfully performed, and was rendered by salvors who maintain a most expensive plant, ready at any hour of the day or night to afford aid to vessels in distress. It happened, however, by reason of the perishable nature of the cargo, and of the way in which the vessel stranded, and the condition of wind and tide, that the skill and exertions of salvors were able to save but a small part of the property at risk. \$17,160 must be but a low percentage of the value of a 1,200-ton steamer, carrying a full Mediterranean cargo. To a certain extent, salvors were successful; to a certain extent, they failed; and it would seem that their measure of success should not be overlooked, if their business be indeed a speculative one, which no one disputes. "Regard is always paid to the value of the property saved, and an award will not be made of such an amount as to deprive its owners of the benefit of the service, with

the view of recouping to salvors their losses. It is one of the risks they run, that they may not be indemnified for their sacrifices. It is said that the court of admiralty has hardly ever, and then only in the case of a derelict, awarded as salvage more than half the value of the property saved." *Carv. Carr. by Sea*, § 345. In the opinion filed by the district judge in the Eastern district against the ship, it is said, "No case has been found where, in awarding compensation for salvage services, the salvors have not been awarded more than the value of the services upon the basis of quantum meruit;" and therefore the conclusion was reached that something more than \$17,520, which was found to be the value of the services, should be given. Incidentally it may be noted that we find no sufficient proof in the record that \$17,520 was the "value of the services on the basis of quantum meruit." The amount is arrived at by charging for the services of the various steam vessels and other property used by salvors "at their regular schedule rates." But they conduct a wrecking business. They do not expect to be able to employ all their vessels all the time. They often have to tie up for considerable periods, waiting for a job, and the schedule rates are undoubtedly arranged to cover these elements of loss. Moreover, the authorities do not support the conclusion of the district judge, although it is quite true that in most of them sufficient was saved to pay for the services on the basis of a quantum meruit, and leave a reasonable surplus for salvage bonus, and the owner as well. In three reported cases the entire proceeds were given to the salvors. The circumstances, however, were exceptional, and totally different from those in the case at bar. In *The Zealand*, 1 Lowell, 1, Fed. Cas. No. 18,205, a derelict was picked up at sea, and brought into port. Her proceeds amounted to \$206 only, and there was evidence that the owner had been informed of the proceedings, and refused to appear. In *Llewellyn v. Two Anchors & Chains*, 1 Ben. 80, Fed. Cas. No. 8,428, the value of the property was \$107, and notice of the proceedings was brought home to the owner, who failed to appear. In *The Burlington* (1896) 73 Fed. 258, the proceeds of the sunken barge amounted to about \$1,100, not much more than one-fifth of what it had cost the salvors to raise her, and they were given the whole amount. The *Burlington*, however, had burned and sunk as a result of the fire. The owner abandoned her to insurers, and collected a total loss. After sinking, she shifted position so as to become an obstruction to navigation. She lay in the Detroit river, on the Canadian side; and under a Canadian statute the minister of marine ordered her removal, and made an agreement therefor,—the person removing to accept whatever he might recover from the wreck in full payment for his services. That the compensation of salvors is subject to reduction, even below a fair quantum meruit, when otherwise nothing would be left for the owner, is a proposition approved in the opinions of the courts in the following cases, although in none of them are the facts exactly like those in the case at bar. Except a few found in the note, these are all the cases in the federal reports where the smallness of the property salvaged is discussed in connection with the amount of the award:

In *The Waterloo* (1830) Blatchf. & H. 114, Fed. Cas. No. 17,257, the vessel, abandoned at sea, was brought into port by salvors. Betts, J.:

"The tendency of a preponderance of decisions is manifestly to consider 50% the ultimatum of salvage to be allowed in cases of derelict. \* \* \* The claims of libelants in this case, if allowed, would absorb the whole proceeds of ship and cargo. This the courts will not sanction, except in cases where the property saved is so small in value as to be necessarily all required to cover charges, and make any compensation to the salvors. The doctrine of salvage derives its support from the consideration that, however munificent the award may be to the salvor, something—a residuum—is left to the owner. His rights are not to be deemed derelict. One of the most satisfactory reasons for allowing a discretion to the courts in this respect is that they can reward, not only according to the merit of the services, but also in proportion to the amount saved. I have met with no instance in which the whole amount saved, and an amount equal to what was preserved in this case, has been all of it taken from the owner. The ship and cargo sold for \$39,000; custom-house duties were \$22,000; leaving a balance of \$17,000 only. Courts, in so doing, would be instituting the rule of nature, or rather of barbarism, in devoting to the first finder whatever property the exigencies of the owner had wrested from him, or compelled him to desert. \* \* \* The main effort of libellant's counsel has been to throw the whole of the duties on the owner, and leave the salvors the same degree of compensation that would be allowed if the gross proceeds of the property represented its net avails. \* \* \* Enough to say that nothing more can be considered saved in this case, out of which salvors may be rewarded, than what remains after satisfaction of the duties. Whether that proportion goes to the government, as the price for the enjoyment of the saved property, or perishes at sea, the residue is all that the exertions of the salvors have placed at the disposition of the court."

The award was 45 per cent. of the net proceeds, which, however, was apparently sufficient to pay the quantum meruit, and more.

In *The Adolphe* (1837) 19 Am. Jur. 219, Fed. Cas. No. 17,712, the property saved was found on a vessel abandoned in a harbor on an uninhabited coast (Patagonia). "The services rendered in this case \* \* \* were laborious, but not particularly perilous, except the dangers which threatened the *Triton*, which have been stated, but which were guarded against by means of the cables and anchors of both vessels, though with much vigilance and labor." Referring to the "liberal compensation which it is the policy of the admiralty law to allow for salvage," the court says:

"I regret that it is not in my power to give this compensation to the salvors in this case without losing sight of the owners of the property saved. This I have no right to do. The salvors had no right to place the owners of this property in a predicament which would subject them to a loss of all their property, in expenses, costs, and salvage. Something should remain to the owners of the property saved, as well as something given to those who volunteered their services in saving it. [The gross amount of sales was \$6,797; customs duties, \$737; and marshal's fees and expenses, \$586.] Considering the small amount saved, compared with the labor and services rendered, I have felt constrained to exceed the maximum, and give 60%, after deducting duties, leaving costs and expenses on the remainder."

In *The Joseph Stewart* (1838) Crabbe, 218, Fed. Cas. No. 13,070, there were 13 claimants for salvage, including the owners of the schooner *Caspian*, which found the schooner *Joseph Stewart* abandoned by her crew, having nearly two feet of water on deck, partially stripped, and with auger holes in her bottom. The court says:

"The difficulty in this case arises, not in estimating the nature and value of the service, nor in ascertaining \* \* \* a rule of proportion for the reward of such a service. \* \* \* Here the fund is so small that the whole of it, distributed among these 13 salvors, could hardly be considered an extravagant reward for their service. Yet we have no authority to treat this as a derelict. \* \* \* Indeed, the libelants claim as salvors, not as finders of property that has no owner. They ask for salvage,—for a reward out of the property saved, for their services in saving it. The very nature of this claim is a demand on the owner for a reasonable compensation for the service rendered him in rescuing his property from total loss; but, if the salvors are to take all, the loss would be as total to the owner as if his property had been swallowed up by the sea. It would be manifestly absurd to call upon the owner with such a demand,—to restore him no part of the property saved, but to tell him they must have all for saving the rest. He is to pay for saving, when nothing is saved. Every reason and principle applied to a claim for salvage implies that a part of the property saved is to be awarded to the salvors, and the rest restored to the owner. Heretofore, under even the most desperate cases, by far the greater part was restored to the owner. Here is our difficulty in this case. After deducting the expenses of these proceedings, \* \* \* and allowing salvors a very moderate, perhaps an inadequate, compensation, \* \* \* there will be little left."

The total gross proceeds were \$926.40, of which the salvors were awarded 50 per cent. (about \$460), and the wreck charged with all the costs, which left some \$200 for the owner.

In *The Amethyst* (1840) 2 Ware, 28, Fed. Cas. No. 330, three schooners fell in with a derelict, and undertook to tow her towards a harbor. She broke away in a storm, and was driven on a reef, and wrecked. At risk of life and property, they got something in the way of cargo out of her. The court says:

"The whole mass of property saved is small, \* \* \* \$841, the largest part of one moiety of which is exhausted by the necessary expenses of getting the property ashore and securing it after the wreck went on the rocks. So that, leaving but a pittance for the owners, the compensation of the salvors will scarcely amount to a quantum meruit for the laborious and dangerous service of rescuing the property from the waves \* \* \* and the piratical shoresmen."

The award was \$400.

In *The Carl Schurz* (1879) 2 Flip. 330, Fed. Cas. No. 2,414, a sunken vessel was raised at an actual expenditure of \$568.65. The court thought the salvor had expended more than was necessary, but that circumstance is not made the ground of decision. The vessel brought only \$792, which was the sum in the court to answer costs, and for distribution between the salvor and owners. The sale took place at a most unfavorable time, but that was an error of judgment for which the court held neither party to blame. The libellant claimed that under no circumstances should he be allowed less than his actual expenditures of money; the court, however (Hammond, J.; Brown, J., concurring), overruled this claim, allowing only 50 per cent. of the proceeds left after payment of costs; the court saying:

"The libellant and the owners must mutually bear their respective share of the loss in value by the sale. If the libellant has been unfortunate, and has spent his time and money in saving a property not worth the expenditure he made, or if, having saved enough to compensate him, it is lost by the uncertainties of a judicial sale for partition, so to speak, it is a misfortune not uncommon to all who seek gain by adventurous speculations in values. The libellant says in his testimony that he relied entirely on his rights as a salvor. This being

so, he knew the risk he ran, and it was his own folly to expend more money in the service than his reasonable share would have been worth under all circumstances and contingencies. He can rely neither on the common-law idea of an implied contract to pay for work on and about one's property what the work is reasonably worth, with a lien attached by possession for satisfaction, nor upon any notion of an implied maritime contract for the service, with a maritime lien to secure it, as in the case of repairs, or supplies furnished to a vessel, or the like. In such a case the owner would lose all if the property did not satisfy the debt, when fairly sold. But this doctrine has no place in the maritime law of salvage. It does not proceed upon any theory of an implied obligation, either of the owner of the res, to pay a quantum meruit, nor actual expenses incurred, but rather on that of a reasonable compensation or reward, as the case may be, to one who has reduced the res from danger of total loss. If he gets the whole, the property had as well been lost entirely, so far as the owner is concerned. The *Joseph Stewart*, *Crabbe*, 218, Fed. Cas. No. 13,070. I think the public policy of encouragement for such service does not, of itself, furnish sufficient support for a rule which would exclude the owner from all benefit to be derived from the service. The property is saved for him, not the public, and he cannot be said to have impliedly authorized his whole property to be exhausted in saving it, particularly where he has not abandoned it, and it is not derelict."

In *Hatrick v. The Spanish Bark* (1880) 11 Fed. Cas. 831, the vessel was found dismasted, derelict, and helpless, near the shore of a dangerous coast, at a great distance from port. The court says:

"This is one of those unsatisfactory cases of salvage claim, \* \* \* where, on account of the greatly disproportioned value of labor and services rendered as decided by any other criterion, it is impossible to compensate the salvors with the liberality which should always control such awards, and be an inducement for others to render like services on similar occasions. \* \* \* The salvaging vessel undoubtedly forfeited her insurance, and increased the risk of her voyage. The actual expense incurred by the detention was very considerable, and sufficient to justify a much more liberal compensation than can be paid for the property saved. It is shown that the propeller, during the services, was broken; thereby entailing an extraordinary expense, which it is claimed should be paid by the salvaged property. The entire property salvaged would be insufficient to compensate fully for the loss claimed to have been caused. \* \* \*"

The net proceeds in the registry were \$2,000, and the award made was \$750; the court saying:

"This is as large a compensation as can, under the circumstances, be reasonably allowed. This will be an unusually large percentage, according to awards for like services, yet necessarily very small, when the actual amount of labor performed and property expended is considered."

In *The Edwards* (1882) 12 Fed. 508, the property salvaged was found in the hold of a bark wrecked on Alacran reef, abandoned and gone to pieces. It was saved by diving by naked divers in 2 to 2½ fathoms, was boated 7 miles to the salvaging vessel, and carried 500 miles to port. Time, one week.

"The value saved, compared with the labor of saving it, is small; being, after payment of expenses and duties, but about \$700. \* \* \* It is true that in rendering a salvage service the salvor assumes the risk of failure, and his salvage depends upon his success, and the amount of property saved; yet when there is enough to fully compensate him for time and labor, and leave a reasonable proportion for the owner, he should certainly be awarded that, if the amount will allow no more."

In *The Clara E. Bergen* (1882) 21 Fed. Cas. 816, it is said:

"It must ever be borne in mind that the salvor depends wholly for any compensation upon success. If he fail,—never mind what his enterprise, labors,

sacrifices, damage to property or injury to person,—he can get nothing. \* \* \* He must save before he can ask to share what is saved. The owner, in fact and in law, can only be called upon to give to the salvor a portion of that very property which the salvor has saved for him; to restore only a portion of that which, but for the salvor, would have been lost to him."

In *The Cairnsmore* (1884) 20 Fed. 523, Judge Deady says:

"Allowing that libelants were engaged in the work of saving this property 40 days, \$5 a day for each of them during the whole period, or \$2,400 in all, in addition to the \$383.82 in money which they expended for teams on the beach, etc., seems to me a very reasonable compensation for their care and labor. But if the property is only worth \$2,500, as alleged by these claimants, there would not be that much left after paying the costs of the proceeding; whereas, if it be worth \$8,000, as alleged by libelants, \* \* \* the one-half or one-third of its value might be sufficient. \* \* \* The reward for salvage service is affected, among other things, by the value of the property saved. This is one of the risks which wreckers take."

Award postponed until after sale.

In *The L. W. Perry* (1896) 71 Fed. 745, a schooner laden with tan bark, water logged and derelict on Lake Michigan, was picked up by a passenger steamer, which departed from her voyage, and was detained one day by the service. One hundred dollars a day would be her actual expense, aside from the value of the service rendered. The total net proceeds were \$335. The court says:

"Without regard to the element of reward which is intended by the salvage allowance, it is manifest that remuneration *pro opere et labore* would be in excess of the fund here, if such basis were allowable. \* \* \* While salvage is of the nature of a reward for meritorious service, and for the determination of its amount the interest of the public, and the encouragement of others to undertake like service, are taken into consideration, as well as the risk incurred and the value of the property saved, and when the proceeds for division are small the proportion of allowance to the salvor may be enlarged to meet these purposes, nevertheless the doctrine of salvage requires, as a prerequisite to any allowance, that the service 'must be of some benefit to the owners of the property saved; for, however meritorious the exertions of alleged salvors may be, if they are not attended with benefit to the owners they cannot be compensated as such.' Abb. Shipp. (London Ed., 1892) 722. The claim of the libellant can only be supported as one for salvage. It does not constitute a personal demand, upon quantum meruit, against owners, but gives an interest in the property saved, which entitles to a liberal share of the proceeds."

After citing *The Waterloo*, *supra*, and *The Joseph Stewart*, *supra*, the court concludes:

"One of the grounds for liberality in salvage awards is the risk assumed by the salvor,—that he can have no recompense for service or expense unless he is successful in the rescue of property, and that his reward must be within the measure of his success. He obtains an interest in the property, and in its proceeds when sold, but accompanied by the same risk of any misfortune or depreciation which may occur to reduce its value. In other words, he can only have a portion in any event; and the fact that his exertions were meritorious, and that their actual value, or the expense actually incurred, exceeded the amount produced by the service, cannot operate to absorb the entire proceeds, against the established rules of salvage."

The award made was 75 per cent. of the net proceeds.

These authorities lend no support to the proposition that salvors are to be paid full value, *pro opere et labore*, although by so doing there is practically nothing left for the owner. On the contrary, the salvage award should be fixed upon due consideration of every ele-



ment in the case, and the sum actually expended by salvors is but a single element. The salvor risks every dollar thus laid out upon a chance. In the event of complete nonsuccess, he loses all. There is no reason why, in the event of partial nonsuccess, he should not lose a part. And it would seem that this principle may with peculiar propriety be applied in the case of a permanent wrecking organization. The volunteer, who on some chance occasion lends valuable aid to a vessel in distress, may never have another opportunity to act as salvor. If ill luck or the strict application of well-recognized rules reduces his award for most meritorious services to a wholly insufficient pittance, it would be a rare stroke of luck which would bring him the opportunity a few months later to save another vessel, whose value would insure him a sum greatly in excess of what it cost to save her. But with a permanent wrecking company there is the constant opportunity for such equalization, especially since the courts have approved the rule that liberal salvage is to be awarded to such organizations, to encourage professional salvors to maintain expensive plants, and keep their vessels manned and equipped for the rescue of distressed vessels. *The Albion Lincoln*, 1 Lowell, 71, Fed. Cas. No. 144. And see the opinion of this court in *The St. Paul* (handed down herewith) 86 Fed. 340. The two cases now before this court well illustrate the above suggestion as to equalization. The same salvors lose part of their expenditures on the *Lamington*, but receive several times their expenditures on the *St. Paul*. The courts were at first inclined to look with disfavor upon the claims of wrecking companies to salvage reward, but since the decision in *The Camanche*, 8 Wall. 448, the contrary rule has prevailed. The skill that comes from long experience, joined with more powerful machinery, and devices specially adapted to the purpose in hand, are of more service to an imperiled vessel than is the aid which may be expected from a chance rescuer. To provide such skill, machinery, and appliances, and to keep them always ready for instant service, though they may be called for but occasionally, is now regarded as a meritorious act, calling for a liberal award. *The Caroline* (1857) 6 Am. Law Reg. 222, Fed. Cas. No. 16,956; *The Vickery* (1858) 23 Fed. Cas. 330; *The Vindicator* (1881) 7 Fed. 236; *Id.* (1882) 13 Fed. 127; *The Egypt* (1883) 17 Fed. 369; *The R. D. Bibber* (1887) 33 Fed. 55; *The Andrew Adams* (1888) 36 Fed. 205; *The City of Worcester* (1890) 42 Fed. 916.

It remains only to determine what amount should be awarded in this case. Leaving out of view for the moment the amount expended by salvors, the services would seem to rank with those rendered in reported cases where 15 to 20 per cent. was paid. But we may not overlook either the amount expended or the amount salvaged. Both are elements of importance. And the most cursory examination of the authorities shows that the percentage of award moves up or down as these increase or diminish. There was a cash outlay by libelants of over \$5,000, made expressly for the prosecution of this particular adventure, and which thus stands on a different footing from the expenditure for wages and maintenance of officers and crews, which would have to go on whether there was

a salvage expedition on foot or not. This special expenditure may properly be considered in estimating the amount of award, and, as is stated in the cases cited supra, the salvors should be made whole for what their service cost them, provided that can be done, and a reasonable amount preserved for owners. Taking all these elements into consideration, and in view of the suggestion in appellant's brief that salvors should receive their cash outlay, and something reasonable in addition, not exceeding \$3,000, we have reached the conclusion that 50 per cent. of the net proceeds (\$17,160.32) would be a proper award in this case. Inasmuch as libelants would be entitled to costs in the district court, and the claimants to costs of these appeals, such costs may be held to balance each other. The decrees of the district court are reversed, and causes remitted, with instructions to decree in accordance with this opinion, but without costs.

## NOTE.

**Salvage Awards in the Federal Courts.**

(A note by the court, filed with the opinion in *Merritt v. The Lamington*, decided in court of appeals, Second circuit, April, 1898.)

Although most of the reported cases bearing on the questions presented in *Merritt v. The Lamington* will be found in this list, it is by no means a complete summary of all salvage causes. The omissions include all cases of rescue or recapture from pirates or alien enemies; some cases where the award has been small, the service being considered as little better than a mere towage or pilotage service; some of the very numerous Florida Reef cases, enough being cited to show the prevailing rates; some cases of salvaging from fire; some cases where there have been reductions for some special impropriety or carelessness by salvors; some where the report gives no details of the service rendered, or the peril; and some, such as *The Helder Borden*, 1 Spr. 144, Fed. Cas. No. 6,600, which are unusually peculiar in their circumstances. With these exceptions, it is thought that the list is reasonably exhaustive.

**I. FIFTY PER CENT. AND OVER.**

- 1797. *The Harmony*, 1 Pet. Adm. 34, note, Fed. Cas. No. 3,089. Ashore on Bahama bank, abandoned. "With very great labor, difficulty, and danger, brought to New York." Amount salvaged does not appear. Award, 50 per cent.
- 1803. *The Jefferson*, 1 Pet. Adm. 46, Fed. Cas. No. 9,793. In distress at sea. Abandoned, but not derelict. Salvors, after great peril and exertion, brought her into New York. Time, 2 weeks. Amount salvaged does not appear. Award, 50 per cent.
- 1803. *The Blaireau*, 2 Cranch. 240. A ship and cargo abandoned at sea in a sinking condition by its crew, and brought 3,000 miles into port, without boats or anchors, at great risk. Amount salvaged, \$60,274. Award, 60 per cent.
- 1803. *The Bellona*, Bee, 193, Fed. Cas. No. 3,428. Derelict and disabled 600 miles from land, in a tempestuous time of the year. Value salvaged, "considerable." Award, 50 per cent.
- 1831. *The Galaxy*, Blatchf. & H. 270, Fed. Cas. No. 5,186. Derelict schooner. No peculiar circumstances. Amount salvaged, \$4,000. Award, 50 per cent.
- 1833. *The Henry Ewbank*, 1 Sumn. 400, Fed. Cas. No. 6,376. Ship derelict on the high seas. "No uncommon perils or difficulties, or any distinguished gallantry." Amount salvaged, \$31,488. Award, 50 per cent.
- 1833. *The Boston*, 1 Sumn. 328, Fed. Cas. No. 1,673. Schooner derelict, or quasi derelict. "Hazards encountered by salvors not very great." Time, "short." Amount salvaged, \$9,400. Award, 50 per cent.

1836. *The America*, 1 Fed. Cas. 596. Vessel ashore and broken up. Facts not given. Award, 25 per cent. on cargo salvaged dry, 50 per cent. on cargo salvaged damaged, 60 per cent. on cargo salvaged by diving.
1836. *The Ajax*, 1 Fed. Cas. 252. Ship lost on Florida reef. Part of the cargo salvaged dry and uninjured, part wet and damaged. Awards, 35 per cent. on the dry, 50 per cent. on the wet, and 50 per cent. on ship's materials.
1836. *The Dorothea Foster*, 1 Adm. Rec. 368, Fed. Cas. No. 429. Salving portion of cargo and materials from a wreck. "Much difficulty and some danger"; "a case of much merit." Amount salvaged, \$9,208. Award, 50 per cent.
1834. *The Sea Flower*, 1 Adm. Rec. 149, Fed. Cas. No. 430. Brig aground on a reef, badly broken up. Supposed likely to go to pieces in six hours. Cargo, quicklime, which would all be lost as soon as she bilged. "The cargo salvaged \* \* \* of little value. \* \* \* Ship not worth much. \* \* \* Compensation must necessarily be small when divided between 2 vessels and 20 men, but there are no peculiar circumstances attached to this case which would seem to require that it should be taken out of the ordinary rule. \* \* \* Moiety is usual allowance under such circumstances." Award, 50 per cent.
1835. *The Lexington*, 1 Adm. Rec. 167, Fed. Cas. No. 8,336. Brig aground on Florida reef, where vessel and cargo would have been a total loss but for the timely assistance of the salvors, rendered at great hazard. Amount salvaged, \$6,875. Award, 50 per cent.
1837. *The Adolphe*, 19 Am. Jur. 219, Fed. Cas. No. 17,712, cited in opinion supra.
1838. *The Joseph Stewart*, Crabbe, 218, Fed. Cas. No. 13,070, cited in opinion supra.
1839. *The Alabamian*, 2 Adm. Rec. 254, Fed. Cas. No. 128. Ship aground on a Florida reef. Master jettisoned part of his cargo. On arrival of wreckers, a part of the cargo transferred to them. They tried to pull ship off, but unsuccessfully. After they left, she got off. Compensation confined to cargo transferred. "Treated generously because they helped the master unsuccessfully." Amount salvaged, \$30,000. Award, 78 per cent. (\$23,500). "This is a large salvage, but, as in governments and in morals, so also in the decisions of this court, particular interests had better be made, sometimes, to yield, to a certain extent, to the greater interests of the general whole; and a general policy which has for its object the safety of commerce through the dangerous Florida Gulf had better be vindicated and sustained."
1840. *The Amethyst*, 2 Ware, 28, Fed. Cas. No. 330, cited in opinion supra.
1840. *Bearse v. Three Hundred and Forty Pigs of Copper*, 1 Story, 314, Fed. Cas. No. 1,193. Ship wrecked and went to pieces on Monomoy Point. Pigs of copper became imbedded in sand, and so remained. Award, 40 per cent.
1842. *Sprague v. One Hundred and Forty Barrels of Flour*, 2 Story, 195, Fed. Cas. No. 13,253. A clear case of derelict. Service meritorious. Amount small (\$696). "Moiety is the general, though not inflexible, rule. It yields to circumstances, but with great reluctance will it be increased." Award, 50 per cent. of the gross, which is about 60 per cent. of net, proceeds.
1842. *The John Taylor*, Newb. 341, Fed. Cas. No. 2,482. Ship wrecked on south coast of Cuba. Over a month spent in efforts to get her off, in salving cargo, and in stripping ship. "The Warrior and her crew did all that human agency could accomplish in effecting the object." Amount salvaged, \$4,800. Award, 50 per cent. (approving an agreement for that sum).
1844. *Two Hundred and Ten Barrels of Oil*, 1 Spr. 91, Fed. Cas. No. 14,297. A whaling ship finds wreck of another whaler on a reef 40 miles from Feejee Islands,—a place dangerous to navigation, from sands, calms, and currents. Efforts made for three days to save something, with but slight success. Wreck then went to pieces, and 224 barrels of oil picked up. Court refers to "the desperate situation of the property, the distance of the wreck from any country where assistance could be pro-

- cured being about 1,000 miles; \* \* \* the great risk incurred. \* \* \* "Salving vessel was carried by swell within 20 or 30 rods of the reef, and only saved by springing up of a breeze." Insurance was forfeited (about \$2,000). Amount salvaged, \$6,740. Award, \$5,740 (about 85 per cent).
1853. *The Cimbus*, 5 Adm. Rec. 30, Fed. Cas. No. 2,718. Ashore on Florida coast. Broke up in two fathoms. Portion of cargo, including locomotive and railroad iron, salvaged by diving. Amount salvaged, \$18,000. Award, 50 per cent.
1853. *The Nathaniel Kimball*, 4 Adm. Rec. 679, Fed. Cas. No. 10,033. Ship ashore nine miles out from Key West. Seven vessels and 99 men employed one month. Weather more than commonly boisterous and windy. Sea high. Amount salvaged, \$56,600. Award, 30 per cent. on dry cargo, 50 per cent. on wet, salvaged by diving and working under water.
1853. *The Pandora*, Newb. 438, Fed. Cas. No. 4,442. Bark on fire in port, abandoned by captain. "The value of the property salvaged is small, and it is certain that it was entirely through libellant's persevering efforts that it was finally rescued." Amount salvaged, \$1,525. Award, 50 per cent., after deducting court costs and expenses.
1854. *The Elizabeth Bruce*, 5 Adm. Rec. 162, Fed. Cas. No. 4,358. Ship aground on Carysfort reef. Three vessels worked five days in boisterous weather. Amount salvaged, \$8,276. Award, 50 per cent.
1856. *The Isaac Allerton*, 5 Adm. Rec. 612, Fed. Cas. No. 7,088. Ship went to pieces on a Florida reef. A large number of vessels and 434 persons were engaged, off and on, for two months, saving cargo sunk in five fathoms. Cargo was reached by tearing off deck planks by explosives, by contrivances for fishing up the packages, and by diving; services generally attended with considerable danger to life and health. "No case," says the court, "has ever occurred before, upon this coast, of saving so large an amount of property by diving, or of saving any amount by diving in such deep water"; and cites *The Thetis*, 3 Hagg. Adm. 14 (on appeal, 2 Knapp, 390) where a British frigate, with \$810,000 in bullion, sank in a cove on the Brazil coast, where the tides made a whirlpool, and the crews of three sloops of war and a tender were engaged continuously for 18 months in salvaging \$750,000, of which they received about \$250,000,—the largest award in the books. In *The Isaac Allerton*, the amount salvaged was \$96,309. Award, 50 per cent.
1857. *The Helen E. Booker*, 5 Adm. Rec. 714, Fed. Cas. No. 6,330. Ship wrecked on Carysfort reef, where it was difficult and dangerous to lay alongside. Two-thirds of the cargo (railroad iron under water) had to be dived for, piece by piece. "The salvage the court is obliged to give in order to compensate the salvors for their work and labor, simply, will leave but a small proportion of the savings to the owners." Amount salvaged, \$40,415. Award, \$22,754.73 (about 55 per cent.).
1857. *The Trusty*, 2 Fed. Cas. 9. A derelict. No special merit. Net proceeds, \$1,468. Award, 50 per cent.
1857. *The Caroline*, 6 Am. Law Reg. 222, Fed. Cas. No. 16,956 (Taney, C. J.). Brig caught and damaged in ice in Delaware Bay. From the nature of her injuries, could be rescued only by the removal of cargo. This was done (and it was not otherwise possible) with the assistance of a steam tug stationed at the breakwater. Part of the cargo was transhipped, and the brig towed to port. From syllabus: "Where a steam tug is kept constantly employed during the winter, on a dangerous station and at a heavy expense, for the express purpose of rendering salvage and towage service to vessels in distress, her owners are entitled to the full remuneration usually awarded to salvors who peril life and property." Award, 50 per cent. on cargo transhipped; 4 per cent. on vessel and cargo.
1861. *The Ft. Wayne*, 1 Bond, 476, Fed. Cas. No. 3,012. Steamboat sunk in Mississippi river raised and preserved by wrecking company. Boat sold for \$3,650. Cargo salvaged for \$6,761. There was a contract by which company was to receive 30 per cent. on cargo salvaged, and 25 per cent.

on boat, at an estimated value of \$18,000. This would give a total to the company of \$6,528. The allowance for cargo (\$2,028) was approved. After paying claims for wages accruing after raising, and before libel, there was in registry of court \$2,500, of which it awarded \$500 to company, which had already received \$3,000 (from underwriters). So that they received, in reality, for saving the boat, \$3,500, which is within \$150 of what it sold for; but nevertheless there was left \$2,000 in the registry, available for the owner, with which to pay other claims, such as wages prior to accident. "The object of the company is to save boats and other property in peril on Ohio and Mississippi rivers. \* \* \* They have provided, at a heavy expenditure of money, the necessary boats and machinery for the prompt and efficient prosecution of their business. \* \* \* Though their main object is their pecuniary profit, their operations have been greatly beneficial to the commerce of the West. Their expensive boats and machinery are admirably adapted to rescue property from loss and destruction, and in many cases they have been successful where all other agencies would fail. In this case, boat and cargo would have been a total loss but for the means used for their rescue."

1865. *The Charles Henry*, 1 Ben. 8, Fed. Cas. No. 2,617. Derelict wreck off Cape Henlopen. Amount salvaged (vessel and cargo), \$3,700. Award, 50 cent., after paying clerk's and proctor's fees.
1870. *The Cayenne*, 2 Abb. U. S. 42, Fed. Cas. No. 2,532. A bark derelict near the Capes of Delaware. Amount salvaged, \$9,570. Award, 50 per cent., which was reduced on appeal (*Hall v. The Cayenne*, 27 Leg. Int. 364, Fed. Cas. No. 5,941) to \$2,000.
1872. *The Clotilda*, 1 Hask. 412, Fed. Cas. No. 2,903. Ship stranded on coast of Maine. Part of the cargo removed, and, on the amount thus salvaged (\$20,000) an award of \$6,000 (30 per cent.) was allowed. The ship was subsequently got off, after four months' work, by Coast Wrecking Company. Her value was about \$25,000, and an agreement for 60 per cent. was approved. "Compensation for salvage services is allowed by reason of the benefit conferred, and ought to bear some proportion to such benefit. This can only be ascertained by an examination of the cargo, and, if found damaged, the benefit being so much the less, the award for salvage should be affected thereby."
1872. *The St. James*, 20 Fed. Cas. 921. Cargo saved in midwinter by diving in the hold of a wreck on an exposed reef, far from land. Awards, 40 to 50 per cent., and 62 per cent. on cargo from the lower hold, below beams.
1879. *The Carl Schurz*, 2 Flap. 330, Fed. Cas. No. 2,414, cited in opinion supra.
1881. *The Vindicator*, 7 Fed. 236. A steamer stranded on the Long Island shore in a position of such danger as to give rise to apprehension that both vessel and cargo would prove a total loss. Vessel broke up 37 days after arrival of Coast Wrecking Company's outfit. Most of the cargo salvaged in a damaged condition. "The compensation is to be looked at, as it may induce aid by competent salvors to other property in distress; and the equipment of the Coast Wrecking Company, with steamers and pumps and wrecking material and skilled men, and its readiness to act at a moment's notice, must be considered; involving, as that does, large investments and expenses, which go on as well while there is no employment." Amount salvaged, about \$20,000. Award, 50 per cent.
1882. *The Edwards*, 12 Fed. 508, cited in opinion supra.
1884. *The Lahaina*, 19 Fed. 923. A steamer valued at \$180,000 picked up a schooner the day after leaving New York, in trough of the sea, with no steering apparatus, and a hole in her side. The captain and crew were ready to abandon. Towed her back to New York, losing three days' time, breaking steel hawser, and paying pilotage and towage of \$279. The cargo, from its nature, would have been wholly lost if wreck had not been taken in tow. Cargo proceeds barely amounted to the duties and expenses of sale, and no claimant of the cargo appeared. The whole net proceeds of cargo (a small sum) were allowed.

As to the schooner, the court says: "Considering \* \* \* the small value of the property saved, the value of the salving ship, and the fact that, had not the schooner been taken in tow, she would have been abandoned, a water-logged wreck, in the track of vessels bound to New York," there will be allowed 50 per cent. of net proceeds, in addition to expenses of steamer, \$279, and \$200 damage to hawser. The value salved was \$3,515.

1887. *The R. D. Bibber*, 33 Fed. 55. A schooner loaded with railroad iron ashore in Galveston Bay. Vessel and cargo salved by libelants under a contract with master for 50 per cent. Wrecking crews had extra pay. Pumps of large cost were used. There was risk of serious damage to property of salvors, and much hardship. Amount salved, \$25,000. The 50 per cent. was held a reasonable charge.
1893. *The William Smith*, 59 Fed. 615. A derelict schooner was picked up, and brought into Southport, N. C., by libelant's large and valuable steamship. During salvage, a stranding occurred, which cost the steamer \$1,000. The schooner was afterwards towed by salving vessel to New York for sale. After deducting necessary expenses of this last towage, there was left \$5,450, net proceeds. Award, 70 per cent.
1896. *The L. W. Perry*, 71 Fed. 745, cited in opinion *supra*.
1896. *The Burlington*, 73 Fed. 258, cited in opinion *supra*.

## II. UNDER FIFTY PER CENT., BUT IN EXCESS OF TWENTY-FIVE PER CENT.

1792. *La Belle Creole*, 1 Pet. Adm. 31, Fed. Cas. No. 17,165. Ship at sea in perishing and hopeless condition. Salvor ship remained by her some time, and with considerable delay and risk; taking out officers and crew, and part of the cargo. Amount salved does not appear. Award, 33½ per cent.
1796. *The Mary Ford*, 3 Dall. 190. Ship derelict on high seas, her rigging partly gone. The salving vessel bound on a foreign voyage, without supernumerary hands. Salvage crew found vessel difficult to manage, and brought her in with great exertion, and at considerable risk. Amount salved, \$43,110. Award, 33½ per cent.
1800. *Stephens v. Bales of Cotton*, Bee, 170, Fed. Cas. No. 13,366. Vessel wrecked on Charleston bar. Her cargo of cotton cast ashore on the adjoining islands, and then secured by great labor, much risk of health, and some of life. Amount salved, about \$13,000. Award, 33½ per cent. on the cotton, and 50 per cent. on materials.
1807. *The Cora*, 2 Wash. C. C. 80, Fed. Cas. No. 1,621, affirming *s. c.* (1806) 2 Pet. Adm. 361, Fed. Cas. No. 1,620. Crew put on board a derelict vessel, two weeks at sea. Much risk to depleted vessel. A "highly meritorious service." Amount salved, \$47,000. Award, 33½ per cent.
1827. *The Hercules*, Blatchf. & H. 9, Fed. Cas. No. 303. Brig grounded on a Florida reef. Master and crew remained aboard. Wrecking vessels took in much of her cargo. Got her off the reef, and into Key West. Amount salved, \$79,000. Award, \$25,000 (about 31 per cent.).
1830. *The Waterloo*, Blatchf. & H. 114, Fed. Cas. No. 17,257, cited in opinion *supra*.
1842. *The Charles*, 1 Newb. 329, Fed. Cas. No. 4,556. Derelict at sea. Amount salved, \$9,300. Award, 33½ per cent.
1848. *The Brewster*, 4 Adm. Rec. 116, Fed. Cas. No. 1,852. A ship went ashore on Carysfort reef, and broke up. Salvors (150), with 15 to 20 vessels, worked 10 days salving cargo and materials. Amount salved, \$58,000. Award, 33½ per cent.; and as to some cargo, where diving was necessary, 60 per cent.
1848. *The Euphrasia*, 4 Adm. Rec. 136, Fed. Cas. No. 4,545. Bark ashore on Carysfort reef, in no great peril if weather kept good. Salvors lightened and helped her off. Time short, and no special merit. Amount salved, \$46,470. Award, \$15,000 (about 31 per cent.).
1849. *The Delphos*, Newb. 412, Fed. Cas. No. 14,400. On fire in Southwest pass. Towed to a convenient place, scuttled, and afterwards raised by salvors. "A liberal compensation should be awarded. Property \* \* \* saved from inevitable destruction by the timely assistance

- of the towboats. \* \* \* The claimants, however, have rights which must be protected. They have been unfortunate, and the court will not subject them to any further loss, which may be inconsistent with a fair and equitable compensation to those through whose means they were saved from a greater calamity." Amount salvaged, \$50,000. Award, 45 per cent. (\$22,500).
1849. The Maryland, 4 Adm. Rec. 358, Fed. Cas. No. 9,218. Ship ashore. Eight vessels, with 120 men, were occupied in salvaging the property,—how long, does not appear. Service rendered in very bad and boisterous weather, and under circumstances of some peril to lives and property of salvors. Amount salvaged, \$50,227. Award, 30 per cent.
1851. The John and Albert, 4 Adm. Rec. 534, Fed. Cas. No. 7,333. A ship in ballast ashore on reef near Key West. Salvors floated and got her into port in a few days. "She would have been totally lost but for efforts and labors of libelants, 34 in all, with 4 wrecking vessels. \* \* \* Service was performed with energy and skill, and involved considerable labor and some peril and exposure on the part of salvors and their vessels." Amount salvaged, \$20,000. Award, 30 per cent.
1852. The T. P. Leathers, Newb. 421, Fed. Cas. No. 9,736. Steamer temporarily abandoned, not derelict, on fire, and in imminent peril of total loss. Services highly meritorious, and rendered at risk of life. Amount salvaged, \$45,000. Award, 33½ per cent.
1853. The F. A. Everett, 4 Adm. Rec. 621, Fed. Cas. No. 4,603. Bark ashore on a Florida reef. Four large wrecking vessels and others with much difficulty and personal danger salvaged \$31,220. Award, 33½ per cent.
1854. The Iconium, 5 Adm. Rec. 287, Fed. Cas. No. 6,995. Ship in ballast aground on Loo-Key shoals. Five wrecking vessels (54 men), in nearly two days of almost incessant labor, succeeded in floating her, by discharging ballast, carrying out anchors, straining on cables, etc. Amount salvaged, \$14,500. Award, 33½ per cent.
1854. The Athalia, 5 Adm. Rec. 295, Fed. Cas. No. 598. Schooner ashore on a Florida reef. Vessel a total loss. Seven large wrecking vessels busy four days. Part salvaged by diving. Amount salvaged, \$41,000. Award, 30 per cent.
1855. The Tevere, 5 Adm. Rec. 364. Brig ashore on a Florida reef in peril of total loss. Three sloops lightened and helped her off in bad weather, with considerable risk. Amount salvaged, \$17,000. Award, 42 per cent.
1856. The Attacapas, 3 Ware, 65, Fed. Cas. No. 637. Brig temporarily abandoned, but not derelict. "Meritorious service." Amount salvaged, \$3,500. Award, \$1,200 (34 per cent.).
1856. The Mary Hale, 5 Adm. Rec. 471, Fed. Cas. No. 9,213. Ship cast away upon Keysal bank. Eight vessels salvaged materials and cargo in bad weather, and under circumstances of some exposure and risk to the salvaging vessels. Amount salvaged, \$35,000. Awards, 36 per cent. to 45 per cent.
1858. The Osteonthe, 6 Adm. Rec. 166, Fed. Cas. No. 10,608a. For getting out cargo and raising hull of a vessel scuttled in the harbor of Key West to extinguish fire, when total proceeds amounted to \$28,000, a contract for \$10,000 was approved (being about 35 per cent.).
1859. The Mulhouse, 22 Law Rep. 276, Fed. Cas. No. 9,910. Ship ashore, and total loss, on a Florida reef. Awards, 25 per cent. salvaging dry deck cotton, 45 per cent. salvaging cotton submerged between-decks, and 55 per cent. salvaging cotton by diving.
1859. The Indian Hunter, 6 Adm. Rec. 343, Fed. Cas. No. 7,024. Ship stranded on a Florida reef, a total loss. A large number of wrecking vessels and men were employed, weather permitting, for one month. Amount salvaged, \$91,076. Award, \$33,852 (about 37 per cent.).
1860. The Ferris, 17 Leg. Int. 116, Fed. Cas. No. 12,178. A leaking derelict on high seas. Reached port in a week. Amount salvaged, \$13,000. Award, \$5,000 (28 per cent.).
1866. The Georgiana, 1 Lowell, 91, Fed. Cas. No. 5,355. A schooner of small value, derelict on high seas, towed into port by vessel of much larger

- value, without great personal risk or labor. Amount salv'd, \$1,950. Award, 40 per cent.
1866. The Albion Lincoln, 1 Lowell, 71, Fed. Cas. No. 144. Bark aground near Vineyard Sound, with her rudder broken off. Was gotten off, but could not navigate, and eventually went ashore, becoming a total loss. Some of the cargo (molasses) was salv'd. "The services were meritorious, and at great expense of time (about one week). The cargo was under water a great part of each tide, and weather extremely cold (about zero, Fahr.)." "The fund is small,—not sufficient to allow a large salvage reward to any one. This is one of the risks which wreckers take, however; and in the case of most of the libelants, who are often employed in the business, it may be supposed to be made up by the larger reward earned when the property is large." Amount salv'd, \$5,200. Award, \$2,450 (about 47 per cent.).
1866. The John Wesley, 9 Adm. Rec. 160, Fed. Cas. No. 7,433. Bark ashore on Florida coast, cargo (cotton) and materials salv'd. Awards: On \$121,-826 dry cotton, 15 per cent.; on \$39,967 damaged cotton, a slightly higher per cent.; on \$2,774 materials, 33½ per cent.
1869. The L. T. Knights, 1 Lowell, 396, Fed. Cas. No. 8,585. A coal-laden schooner found derelict at sea, 50 miles from Long Island. Brought into Newport, after 30 hours, with a good deal of labor. There was some risk, also, as the derelict had holes bored in her hull, which were not discovered for many hours. Amount salv'd, \$6,400. Award, \$2,500 (about 40 per cent.).
1869. The Comanche, 8 Wall. 448. Wrecking company sent equipment from New York to San Francisco. Work most arduous. Most of it had to be done by divers in the hold of a sunken ship, and was very dangerous. Time, five months. Actual expenditures of salvors, \$70,000. Amount salv'd, \$400,000. An agreement for \$110,000 was held reasonable (about 27 per cent.).
1873. The Northwester, 10 Adm. Rec. 415, Fed. Cas. No. 10,333. Twenty-five vessels and 229 men were engaged 15 days in extinguishing fire and saving cotton from a burnt and stranded hulk near Key West,—most of it by diving, and under conditions rendered peculiarly disagreeable and injurious, both above and below water, by reason of burnt bales of tobacco in the wreck. Weather, part of the time, cold and boisterous. Amount salv'd, \$85,000. Awards: 20 per cent on cotton dry; 33½ per cent. on cotton wet and burnt; 40 per cent on materials; 50 per cent. on property salv'd by diving.
1875. The Aroma Mills, 2 Hughes, 30, Fed. Cas. No. 2,041. Steamer abandoned and stranded, in imminent peril of hopeless loss. Amount salv'd, \$9,000. Award, 40 per cent.
1875. The Ellen Holgate, 8 Leg. Gaz. 44, Fed. Cas. No. 4,375a. Schooner sunk in a collision. Service lasted some 11 days, the first few in tempestuous weather, with heavy sea running, ice, hail, and sleet, in a dangerous part of Delaware Bay. "The two tugs rendered meritorious service." Amount salv'd, \$7,000. Award, 33½ per cent.
1880. The Lovetand, 5 Fed. 105. Bark derelict after collision, having lost everything above deck. Service rendered which was attended with difficulty and danger; lasted 51 hours. Amount salv'd, \$25,000. Award, \$7,000 (about 26 per cent.).
1880. Hattrick v. The Spanish Bark, 11 Fed. Cas. 831, cited in opinion supra.
1886. The Maggie Willett, 27 Fed. 519. Schooner rescued at sea in a desperate condition. Brought into port. Three days' service. Amount salv'd, \$11,000. Award, 33½ per cent.
1887. The Slobodna, 35 Fed. 537. Ship loaded with cotton ashore on Florida coast, a total loss. Forty-one vessels, with 335 men, were engaged 28 days. Awards: 25 per cent. on dry cotton, 33½ per cent. on wet cotton; 45 per cent. on materials.
1888. The Lone Star, 35 Fed. 793. Steamship on fire at wharf, towed out, sunk, and subsequently raised by salvors. "Meritorious service." Amount salv'd, about \$25,000. Award, 33½ per cent.



1888. *The Andrew Adams*, 36 Fed. 205. A schooner stranded on south coast of No Man's Land, district of Massachusetts, in a place where she was certain to go to pieces in case a storm occurred before she was got off, and where no vessel had ever been got off before. Quicksand beach. A wrecking company, by request, undertook to get her off. Services, with no great danger, but with all possible skill, lasted 20 days, and were successful. The salvors made repairs to the amount of \$2,500. "The court should especially take into consideration the business which is carried on by this company. It has procured apparatus of the most expensive character, which is used almost entirely for the purpose of salving vessels wrecked on this coast. It is of the utmost importance to commerce on our coast that such a business should be undertaken and carried on by somebody with sufficient capital and sufficient enterprise to assist wrecked vessels. \* \* \* I think the court should bear that in mind, and see that a liberal measure of salvage is awarded to a company undertaking and performing successfully a service of this kind." Amount salvaged, about \$20,000. Award, 50 per cent., with no addition for the repairs. This leaves the amount of salvage award \$7,500 (about 37 per cent.).
1892. *The Thos. W. Haven*, 48 Fed. 842. Schooner abandoned, water logged, with cargo of lumber washing about her deck. Picked up off Frying Pan shoals. Salving vessel worth \$20,000. Neither life nor property of salvors in any danger. Vessel and cargo sold for \$3,450. Salvage award, \$950 of the gross proceeds (i. e. before deducting harbor expenses, towing, wharfage, layage, and expenses of discharge). What these expenses were does not appear. The award is 28 per cent. of the gross proceeds.
1892. *The Agnes I. Grace*, 49 Fed. 663, affirmed in circuit court of appeals, 2 C. C. A. 581, 51 Fed. 958. Schooner with hole in her bottom astrand on a quicksand shoal, into which she sank three feet. Water was pumped out and vessel pulled off by libellant's steam tugs at great risk to the tugs. The schooner's peril was extreme, and chances of success exceedingly slight. Service lasted "several days," and value of property employed over \$70,000. Amount salvaged, \$12,030. Award (an agreed sum held reasonable) \$5,000 (about 42 per cent.).

### III. TWENTY-FIVE PER CENT. AND UNDER.

- 1816 *The Sybil*, 5 Hughes, 61, Fed. Cas. No. 4,824; Id. (1819) 4 Wheat. 98. In distress and abandoned by crew to salvors 600 miles from land. Amount salvaged does not appear. Award, 25 per cent.
1832. *The Emulous*, 1 Sumn. 207, Fed. Cas. No. 4,480. Schooner ashore on a reef in Vineyard Sound. Abandoned temporarily, but not derelict. Less than two days' service, and weather not boisterous. Amount salvaged, \$5,722. Award, \$850 (about 15 per cent.).
1836. *The Bee*, 1 Ware, 336, Fed. Cas. No. 1,219. Vessel ashore on Grand Manan, abandoned by master and crew. Salvors got her off, and to port. "It is not a case which demands a high rate of salvage." Amount salvaged, \$2,000. Award, \$350 (about 17 per cent.).
1837. *The Ella Hand*, 2 Adm. Rec. 24, Fed. Cas. No. 4,369. Bark aground. Salvors lightened, got her off, and took into port. She was not in a position of peril to herself, as the master could have got her off by jettison. Amount salvaged, \$33,200. Award, \$7,500 (about 23 per cent.).
1838. *The Howard*, 2 Adm. Rec. 148, Fed. Cas. No. 6,752a. Bark ashore on Florida reef. Rescued in a partially damaged condition. Nothing specially meritorious about the service. Amount salvaged, \$35,391. Award, 25 per cent.
1841. *The Grace Brown*, 2 Hughes, 112, Fed. Cas. No. 1,171. Ship ashore, deserted, but with intention to return; not derelict. Nothing unusual in service. Amount salvaged, \$38,000. Award, \$2,400 (about 6 per cent.).
1843. *The Ann Johnson*, 4 Adm. Rec. 527. Vessel hauled off a shoal without much trouble. Situation not perilous, except in the event of a storm. Amount salvaged, \$14,000. Award, \$2,000 (about 14 per cent.).

1845. The John Gilpin, Olcott, 77, Fed. Cas. No. 7,345. Brig ashore in lower bay of New York, abandoned, in peril of instant destruction,—ultimately went to pieces. Services well-timed, faithful, and beneficial, but nothing extraordinary. Amount salvaged, \$11,294. Award, 20 per cent.
1853. The William Penn, 2 Hughes, 144, Fed. Cas. No. 1,965. Ship ashore off Charleston harbor. Salvaging steamer, after a night of considerable peril, succeeded in getting her off. Amount salvaged, \$23,000. Award, 15 per cent.
1853. The H. D. Bacon, 1 Newb. 274, Fed. Cas. No. 4,232. Salvors, by the use of their machinery and a diving bell, worth \$20,000, raised a badly-sunken steamboat in the Mississippi river in 12 hours. Amount salvaged, \$20,000. Award, approving a contract for that amount, \$4,000 (or 20 per cent.).
1854. The Angeline, 5 Adm. Rec. 202, Fed. Cas. No. 385. Schooner ashore on Carysfort reef. Wreckers got her off. No very highly meritorious service. Amount salvaged, \$2,100. Award of 20 per cent. held reasonable, but reduced for specific misconduct.
1855. The John Land, Hoff. Op. 96, Fed. Cas. No. 3,939. Salvaging vessel abandoned a whaling cruise, and spent nine months in bringing the salvaged ship to port. Amount salvaged, \$260,000. Award, \$60,000 (about 23 per cent.).
1855. The Ellen Hood, 5 Adm. Rec. 347, Fed. Cas. No. 4,377. Ship grounded on coast of Florida, but in no great peril. Could have got off without assistance, by jettison. Amount salvaged, \$192,391. Award, 11 per cent.
1856. The Ashburton, 5 Adm. Rec. 432, Fed. Cas. No. 575. Ship stranded. Six large wrecking vessels, besides small boats, engaged in the service. An unnecessary number. "There is to be no increase of compensation for the use of supernumeraries." Amount salvaged, \$73,000. Award, 15 per cent., but reduced for neglect to sound, thus putting ship aground again.
1856. The Diadem, 5 Adm. Rec. 561, Fed. Cas. No. 3,874. Ship stranded on reef near Key West, in imminent peril. Time of service does not appear. Amount salvaged, \$125,000. Award, \$12,000 (about 10 per cent.), but reduced for misconduct.
1856. The Albus, 1 Fed. Cas. 323. Ship, aground in a perilous position, employed a schooner to carry her anchors, and by that means got off. Amount salvaged, \$20,000. Award, \$2,500 (about 12 per cent.).
1857. The Crown, 5 Adm. Rec. 675, Fed. Cas. No. 3,450. Ship ashore on reef off Florida coast. Fifteen vessels, carrying 152 men, worked, so far as bolsterous weather permitted, for 13 days, and until stranded vessel broke up. Amount salvaged, \$123,000. Award, 19 per cent.
1857. The Philah, 5 Adm. Rec. 693, Fed. Cas. No. 11,091a. Bark laden with cotton and molasses ashore on a reef near Tortugas, in a condition of great peril. Was got off after removing part of her cargo. Time short, and no particular peril to salvaging vessel, but without her help the bark would have been lost. Amount salvaged, \$70,000. Award, \$17,000 (about 24 per cent.).
1858. The Sierra Nevada, 6 Adm. Rec. 67, Fed. Cas. No. 12,846. A ship grounded on Florida reef, in imminent danger of total loss, was salvaged, after 36 hours' labor, by the aid of 8 wrecking vessels, carrying 92 men. Amount salvaged, \$85,000. Award, \$17,000 (20 per cent.).
1858. The Sultan, 6 Adm. Rec. 112, Fed. Cas. No. 13,601. Ship, laden with cotton and corn, ashore on a reef near Key West, with dangerous shoals on both sides, ahead and astern. Lightened, heaved off, and brought to port by aid of 12 wrecking vessels and 108 men, working four days and nights. Amount salvaged, \$127,000. Award, \$23,000 (about 18 per cent.).
1859. The E. M. Bicknell, 1 Bond, 270, Fed. Cas. No. 1,476. Steamboat ashore in Ohio river, in immediate peril of loss. Amount salvaged, \$19,500. Award, 25 per cent.
1859. The Island City, 1 Cliff. 210, Fed. Cas. No. 55; Id. (1861) 1 Black, 121. Bark caught in ice near Hyannis in a gale. Three sets of salvors (joint value of vessels engaged, \$131,000) work some 15 days. Amount salvaged, \$70,000. Award, \$13,000 (about 19 per cent.).

1860. *The Eliza Mallory*, 6 Adm. Rec. 428, Fed. Cas. No. 4,365. Ship stranded on Florida coast, a total wreck. Twelve wrecking vessels worked from one to five weeks. Amount of cargo salvaged, \$56,445. Award, \$16,241 (about 25 per cent.).
1860. *The Huntsville*, 12 Fed. Cas. 996. Steamer afire at sea reaches port, and, by aid of salvors, fire is extinguished. "There was not in any part of the service rendered \* \* \* any immediate risk of life, nor was the property employed in salvaging exposed to any risk or danger. But the services were highly meritorious, and by them a valuable vessel has been preserved." Amount salvaged, \$80,000. Award, 12 per cent.
1861. *The Ocean Belle*, 19 Fed. Cas. 200. Ship stranded 30 miles from Key West. Wreckers got her off in good weather, and towed to port. "Had the weather been bad, the ship, from her exposed situation, would have been in great peril of total loss." "In places where wrecking is a business, and salvors engage therein more from interest than humanity, the scale of salvage awards should be so adjusted as that it will never be to the interest of a salvor that a ship should be lost, and that it should always be to his interest that she should be saved in a condition as little damaged as possible." Amount salvaged, \$165,000. Award, \$17,000 (about 10 per cent.).
1865. *The Ida L. Howard*, 1 Lowell, 2, Fed. Cas. No. 6,999. Schooner, derelict, stranded in Boston harbor. Numerous salvors labored diligently during more than one day, materially assisted by a steamer furnished by the underwriters. Amount salvaged, \$12,000. Award, \$2,000 (about 16 per cent.).
1867. *The Lovett Peacock*, 1 Lowell, 143, Fed. Cas. No. 8,555. Schooner abandoned, but not derelict. Salvors brought her to port after 13 days of severe labor and hardship, and after encountering a gale in the gulf stream. Amount salvaged, \$90,000. Award, 25 per cent.
1869. *The Annie Leland*, 1 Lowell, 310, Fed. Cas. No. 421. Schooner with cargo of coal stranded on rocks, and in a dangerous situation. Was got off and into port by salvors from the shore, at their own risk and responsibility, while captain and crew were dismantling schooner with intention of abandoning her. Time, a few hours only, and no danger. Amount salvaged, \$11,000. Award, \$2,600 (about 22 per cent.).
1869. *The Albert Gallatin*, Fed. Cas. No. 140. Ship burned at her anchorage, Mobile Bay. No risk, but a disagreeable and laborious service. Amount salvaged, \$346,620. Award, \$34,828 (about 21 per cent.).
1870. *The Birdie*, 7 Blatchf. 238, Fed. Cas. No. 1,432. Brig carried by the ice ashore on Long Island. So cold, crew had to leave to save their lives. Coast wrecking tug and a hired tug got her off. Amount salvaged, \$19,000. District court allowed \$288, which was paid for hired tug, and \$240 (regular rates) for the other tug. Circuit court raised award to \$1,200 (about 6 per cent.).
1872. *The Anna*, 6 Ben. 166, Fed. Cas. No. 398; *Id.* (1873) 10 Blatchf. 456, Fed. Cas. No. 401. Brig in collision, whereupon master and crew abandoned her, and went aboard colliding vessel. Salvaging vessel put two men aboard, and brought her into port. Was not required to deviate from her course, or lose any considerable amount of time, and sustained no loss, but laid out \$600 for towing. Amount salvaged, \$30,500. Award, \$6,000 (about 20 per cent.). "Confessedly, the share of the property allowed is greatly less than the early practice of courts of admiralty would have sanctioned; and, in the changed condition of navigation, it is properly so."
1879. *The Allegiance*, 6 Sawy. 68, Fed. Cas. No. 207. Ship aground. Steam tugs got her off and towed her in. No serious risk. Amount salvaged, \$47,000. Award, \$5,000 (about 11 per cent.).
1882. *The Sandringham*, 10 Fed. 556. Steamship stranded on Cape Henry, within 100 yards of shore, where currents are often dangerous. Salvors, with a large force of vessels, wrecking apparatus, and men, after a week of hard and dangerous labor, in which highest degree of care was shown, succeeded in saving vessel and cargo. Amount salvaged, \$200,000. Award, \$50,000 (25 per cent.).

1883. *The Egypt*, 17 Fed. 359. A steamship of great value ashore on coast of Virginia, in imminent peril of total loss. Service rendered with extraordinary skill and success, the consumption of much time (eight days) and labor, and great risk to the property used in the enterprise, which was of great value. Amount salvaged, \$250,000. Award, \$50,000 (20 per cent.).
1884. *The Queen of the Pacific*, 21 Fed. 459. Steamship stranded on quicksand near mouth of Columbia river. Highly meritorious service, lasting two days. Amount salvaged, \$736,786. Award, \$64,700 (about 9 per cent.).
1888. *The Kimberley*, 40 Fed. 289. Steamship stranded in December off False Cape shoals. "All the elements of meritorious service concurred": (1) Great danger from which the property salvaged was rescued; (2) great value salvaged; (3) serious and continued risk incurred by salvors and their property; (4) great value of the property put at risk (\$164,000); (5) extraordinary skill and perfect success in rendering the service; (6) much time and labor spent in the enterprise. Amount salvaged, \$490,000. Award, first, \$46,000, for actual outlay of labor and expenses, and, on top of it, 20 per cent. of the amount salvaged. An appeal was taken by claimants, but the delay would have operated so oppressively upon libelants that they settled at a heavy discount.
1889. *The S. A. Rudolph*, 39 Fed. 331. A schooner stranded on Jersey coast in snowstorm. Master and crew taken ashore by life-saving service. The salvors got her off, and towed to New York. Amount salvaged, \$6,314. Award, \$1,500 (about 24 per cent.).
1890. *The City of Worcester*, 42 Fed. 913, affirmed (1891) 45 Fed. 119. A steamer was stranded on Bartlett's reef, near New London. Her cargo was removed by wrecking company the next day without danger; the day being pleasant, and the water smooth. The next day was rough; new holes being worn in the steamer, in addition to those previously made. The wrecking companies, with a large outfit, were at work about two weeks. Bills of salvors for hire of vessels, materials purchased and used in repairs, sails used for patches, rope and anchors lost, aggregated \$1,339. The cargo was worth about \$100,000. "The services in salvaging the cargo were valuable, but were, in consequence of the exceptionally fine weather on Sunday, without danger,—were easily and quickly rendered. For these the sum of \$1,218 should be paid" (between 1 and 2 per cent.). "An important element which enters into the determination of the amount due upon the libel [on the vessel] is the fact that each salvor is the owner of a valuable plant, which is constantly ready for service, and equipped with a crew which is constantly under pay. The calls for salvage service are occasional. The necessity for wages and repairs is continuous. The City of Worcester had the prompt benefit of a large plant, which was itself in some danger of injury." Amount salvaged (the steamer), \$237,500. Award, \$31,725 (about 13 per cent.).
1892. *The Tregurno*, 50 Fed. 946. Steamer ashore on Florida coast. A heavy wrecking force was engaged 25 days, being driven away several times by bad weather. There was no anchorage nearer than 25 miles. Two of the salvaging vessels were damaged while taking off cargo in heavy seas. Ultimate success as to ship and cargo. Amount salvaged, \$205,000. Award, \$50,000 (25 per cent.).
1894. *The Oxford*, 66 Fed. 584. Steamer ashore in dangerous position on Florida reef. Salvage service lasted 13 days, and was rendered by 65 sailing vessels, 4 steamers, and 500 men,—much of it prosecuted at night, and in rough weather. "The large number employed on account of the length of time occupied by the service will so divide any amount which can reasonably be given that the individual shares, instead of being a bonus or a gratuity as a salvage, will scarcely compensate for the actual labor performed. That this has been the case is exceedingly to be regretted, but the amount cannot be increased on account of the large number of individuals employed to do a certain service. There were more than necessary, but that was an honest error of judgment. It was impossible for them to determine just what force might be re-

- quired. \* \* \* A reasonable compensation should be allowed, although nothing that can be considered as a bonus or gratuity can be reached." Amount salvaged, \$155,000. Award, \$37,114 (about 24 per cent.). A material reduction of the award for salvaging the ship was made on appeal. 13 C. C. A. 647, 66 Fed. 593.
1895. The Dania, 70 Fed. 398. Steamer utterly helpless from broken shaft about 360 miles from New York. Towed into that port by another steamer in two days and two hours, without any difficulty, during weather which was fine, excepting a dense fog about half the time. Amount salvaged, \$426,000. Award, \$17,500 (about 4 per cent.).
1895. The North Erin, 71 Fed. 430. A tug, upon telegraphic request, went 80 miles to a steamer pounding on Long Island coast, in a position of some danger, with a cargo largely perishable, and succeeded after three hours in getting her off. A Coast Wrecking Company's steamer would have reached the steamer the next day. Value of tug, \$50,000. Amount salvaged, \$100,000. Award, 10 per cent.
1896. La Hesbaye, 71 Fed. 743. A steamship, with her rudder lost, was brought in, by the help of another steamer, to New York (1,100 miles). Service lasted nine days, and was difficult. Salvor lost four days. Amount salvaged, \$100,000. Award, \$8,000.
1896. The Alamo, 21 C. C. A. 451, 75 Fed. 602. A large steamer ashore on a Florida reef in a position of peril. A tug and sailing vessels got her off, and piloted her into port uninjured. Time, 24 hours. Amount salvaged, \$500,000. Award, \$15,000 (3 per cent.).
1896. The Elfrida, 23 C. C. A. 527, 77 Fed. 754. A steamer aground at Velasco, Tex., in a position of little danger, at a season when weather is nearly always mild and wind light. Service required but 15 or 16 men, a tug, barge, and small schooner, with anchors and cables. Time, 3 days. No danger to life or property, and no application of unusual skill. Amount salvaged, \$70,000. An agreement for \$22,000 was reduced to \$10,000, which is about 14 per cent.

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### THE JOHN R. PENROSE.

### THE WM. J. LIPSETT.

### SMITH et al. v. THE WM. J. LIPSETT.

(District Court, E. D. Pennsylvania. April 22, 1898.)

#### **COLLISION—COST OF REPAIRS—ROTTENNESS OF INJURED PART.**

The rule that, in collision cases, the respondents must pay the cost of repairs rendered necessary by their carelessness, does not apply where the part injured was rotten and unfit for use, and the injury was as justly attributed to that fact as to the collision. In such case, only half damages will be allowed.

This was a libel in admiralty by the owners of the schooner John R. Penrose against the schooner William J. Lipsett to recover damages resulting from a collision of the two vessels in Delaware Bay. The Lipsett was heretofore held to be solely in fault (81 Fed. 623), and the cause is now heard on the commissioner's report on the question of damages.

Horace L. Cheyney and John T. Lewis, for libellant.  
Curtis Tilton, for respondent.

BUTLER, District Judge. With much reluctance, and only because he believed the authorities required it, the commissioner allowed the entire cost of the new bowsprit. I agree with him that the allowance

is inequitable; and do not feel constrained by the authorities to acquiesce in it. The rule is well settled in collision cases that respondents must pay the cost of repairs rendered necessary by their carelessness, notwithstanding the value of the vessel may be increased thereby. The rule sometimes works apparent injustice, and is not enforced against insurers. Where, however, the injuries may as justly be attributed to the worn-out or rotten condition of the vessel as to the collision, the rule should not be applied. The cases are not entirely clear respecting this, but I think the exception is fully recognized. *Sturgis v. Clough*, 1 Wall. 269, 272; *The N. B. Starbuck*, 29 Fed. 798; *The Reba*, 22 Fed. 546; *The Syracuse*, 18 Fed. 830. Here the bowsprit was rotten and unfit for use. The vessel was unseaworthy in this respect, and should not have gone out until repaired. The commissioner virtually so finds; and the testimony leaves no doubt of the fact. Her master substantially admits it. She might possibly have been used in this condition for a short time, but not without risk. She was in fault therefore in going out in such condition. To compel the respondent to pay the entire cost of a new bowsprit, which the libelant should have put in before starting, would be clearly unjust. Under the circumstances I will treat both parties as in fault to this extent, and will allow the libelant one-half the cost, which appears to be \$85, reducing the balance against the respondent to \$665.72; and for this sum a decree may be entered. I do not find anything in the evidence that would justify further interference with the commissioner's report.

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THE H. M. WHITNEY.

HARRIS v. METROPOLITAN S. S. CO.

METROPOLITAN S. S. CO. v. HARRIS et al.

(Circuit Court of Appeals, Second Circuit. March 2, 1893.)

Nos. 75 and 76.

1. COLLISION—LIBEL—VARIANCE BETWEEN ALLEGATIONS AND PROOF.

Under a libel charging that a vessel was towed in a fog too rapidly, the admission of evidence on the theory that she should have anchored is not sufficient ground for reversal, where the respondent was not surprised, and was given opportunity to, and did, answer the evidence.

2. SAME—LONG TOWS—EXTREME CARE REQUIRED.

However great a menace to navigation the use of public waterways by long tows may be, the courts will not forbid it as long as it is allowed by the authorities who regulate navigation; yet they will hold those who do so to a degree of care commensurate with the increased risk.

3. SAME.

During a dense fog, a tug towing two barges on hawsers of 70 to 80 fathoms each, making a fleet extending more than a quarter of a mile, started through Vineyard Sound, and was about to enter Pollock Rip Slew, a dangerous place, by reason of its shoals, tides, narrowness of channel, and changes in its course. As she was about to enter the slew, she passed a steamer which could be dimly seen through the fog. The steamer had stopped her engines, but started again as soon as the tug and first barge passed, and hove her wheel to port, so as to converge on the course over which the tug and first tow had passed, and ran into the second barge, about 450 feet behind the first. It was the general practice of those towing over that

route to tow more than one barge. *Held*, that the tug and tow were at fault in not going to anchor until the weather cleared, instead of entering the slew, and that the steamer was also at fault in not waiting a reasonable time before starting up her engines and porting, and that, having got out of the slew, it was not dangerous for her to wait with engines stopped. 77 Fed. 1001, affirmed.

### Appeals from the District Court of the United States for the Southern District of New York.

In these causes cross libels were filed in the district court, Southern district of New York,—one by the owners of the barge Shamokin and the tug International, to recover damages for the sinking of the Shamokin while in tow of the tug, by a collision with the steamer H. M. Whitney; and the other by the Metropolitan Steamship Company, owners of the H. M. Whitney, against the libelants in the first cause, to recover the damages which the H. M. Whitney sustained in the collision. The district court found both parties in fault, and divided the damages. From the decrees making such disposition of the causes, both sides have appealed. The following excerpts from the opinion of the district judge, supplemented by some findings of this court, sufficiently indicate the general circumstances attending the collision. Most of these statements are undisputed, and, as to the others, they are supported by a clear preponderance of proof: "The Shamokin was a large barge, 186 feet long; \* \* \* carrying capacity, 1,450 tons. She was loaded with coal, and was employed in transportation between Philadelphia and Boston. At the time of the collision, she was astern of a smaller barge ahead of her (the Hercules), which was attached to the International by a hawser of some 70 or 80 fathoms; and a hawser of similar length attached the Shamokin to the Hercules. The fleet, which was over a quarter of a mile long, was overtaken by fog the evening previous, and was anchored through the night to the northward and westward of Handkerchief Lightship. At about 2 p. m. of June 26, 1894, the fleet got under way to go through Vineyard Sound; but it was \* \* \* obstructed by fog, and, when halfway between Shovelful Lightship and Pollock Rip Lightship, the fog became dense"; a wet, dense, black fog, the master of the Shamokin calls it. Before that time, however, the fog had become thick. No one on the fleet could see Shovelful Lightship, although they passed it within 200 to 300 feet. "The course in approaching Pollock Rip Lightship is E. by S.  $\frac{1}{4}$  S." When the fog changed, as the master of the Shamokin describes it, from a thick, white, dry fog to a dense, wet, black one, "the fleet was within range of the fog signal of the Pollock Rip Lightship. The tug sounded the regulation signals of three blasts at regular intervals, indicating that she had a tow. The tug was proceeding at the rate of about three or four knots over the land, the tide at the time setting westerly and southerly. At Pollock Rip Lightship the course changes  $5\frac{1}{2}$  points to the northward, viz. to N. E.  $\frac{1}{4}$  N. The Whitney, approaching in the opposite direction, and heading to the southwest, heard the tug's fog whistle, and gave the tug a signal of two blasts, which was accepted and answered with two by the tug. \* \* \* At that time neither was seen by the other. \* \* \* The tug [had] previously rounded the Lightship." The libel of the Shamokin puts the tug on a course N. E. when the International heard the fog signal of the Whitney, and the evidence makes it at least that, if not more northerly. "On the exchange of whistles, the tug starboarded until she headed N. by E. The Whitney starboarded one point until she headed S. W. by S. The tug and steamer were [barely] visible to each other as they passed at a distance variously estimated at from 100 to 300 feet, probably at least 200 feet. The Hercules, the first barge astern of the tug, was [dimly] seen, when she was passed by the Whitney; and those on her in like manner saw the Whitney." The libel and answer of the Shamokin both assert that the Whitney and the Hercules passed at about the same distance from each other as did the Whitney and the tug; and the evidence abundantly supports that allegation. "Soon after the Hercules was passed, the Whitney, seeing no other tow, started up her engines, and ported. \* \* \* Almost immediately after porting, the Shamokin was seen not 100 feet distant, crossing the bows of the Whitney from port to starboard. The Whitney reversed, but collision was then inevitable. She struck

the Shamokin at an angle variously estimated from  $4\frac{1}{2}$  to 7 points, causing damage to both vessels. \* \* \* The Shamokin sank in a few minutes; \* \* \* a total loss of the barge and her cargo."

Robt. T. Benedict, for Metropolitan S. S. Co.

Wilhelmus Mynderse, for Harris and others.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

LACOMBE, Circuit Judge (after stating the facts). Each side charges faults against the other, which the district judge did not sustain; and in some of his conclusions we are not able to concur. Discussion of these branches of the case, however, may be omitted here, since we find sufficient in the record to sustain the decrees below against both vessels.

The first question to be considered is as to the alleged fault of the tug and tow in navigating in that locality at that time in the way in which they did. The libel of the Whitney charges fault, "in that the Shamokin was being towed at too rapid a rate of speed in such a fog; in that those on said barge [and on the International] took no measures to indicate that she was being towed by said tug." The language of this charge, interpreted with absolute literalism, may be held to cover a contention that the speed of the fleet should have been reduced to zero; i. e. that it should have anchored, although the ordinary and natural import of such language is not so extensive. Still, there has been no "surprise," nor has the fleet been embarrassed in giving its testimony, or lost any of its witnesses by relying on the more natural construction of the libel. The testimony of the Whitney bearing on its contention was introduced early in the case. There was abundant opportunity to answer it, and it was answered. The district court has found the fleet in fault for not anchoring, and it would seem hypercritical to reverse because the phraseology of the libel does not charge in clearer language the particular fault as to which evidence was introduced by both sides, and full argument had both in the district court and here.

The opinion of the district judge says:

"Considerable testimony was given \* \* \* to the effect that navigation in dense fog in Vineyard Sound, and particularly around Pollock Rip Lightship, was highly dangerous, and that the tug and tow might easily have anchored in a safe place before reaching the lightship. Though there was some contradiction in the evidence on this latter point, I am persuaded from the affirmative testimony, as well as by consulting the chart, that the tug would have found no difficulty whatever in anchoring in a perfectly safe place had she desired to do so, before rounding Pollock Rip Lightship."

The first of these propositions is hardly disputed. Certainly, all the witnesses agree that, by reason of the shoals, the eccentricities of the tide, the narrowness of the channel in places, and its changes of course, the stretch from south of Shovelful to the Whistling buoy, beyond Pollock Rip Slew, is, during a thick fog, an extremely dangerous piece of water to pick one's way through; "in a dense fog or a dark night, as dangerous as any place between New York and Portland," says one of the witnesses. And, as to the second



proposition, the great preponderance of the evidence is with the district judge.

In view of the testimony, we are not prepared to say that the towing hawsers used by this flotilla were too long, nor that it is improper navigation to tow the barges "tandem," or to tow more than one at a time. That there cannot, even under the most favorable circumstances, be the same control exercised over such a flotilla as over a vessel moving under her own power, is self-evident. So, too, is the proposition that, the longer a vessel or a flotilla is, the more space she will require to maneuver in. Still, it is not for the courts to forbid the use of public waterways by long tows, however great a menace they may be to navigation, when the authorities whose function it is to regulate navigation in such waterways allow them. We had the question of towing on a long hawser through Hell Gate before us in *The Josephine B.*, 7 C. C. A. 498, 58 Fed. 813, and held that, in the absence of any special regulations on the subject, the practice, which was shown to be a common one, was not to be condemned on the evidence there adduced. The court of appeals in the First circuit had the question of a single tow on a long hawser, and used this language: "It is beyond the province of the courts to condemn a practice so notorious and so long-continued that it must be presumed to be known to congress and to the supervising inspectors, and yet has not been condemned by either of them." *The Berkshire*, 21 C. C. A. 169, 74 Fed. 906. But there is a wide difference between condemning such a practice altogether and holding those who indulge in it to a degree of care commensurate with the increased risk which their indulgence in such practice entails. "While," as said in *The Berkshire*, "we cannot condemn a tow of the character of that in this case as absolutely unlawful, yet we must hold tugs which navigate this coast with such long and essentially hazardous fleets to the use of the extremest care in the interests of common safety." *The Gladiator*, 25 C. C. A. 32, 79 Fed. 446.

In the case at bar the entire flotilla was about a quarter of a mile in length. After rounding the lightship, and getting into the jaws of the slew, it would have to run for nearly a mile through a channel no wider than its own length, and in which the irregular and uncertain tides, as one witness expresses it, "follow the sun in a continual move, not running in any direct direction all the time." And in that narrow channel the chances were that other vessels westward bound would be encountered, for a heavy coastwise traffic passes through it. The tug would, of course, be unable to check the motion of any of its tows, or to give them, or some one of them, any sudden movement to port or starboard; and yet the tug might be exposed to a different tidal action from that which was affecting the last barge in tow. It is manifest that even in broad daylight careful steering by the whole flotilla might be required to make the passage in safety. Before they reached Pollock Rip Lightship, however, the situation, even on the statement of the Shamokin's own witnesses, was very far removed from broad daylight. No one on the *International*, the *Hercules*, or the

Shamokin saw Shovelful Lightship as they passed it some 200 to 300 feet away; nor did any of them see the Pollock Rip Lightship, though some of them made out the whiter color of the steam from her siren showing above the dark fog. No vessel of the three could see the other, and the only guide for the steersmen of each tow was the hawser leading over her bow to the vessel ahead. The master of the Shamokin testified that, after passing Shovelful Lightship, he couldn't distinguish the steam signals of the International. "The fog shut down thick. It run his signals together so that I couldn't count them. I couldn't tell whether he was blowing one long blast, two blasts, or three blasts." Even this indication as to any changes of course by the tug to port or starboard to avoid other vessels was lost from that time on to the steersmen of the tow. And at this time there was safe anchorage available. It was no doubt not an absolutely safe anchorage, but no place is absolutely safe on navigable water in a fog. There was enough water to the starboard of Stone Horse Channel for the tug and tow to withdraw into, out of the path of vessels navigating through the fog from the whistle on Pollock Rip Lightship to the bell on Shovelful Lightship, or vice versa. It might be that sailing vessels beating across the full width of the channel, in order to make to windward, were still to be encountered even on the anchorage; but, nevertheless, anchoring would reduce the whole number of vessels to be encountered. The speed of any sailing vessels thus encountered must have been low, for there was "very little air." And, once at anchor out of the main channel, their positions fixed, and no longer shifting, the signals they were required to give as anchored vessels would have announced their whereabouts to all who heard them, and reduced the risk of collision with others to a minimum. In view of these facts, we have no hesitation in holding the tug and tow in fault for going on into the slew, instead of anchoring until the weather improved. It was a hazard, which might fairly be undertaken by a vessel in control of her own motive power, picking her way cautiously along from whistle to bell, and from bell to whistle, and meanwhile announcing to all approaching vessels her exact whereabouts by fog signals whose meaning is well known. But for a tow a quarter of a mile long, navigated by three steersmen at equal distances apart, neither of whom could positively tell with any exactness what the other was doing, and with no signal to indicate where the tow ended, it seems to us to have been an extremely hazardous undertaking. To handle these long tows in that manner, hauling them through narrow and tortuous channels in such a fog as this, is a serious menace to the safety of navigation. Whether the navigators who undertake such experiment do or do not violate some particular provision of the sailing regulations, they certainly expose their fellow navigators to a greatly increased risk, unnecessarily; and for a collision resulting from such action they should be made to respond. Navigating in crowded waters, with essentially hazardous fleets, they should, in the language of the court of appeals in the First circuit, "be held to the extremest care." And certainly in the case at bar the care exercised was far short of "extreme."

The navigation of the H. M. Whitney remains to be considered. She was apprised of the presence of the International, and understood from her signals that she was towing. The Whitney did not know how many craft the International had in tow, but she was bound to assume that in all probability there was more than one. The evidence is overwhelming that it is the general practice of those who tow over this route to take more than one barge, and to tow them tandem. Having passed the International and the Hercules safely, and, as we find, on substantially parallel courses, and with engines stopped, the Whitney "started her engines ahead, and hove her wheel to port." Had it not been for this maneuver, we are satisfied the collision would have been avoided. The master of the Whitney testified that he waited after the Hercules passed until he supposed everything was all clear before he started up and ported. But his waiting must have been of the briefest, for, as he testified, he ran probably 20 to 30 seconds before he made out something ahead, and the Shamokin was only 450 feet behind the Hercules. Knowing that, in the ordinary course of events, another tow was to be expected, and having observed the distance at which the Hercules was towing behind the tug, the Whitney should have waited a reasonable time for the appearance of a possible second tow before starting up again, and changing her course, so as to converge upon that over which the tug and first tow had passed; and it seems quite plain upon the evidence that reasonable time was not allowed. There is a suggestion in the proof that it was dangerous for her to wait with engines stopped in this narrow channel, with its uncertain tides. There would be force in this suggestion if she were still in Pollock Rip Slew; but we concur with the district judge in the finding that she had got out of the jaws of the slew, into the more open water near the lightship. Her own evidence as to the direction from which she heard the whistle of the lightship at the time of collision seems to settle this question, as to her position, quite conclusively. We concur, therefore, with the conclusion of the district judge that the Whitney "was to blame \* \* \* for not waiting a reasonable time before starting up her engine and porting."

The decrees appealed from are therefore affirmed, but, as both sides appealed, and no modification is made in the decrees, without interest or costs to either side.

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#### THE TRANSFER NO. 6.

THE E. H. MEAD.

KNICKERBOCKER ICE CO. v. THE TRANSFER NO. 6.

NEW YORK, N. H. & H. R. CO. v. THE E. H. MEAD.

(District Court, E. D. New York. April 14, 1898.)

#### **COLLISION—TUGS—VESSELS IN TOW—NEGLIGENCE.**

While the steamtug Mead was taking the barge Pawtuxet from a slip in New York, on the East river, and while the stern of the barge was still partially within pier 127, and her bow pointing a little north of east, and in

the direction of the Morrisania shore, Transfer Tug No. 6, with a car float on her port side, struck the stem of the Pawtuxet, and injured her. Tug No. 6 and car float had shortly before backed from a slip on the Morrisania shore, had straightened to the northward, with the intention of delivering the floats at a dock practically opposite the Pawtuxet. *Held*, that the accident happened entirely from the negligence of Tug No. 6 in running too close to the Mead and Pawtuxet.

Benedict & Benedict, for Knickerbocker Ice Co. and The E. H. Mead.

Henry W. Taft, for New York, N. H. & H. R. Co. and The Transfer No. 6.

THOMAS, District Judge. While the steamtug Mead (dimensions, 120 feet long by 22 feet wide) was taking the barge Pawtuxet (dimensions, 245 feet long by 40 feet wide) from the slip between 127th and 128th street, New York, on the East river, and while the stern of the barge was still partially within pier 127, and her bow pointing a little north of east, and in the direction of the Morrisania shore, Transfer Tug No. 6 (dimensions, 100 feet long by 20 feet wide), owned by the New York, New Haven & Hartford Railroad Company, with a car float (dimensions, 227 feet long by 33 feet wide) on her port side, struck the stem of the Pawtuxet, and injured her. Tug No. 6 and car float had shortly before backed from the lower of the three slips belonging to the railroad company on the Morrisania shore; had straightened to the northward, with the intention of delivering the floats at the dock immediately north of the upper slip, which dock was practically opposite the Pawtuxet when her bow faced towards the Morrisania shore.

It is claimed on the part of Tug No. 6 that the stern of the float went slightly to the south, and to about the middle of the river, and that, when she straightened about, the starboard side of the tug was some 50 feet from the racks of the ferry on the east side, which distance was reduced to 25 feet at the time of the accident. It is also contended by the captain of Tug No. 6 that a line running from the stern of the Pawtuxet shoreward, and estimated by him to be some 60 feet in length between the stern and the end of pier 127, parted or was thrown off, and that the barge, thus released, floated eastwardly, as the Mead was so operating at the time as to give her that direction, and that the barge, thus released and impelled, went so far across the river as to strike the port side of the float. It is claimed in behalf of the Mead that she was attached to the Pawtuxet by a line some 30 feet in length; that the bow of the barge was east of the tug; that the tug was so much pointed towards the New York shore that her operation tended to hold the stern of the barge to the westward, while she was being brought about; and that Tug No. 6 and her car float backed westwardly beyond the Mead's bow, and took her course so near to the port side of the Mead as to rub against the same, and finally to strike the stem of the Pawtuxet with the port side of the car float at a point astern of the bow of the latter.

The witnesses for the tug and the barge all give the same evidence as to the relative positions of the Pawtuxet and Mead, and their description of the accident is similar. This description in accuracy seems

preferable. The distance from pier 127 to the Morrisania side of the river is about 450 feet. The accident could not have happened as stated by the captain of Tug No. 6, unless the Mead was within about 100 feet of the east shore, and so pointed as to give an eastwardly direction to the barge, as she drew upon the same, and also so disposed as to allow the barge to pass the Mead, so that the former would be struck, and not the Mead herself. The evidence is general and credible that the Mead was pointing substantially down the river; that her stern line was about 30 feet in length. It would be difficult, and perhaps impossible, in view of this, to place the Mead sufficiently eastwardly to either give the barge a motion which would carry her eastwardly, as contended by Capt. Simms, or at least that would allow her to go sufficiently to the eastward to collide, unless she dragged the Mead with her, or unless the Mead and her stern line were stretched across the river about in front of the bow of the barge. In other words, the Pawtuxet, 245 feet in length, the Mead, 123 feet in length, and some 30 feet of stern line between the two, would have to be in almost a direct line across the river in order to allow the barge to go sufficiently eastward to strike the car float, unless her momentum was so great as to drag the Mead with her. To meet this view, probably, the captain of Tug No. 6 says that the stern of the barge, when he first saw it, was about 60 feet east of pier 127, with a stern line running to shore, and that it was the casting off of this line that enabled the barge to respond to an eastwardly impulse given to her by the tug, and to cross the river. The existence of such a line after the stern of the barge had cleared pier 127 seems improbable, inexplicable, and useless in connection with the movement of the Pawtuxet. It is contrary to the evidence of the captain of the Pawtuxet and his assistant, both of whom were on the spot, and who were fair witnesses. Yet, without some such way of accounting for the space across the river, it is not apparent that the collision could have taken place as stated by Capt. Simms. On the whole case, the account given by the people connected with the Pawtuxet and the Mead seems preferable, and the accident seems to have happened entirely from the negligence of Tug No. 6 in running too close to the Mead and Pawtuxet, of whose presence and maneuvering those in charge of Tug No. 6 had been aware, even from the time of coming from the slip. Therefore a decree should be entered in favor of the Knickerbocker Ice Company for the injury to the Pawtuxet, as a commissioner may ascertain the same, together with costs; and the libel of the New York, New Haven & Hartford Railroad Company against the steamtug E. H. Mead should be dismissed, with costs to the libellant.

## POWERS et al. v. BLUE GRASS BUILDING &amp; LOAN ASS'N et al.

(Circuit Court, D. Kentucky. March 25, 1898.)

No. 6,662.

**1. ASSIGNMENT BY BUILDING AND LOAN ASSOCIATION — AUTHORITY OF SHAREHOLDERS.**

The directors of a building and loan association have no authority, either under the general assignment statute of Kentucky or at common law, to make a valid assignment for the benefit of creditors, without authority from the shareholders, when the corporation is not in fact insolvent.

**2. DEPOSING DIRECTORS—INVALID ELECTION.**

The shareholders of a building and loan association cannot depose directors whose term of service has not expired, and elect a new board.

**3. APPOINTMENT OF RECEIVER—CORPORATE DISORGANIZATION.**

The directors of a building association, without consulting the shareholders, made an assignment for the benefit of creditors, and delivered the corporate assets to the assignee. The shareholders repudiated the assignment, and elected a new board of directors, who elected new officers. The old officers and directors refused to recognize this result. Shareholders brought suit to set aside the assignment, and restore the assets to the corporation. *Held*, that a receiver pendente lite should be appointed.

**4. ASSIGNEE'S POSSESSION—PROPERTY IN POSSESSION OF COURT.**

Under Ky. St. § 76, requiring an assignee to give bond and state his accounts in a county court, assets in his possession are not in the possession of the court.

**5. PETITION FOR DIRECTION OF COURT—STATUS OF TRUST PROPERTY.**

Where, under the Kentucky statute, an assignee petitions the circuit court for direction in the conduct of his trust and settlement of his accounts, such court does not thereby acquire possession or control of the trust property.

**6. CONFLICT OF JURISDICTION—DIFFERENT ISSUES AND RELIEF.**

The pendency in a state court of a suit brought by an assignee for the construction of a deed of assignment made by a building and loan association, and the adjudication of the right under the deed of the different classes of shareholders *inter sese*, is no obstacle to the prosecution, in a court of the United States, of a suit by shareholders to annul the deed of assignment as invalid, and recover the assets from the assignee.

Humphrey & Davie and C. H. Stoll, for complainants.

Helm, Bruce & Helm, Wm. Rogers Clay, and Bronston & Allen, for defendants.

**LURTON, Circuit Judge.** This case comes on upon a motion to appoint a receiver pendente lite for the Blue Grass Building & Loan Association, a corporation organized under the law of Kentucky. The motion is based upon the bill, amended and supplemental bill, and exhibits, and upon a mass of *ex parte* affidavits, taken either in support or opposition to the motion, and also upon a transcript of a record from the Fayette circuit court of a suit there pending, which is filed for the purpose of showing that that court has obtained jurisdiction of the subject-matter here involved, and that such prior jurisdiction should not be interfered with by this court. The complainants are stockholders in the Blue Grass Building & Loan Association, and citizens of states other than Kentucky. The defendants are the association and Bishop Clay, to whom the directors and officers of the association, by a deed of general assignment, on the 31st day of January, 1898, conveyed all the assets and books and papers

of the association, with authority to wind up the association by collecting its assets; selling its property, and making distribution of proceeds among the shareholders according to their rights, after paying debts and expenses of the trust. I shall content myself with a mere statement of my conclusions.

1. This general deed of assignment to Clay of January 31, 1898, does not appear to have been made with any evil intent, nor to be fraudulent in fact. But it was made without authority from the stockholders, and under circumstances which subject the board to very just criticism. The indebtedness of the association to creditors proper was absolutely frivolous. Not more than 6 per cent. of the shareholders had given withdrawal notices, and, if they be treated as in a sense creditors, the cash in the treasury was still largely more than sufficient to have paid in full every creditor proper, and to every such withdrawing stockholder everything which, under the by-laws, they had a present right to demand. The mortgages held by the association, together with its real estate, cash on hand, and other assets, amounted to approximately \$300,000. There was a difference of opinion as to the advisability of continuing in business under the law as declared by the court of appeals of Kentucky, and the stockholders had resolved upon a change in their methods of business so as to comply with the law as declared by the Kentucky court, and had adopted a plan of reorganization. Pending their efforts in this direction, the directors seem to have concluded that a continuance in business was not advisable, and the reorganization scheme an abortion. To make an assignment which amounted to putting the association into liquidation without consulting their constituency was clearly a most illy advised act. The association was not insolvent. Its debts proper were insignificant. No trust had therefore arisen in favor of creditors. Neither are withdrawing stockholders to be regarded as creditors in the sense in which that word is used when so serious an act as that of an assignment is contemplated. Ninety-nine per cent. of the liability of this association at the date of this assignment was to its own shareholders as such. I am of opinion that under such circumstances the directors had no power, either under the general assignment statute of Kentucky or at common law, to make and execute the deed of assignment to Clay. The act was ultra vires the officers and directors of the association. Still it was an act which might have been ratified by the shareholders as a mode of liquidation within the general power of the corporation. But there has been no ratification, actual or implied. Upon the contrary, the shareholders in general meeting, assembled at the call of the directors, have rejected and repudiated the assignment, and demanded that it be retracted. They have gone perhaps further than their power justified, for since the filing of the original bill they have deposed their directors, and elected a new board, and the new board have elected new officers. This result has not been recognized by the majority of the old board, and thus we have the unusual spectacle of two sets of managing officers for this distressed corporation. The one set repudiate the deed of assignment,

and they represent apparently more than 80 per cent. of the whole stock. The old officers maintain that they have not been lawfully displaced, and stand by the deed of assignment.

2. Holding as I do, that the deed of assignment was a voidable act, and that, having been rejected by the shareholders, it is now a void act, it must follow that Clay has no authority to withhold from the corporation its assets, books, and papers. . He is a mere trespasser, and withholds at his peril the property placed in his possession under the deed of January 31, 1898, from the association. The case for the appointment of a receiver is clear, unless the hand of this court is stayed as an effect of the bill pending in the state court, concerning which I shall shortly speak. If Clay has no title under the assignment, there ought to be a receiver pendente lite, because the question of his title cannot be finally or authoritatively decided upon a mere motion for a receiver, and before the cause is finally heard. No order can at this stage of the case be made directing that the association be placed in possession of its assets. Such an order would be premature. Neither would the court be justified, upon the facts as they now appear, even if this was a final decree, in restoring these assets to the custody of either the old officers and directors of the association or to those who claim to be their successors. The old managers, in abdicating their trust, as they did when they made the illegal assignment to Clay, have forfeited the confidence of their constituency, and should not be restored to power. The new board, I do not think, were lawfully elected under the charter and by-laws of the association. The action of the shareholders in deposing a board of directors whose term of service had not expired was irregular and illegal. Under such a condition of corporate disorganization it is proper that the corporate assets should go into the hands of a receiver until there can be elected a directorate which will lawfully represent those interested in them.

3. But it is said that this court ought not to appoint a receiver, or take cognizance of the question as to the validity of the assignment to Clay, because such a course will be in conflict with the prior jurisdiction of the Fayette circuit court touching the same subject-matter. This court has the highest respect possible for the Fayette circuit court, and will cheerfully withhold any action if by so doing it will interfere with the prior jurisdiction of that court over either the res or the subjects presented to this court for judgment. But it can be no disrespect to that court if this court simply maintains its own jurisdiction, and no more. But has that court obtained any such exclusive jurisdiction as will bring this court into conflict with that court if a receiver be appointed, and this suit be maintained for the single purpose of determining the validity of the assignment to Clay? First, as to the res, which is the property of the Blue Grass Association. The principle that, where property is in the actual possession of one court of competent jurisdiction, such possession cannot be interfered with by process out of another court, is well settled. *Buck v. Colbath*, 3 Wall. 334; *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27; *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906;



*Compton v. Railroad Co.*, 31 U. S. App. 486-523-530, 15 C. C. A. 397, and 68 Fed. 263. There are two classes of cases in which the court first obtaining jurisdiction should be suffered to proceed without any interference by process from another of concurrent jurisdiction. The first class consists of those cases in which the exercise of jurisdiction by one court will interfere with the prior possession of the res by another court of competent and concurrent jurisdiction. *Krippeendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27; *Heidritter v. Oil-Cloth Co.*, 112 U. S. 294, 5 Sup. Ct. 135; *Byers v. McAuley*, 149 U. S. 608, 13 Sup. Ct. 906. The second class is where there are two suits pending in different courts of concurrent jurisdiction, in which the parties are the same, and which involve and affect the same subject-matter, and where the jurisdiction of neither is complete nor effectual unless it may, if necessary or proper, exercise exclusive dominion over the res in litigation. The cases relied upon by counsel for defendants of *Gates v. Bucki*, 12 U. S. App. 69, 4 C. C. A. 116, and 53 Fed. 961; *Merritt v. Barge Co.*, 24 C. C. A. 530, 79 Fed. 228; *Zimmerman v. So Relle*, 25 C. C. A. 518, 80 Fed. 417; and *Sharon v. Terry*, 36 Fed. 337,—are cases belonging to the latter class. The conflict exists in such instances because the suits are in the nature of suits in rem. The mere fact of the pendency of two suits in personam between the same parties and upon the same identical cause of action, in courts of different jurisdictions, does not make a case in which the jurisdiction of one is impeded or interfered with by the action of the other. *Stanton v. Embrey*, 93 U. S. 548. To make a case of conflict, the two concurrent suits must involve relief against the same res. The distinction here drawn is recognized in the cases last cited, and is clearly indicated in *Buck v. Colbath*, 3 Wall. 334. If the parties are the same, and the issues the same, and the relief sought involves dominion over the same res, and cannot be effectually granted if dominion over the res be taken by process from another court, it is a case where the second court should regard the jurisdiction of the first as exclusive, and hold its hands until the court first obtaining jurisdiction has terminated the case then pending. In *Buck v. Colbath*, supra, the court said:

"But it is not true that a court, having obtained jurisdiction of a subject-matter of a suit, and of parties before it, thereby excludes all other courts from the right to adjudicate upon other matters having a very close connection with those before the first court, and, in some instances, requiring the decision of the same questions exactly."

And again, in speaking of the limitation of this rule, the court, in the same case, said:

"The limitation of the rule must be much stronger, and must be applicable under many more varying circumstances, when persons not parties to the first proceeding are prosecuting their own separate interests in other courts."

Applying these principles first to the question of the actual possession of the res, and then as to the identity of the suit pending in the state court, we reach these conclusions:

(a) The possession by Clay before he filed his petition in the Fayette circuit court was a possession taken and held by virtue of the deed of assignment to him. The fact that under the Kentucky act he was

required to give a bond in a county court, and to pass his accounts in that court, or might apply to that court for direction, did not make him an officer of that court, or give that court any exclusive possession or dominion over the trust estate. While an administrator and a receiver are officers of the court appointing them, and their possession is the possession of the court, an assignee under the Kentucky statute is not in possession for any court, but holds under the deed appointing him. This has been so often settled in reference to similar assignments, under like statutes, as to be no longer open to debate. *Shelby v. Bacon*, 10 How. 55; *Purifier Co. v. McGroarty*, 136 U. S. 237, 10 Sup. Ct. 1017; *Morris v. Landauer*, 6 U. S. App. 510, 4 C. C. A. 162, and 54 Fed. 23; *Lehman v. Rosengarten*, 23 Fed. 642; *Ball v. Tompkins*, 41 Fed. 486.

(b) The same Kentucky statute gave like authority to an assignee to apply by petition to the circuit court for direction in the conduct of his trust and for settlement of his accounts. The petition filed by Clay did not change the character of his possession. He remained in possession of the res after he filed that petition as assignee under the deed, and not under any appointment by or authority from the circuit court. That court not only did not take possession of any part of the assets, but refused to permit him to pay into court money belonging to the trust. The object of that petition was to administer his trust under the advice and direction of that court. He submitted to it the construction of the deed and the rights of the different classes of shareholders for adjudication, and brought before the court as defendants one of each class to stand for and represent the class in settling rights under the deed *inter sese*. The pendency of that suit has not placed the property of the association in *grimeo legis*. Clay is just as completely in possession of the assets as he was the day before his suit was filed. He is in possession as assignee, and not as a mere hand of the court. The purpose of that suit is to wind up the trust under the deed, and is in actual furtherance of the scheme of liquidation sought to be carried out by and under an illegal and invalid general assignment. No issue as to the validity of the deed is presented by that petition. Its entire legality is assumed, and the court asked to aid the assignee by its advice and direction. So far as any issues are presented for judgment, they are confined to such as arise under the deed and between those who may claim under it. The purpose of the present suit is to recover the assets of the association from Clay as one who has illegally possessed himself of them through the dereliction of the corporate officers who had the management of the corporate affairs. This suit attacks Clay's title. If his title is good, that is the end of the suit. That is the only issue, and its settlement in favor of the assignee closes this litigation. This court could not, with proper respect for itself and for the state court, retain it for the purpose of interpreting the deed or adjudging the rights of creditors or shareholders thereunder. That subject is within the exclusive jurisdiction of the state court.

But it is said that the purpose of this suit could be just as well accomplished by a suit in the Fayette circuit court, or by intervention in the pending suit. Doubtless this is true. This court would

be glad to have the whole matter disposed of by that court. But the complainants, as citizens of states other than Kentucky, have the constitutional right to bring this cause in a court of the United States. They have done so. If the court may grant the relief sought without interference with the proper jurisdiction of the Kentucky court, it must do so. It is also urged that, although neither the issues nor the parties are the same, and although that court may have no actual possession of the res, still the effect of this suit is to make ineffectual the jurisdiction of the state court. If this court should finally decide that the deed of assignment to Clay was invalid, the result would be that Clay would have no duties to perform as assignee, and no trust to have construed. But that does not show that this court, in the exercise of its proper jurisdiction over the issues under this suit, has interfered with the jurisdiction of the state court. The relief sought under the two suits is wholly different. The relief granted here may make the relief sought there unnecessary. In *Buck v. Colbath*, supra, Justice Miller calls attention to the necessity of looking closely to the nature of the relief sought when two cases pending in different courts are supposed to present a question of conflict of jurisdiction. He says:

"In examining into the exclusive character of the jurisdiction of such cases, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. For example, a party having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an action of ejectment to get possession of the land. Here, in all the suits, the only question at issue may be the existence of the debt mentioned in the notes and mortgage; but, as the relief sought is different, and the mode of proceeding is different, the jurisdiction of neither court is affected by the proceeding in the other. And this is true, notwithstanding the common object of all the suits may be the collection of the debt. The true effect of the rule in these cases is that the court of chancery cannot render a judgment for the debt, nor judgment of ejectment, but can only proceed in its own mode to foreclose the equity of redemption by sale or otherwise. The first court of law cannot foreclose or give a judgment of ejectment, but can render a judgment for the payment of the debt; and the third court can give the relief by ejectment, but neither of the others. And the judgment of each court in the matter properly before it is binding and conclusive on all the other courts. This is the illustration of the rule where the parties are the same in all three of the courts."

*Bank v. Lanahan*, 60 Md. 477, presented a case of supposed conflict, very much such as that here claimed, and is a well-reasoned opinion. I think there is no conflict, and that this court will only exercise its own proper jurisdiction in taking cognizance of this case, and in appointing a receiver pendente lite. It is evident that the best interests of all shareholders demand a speedy termination of this litigation. I have very plainly intimated my views as to the invalidity of the deed of assignment. I trust that an agreement can be reached as to a proper receiver. I will gladly appoint any one satisfactory to both sides. If no agreement can be reached, I will leave the selection of a receiver to Judge Barr, whose large acquaintance in the locality will enable him to select some one competent and willing to act.

MERCANTILE TRUST CO. et al. v. SOUTHERN STATES LAND & TIMBER CO., Limited, et al.

McDONNELL et al. v. MERCANTILE TRUST CO. et al.

(Circuit Court of Appeals, Fifth Circuit. March 15, 1898.)

No. 627.

**1. INSOLVENT CORPORATION—LIEN OF JUDGMENT CREDITORS.**

When a corporation becomes insolvent, and a court of equity has, on the filing of a bill by the proper parties, seized the property and appointed a receiver, a creditor who obtains a judgment at law after such bill is filed and receiver appointed, does not thereby acquire a legal or equitable lien on the property not covered by a mortgage.

**2. MORTGAGE—LIEN ON LOGS AT MILLS.**

Where, by the terms of a mortgage executed by a corporation, it had the right to enjoy the mortgaged premises, to cut and remove logs for the mills, to manufacture lumber from them, and to pledge or sell that lumber, when the corporation becomes insolvent, and a bill is filed and receivers appointed, the logs cut from the land and removed to the mills, and the lumber manufactured from such logs, are not subject to the mortgage lien.

**3. INSOLVENT CORPORATION—DISTRIBUTION OF ASSETS.**

Where proceeds of mortgaged property of an insolvent corporation have been subjected to the satisfaction of the mortgage creditors, such creditors are entitled to a decree for any balance that may be found due them, and as to such balance they are on a par with other general creditors, and are entitled to their pro rata share of the funds on which there is no lien.

Appeals from the Circuit Court of the United States for the Southern District of Alabama.

D. P. Bestor, J. W. Gray, W. A. Blount, A. C. Blount, Jr., Leopold Wallach, and Alex. C. King, for appellants.

John C. Avery, Gregory L. Smith, and Harry T. Smith, for appellees James McDonnell and others and for cross appellants James Pollock and others.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. The Southern States Land & Timber Company, Limited, is an English corporation. In May, 1889, it was the owner of a large lumber milling property situated in the states of Alabama and Florida. On May 17, 1889, it conveyed this property, described in the deed, to trustees named in the deed, to secure an issue of 1,350 coupon bonds, of £100 each. The deed of trust and the bonds made elaborate provision for the conduct of the company's business, the payment of interest, and the payments to the sinking fund. Of the issue of bonds under this deed of trust, George H. Moore, the original complainant in this suit, became the owner of 243. The mortgagor company made default in the payment of interest and in the payments to the sinking fund; and on April 6, 1895, George H. Moore, the original complainant, in behalf of himself and all other first-mortgage bondholders (who may come in and pay their pro rata share of the expenses of this suit) of the Southern States Land & Timber Company, Limited, exhibited his bill against that company and the trustees named in the

mortgages (there was a second mortgage) to one of the judges of the circuit court for the Southern district of Alabama. Besides the customary and appropriate allegations in a bill for the foreclosure of a mortgage, the original bill in this case alleges that the mortgagor company is largely indebted to other persons than the holders of the bonds under the mortgage sought to be foreclosed; that the aggregate of these debts to other persons exceeds \$100,000; that some of these creditors reside abroad; that a large part of the property of the company, consisting of sawn timber and lumber, is pledged to secure a part of this indebtedness; that there are due the company various sums on open account in various parts of the United States; that the company also has cargoes afloat destined to various parts of the world; that, being a foreign corporation, its property is subject to garnishee process and attachment in various parts of the United States; that a large part of the value of the properties of the company lies in the unity and integrity thereof, and to dismember the same would be to destroy that value to a great extent; that the company is now insolvent, and unable to meet its maturing obligations, and that there is a great danger, unless the assets of the company are marshaled, and the respective priorities of the debts and liens ascertained, that a multiplicity of suits will result, threatening discordant decisions from different courts, especially between the courts of the United States and the kingdom of Great Britain and other foreign countries, concerning the relationship of the various secured creditors growing out of pledges of property and other equities in the property respectively pledged to them, thereby threatening a maze of litigation and counter litigation that would entail great loss to the trust estate; that, to prevent this multiplicity of suits, a general bill for taking the accounts, ascertaining and fixing respective priorities, marshaling the assets, and preserving the trust estate is necessary. After prayer for process, the prayer is that the court shall decree that the mortgage dated the 17th day of May, 1889, is a first lien on all of the property therein described, and ascertain the amount of the bonds and unpaid interest due thereon and entitled to the benefit of that mortgage, and ascertain the amount due for principal and interest on the mortgage debt, and in default of the payment of that sum by a short day, to be named, to decree the foreclosure of the mortgage and order the sale of the mortgaged property according to the usual practice in equity; that a single decree administering the entire property as a single trust estate, and adjudging the rights of the several security holders and lien holders and other parties to such suit, be rendered in the cause, and that the trust estate be administered in accordance with such decree in this suit; that the assets of the company be marshaled, and the debts of the same be ascertained, with their rank and dignity, and that the rank and dignity of the several mortgages and other liens covering any portion of the property of the company be ascertained and fixed by the decree, together with an ascertainment of the property covered by it; that a proper decree for the sale of the other property of the company, which may be held not to be covered by the lien of the mortgage of May 17, 1889, not hereinbefore prayed to be sold, shall be so framed that a purchaser may have the opportunity of buying the same as an entirety, and that an accounting be had to determine what,

if any, property is subject to specific liens, the amount of such liens, and the priority of the several claimants thereto, and that pending the entry of such final decree a receiver or receivers be forthwith appointed of all and singular the property of the company, with power and authority, under the direction of the court, to operate the same, with the usual power and duty of receivers and managers of such property; and that until an application for the appointment of such receivers can be heard, and until the appointment of the same, the court will issue an injunction or restraining order prohibiting the defendant mortgagor company, or any of its officers, agents, or other persons, in possession of its property or any part thereof, from selling, transferring, conveying, or otherwise disposing of or incumbering, any of the corporate property, or delivering the possession thereof to any one, except to the receiver or receivers to be appointed by the court in this cause.

At the same time (April 6, 1895) the Southern States Land & Timber Company, Limited, defendant in the bill, appeared and answered that the allegations of the bill are substantially true, and that the defendant submits the complainants' application to the honorable court for such action in the premises as to it may seem meet and just and in accordance with the usual practice in equity. Thereupon, on the same day, the court passed its decree granting the prayer of the bill asking for the appointment of receivers and the issuance of an injunction, and on April 8, 1895, the receivers took possession of all the property of the debtor company, and continued the operation and business thereof under decrees of the court. They made sales, in due course of trade, of the lumber and other goods on hand held for sale, and from time to time made considerable needed improvements and repairs on the plant used in the operation of the business.

On the 26th of June, 1895, James McDonnell and 13 others, creditors of the Southern States Land & Timber Company, Limited, presented severally their petitions to intervene in this suit. The 13, referring to the petition of James McDonnell, joined therein. Subsequently other like creditors, by separate applications, joined in the petition of intervention of James McDonnell. After showing the nature of their claims, and the times within which each arose, they show that on the 5th of June, 1895, and on different subsequent dates, they had obtained judgments in the state courts against the Southern States Land & Timber Company, Limited, on the part of the indebtedness due to each which had then matured, and had caused executions to be issued on the judgments, and placed in the hands of the sheriff of the county in which the property of the debtor company was situated. They prayed to be made parties to this suit, and that at the hearing of this cause the honorable court will be pleased to take cognizance of their claims, and of the claims of such other persons, similarly situated, as may hereafter join therein, and decree the amount due them, and cause the property and assets (not subject to the lien of the mortgage sought to be enforced by the original bill of complaint), or the proceeds thereof, to be applied to the payment of the indebtedness due to them, and to such other persons holding proper liens or claims against the same, in the proportion to which each may be entitled,

and that this honorable court will grant to petitioners and those joining therein such other and further relief as they may be entitled to in the premises. Certain amendments to the petitions for intervention and certain orders in reference thereto were made which it is not necessary to notice.

On the 6th of February, 1896, the interveners moved the court for the appointment of a special master, and for an order of reference to him to hear evidence upon and ascertain and report to the court what property the debtor company owned at the time of the appointment of the receivers which was not covered by either of the mortgages described in the original bill of complaint; what property was covered by either one of the mortgages and not by the other; what disposition the receivers had made of any of the properties, and what part still remained on hand; what part of the unmortgaged property had been used in the betterment of the mortgaged property, and what part of the unmortgaged property had been used in the payment of labor and other expenses or purchase money in the production or procurement of other assets on hand, or proceeds of which or that into which they have been converted, and are now in the hands of the receivers; what portions, if any, of the unmortgaged property have the petitioners or any of them (indicating which) any lien upon or legal or equitable right to be paid therefrom, and whether or not they, or any of them, have any legal or equitable right to a lien upon the property covered by the mortgages, to the extent, if any, to which any of the unmortgaged properties have been used by the receivers in the betterment of the mortgaged property; what amount is due to each of the petitioners; and to what extent, if any, these several indebtednesses constitute liens upon any of the property of the company, or any portion thereof, and as to the priority of such liens with regard to the mortgages described in the bill of complaint. This motion was granted, and John E. Mitchell, Esq., was appointed special master, and the reference was made to him February 7, 1896.

On May 20, 1896, the court passed the following decree:

"This cause coming on to be heard upon the bill of complaint and exhibits thereto, and the decree pro confesso heretofore rendered in this cause against the defendants, and the same being duly considered and understood by the court, the court is of the opinion that the complainants are entitled to relief. It is therefore ordered, adjudged, and decreed that it be and it is hereby referred to Richard Jones, clerk of the court, as special master (the parties to the litigation, by their solicitors in open court, consenting to such appointment, and the court considering such consent sufficient special reason therefor), to ascertain and report, within sixty days from the date hereof: (1) The number and amount of the outstanding and unpaid debentures issued by the said Southern States Land and Timber Company, and secured by the said deed of trust dated on, to wit, the 17th day of May, A. D. 1889, and the amount of interest due thereon. (2) The names of the holders or owners of said debentures, and the number and amount of such debentures held by each. The said master shall cause to be published in the London Times, a newspaper published in London, England, and also in a newspaper published in the city of New York, state of New York, a notice calling upon all holders or owners of said debentures to present their said debentures to said Richard Jones, or to John A. Shields, United States commissioner, residing in the said city of New York, within the time named in said

notice (which time shall be not less than thirty days from the date of the first publication in said London Times), and they shall also present a statement showing the name of the owner or holder of said debentures. The holders or owners of said debentures may present their said debentures to said John A. Shields, together with a statement of the name of the owner or holder of said debentures, and procure from the said Shields, as United States commissioner, a certificate under his hand and official seal, stating the name of the holder, the number or numbers of the debenture or debentures, and the amount thereof, which certificate such holder or owner may present, in lieu of said debentures, to the said Richard Jones, as master, within the time stated in said notice, or within five days thereafter, and which certificate shall be presumptive evidence of the facts stated therein. Said notice provided above to be given by publication shall be by insertion twice a week for two successive weeks in said newspapers."

On the 10th of June, 1896, the report of the special master, John E. Mitchell, was filed, and to it the interveners filed numerous exceptions, the nature of which is sufficiently shown in the ruling of the court thereon announced July 27, 1896, to the effect: (1) The court will recognize the priority of those judgment creditors who have obtained judgments prior to the decree pro confesso rendered in this cause, and who would have obtained by the levy of an execution such priority if no obstacles had stood in the way of the levy of such process by the action of the court and its appointment of receivers to take possession of the property of the defendant. And the court holds that the interveners whose judgments were recovered before the decree, though after the appointment of receivers, shall have a lien upon all the property and effects of the defendant not covered by the mortgage, and in the hands of the receivers, and recognizes the right in the interveners paramount to the other creditors to be paid out of such property and effects. The lien is not one that can be enforced or perfected by an execution because of the rule that a judgment recovered after the appointment of a receiver does not become a lien upon the property in the hands of the receiver, but it is such a lien as will be recognized in equity. The petitions herein were filed before any order calling creditors in to establish their claims, and before any decree pro confesso against the defendant was rendered, and its insolvency adjudicated, and the judgments set up were obtained prior thereto. (2) The court holds that the logs cut from the land covered by the mortgage, and removed to the mills, and the lumber manufactured from such logs, are not covered by the mortgage lien. The exceptions to that part of the master's report finding that petitioners have no lien and are entitled to no priority of payment are sustained; also the exceptions to that part of the report finding that petitioners have no lien or right to priority of payment out of the property and effects of defendant not covered by the mortgage are sustained. The exceptions to that part of the report finding that the logs and lumber are covered by the mortgage lien are sustained, and the exceptions to that part of the report finding that railway equipments are covered by the mortgage are sustained. The exceptions to that part of the report finding that the mills at Millview, Fla., are covered by the mortgage, are overruled. In accordance with which announcement the court the same day (July 27, 1896) passed the following decree:



"This cause coming on to be heard on the interveners' exceptions to the report of the special master, John E. Mitchell, and the same being argued by the solicitors for the parties, and being considered by the court, it is now ordered, adjudged, and decreed that the exceptions to that part of said report which finds that said interveners have no lien and are entitled to no priority of payment out of any of the property of the defendant are sustained; also the exceptions to that part of the report which finds that none of the interveners have a lien or a right to priority of payment out of the property and effects of the defendant not covered by mortgage are sustained; also the exceptions to that part of the report which finds that the logs and lumber are covered by the mortgage lien are sustained; and also the exceptions to that part of the report which finds that railway equipments are covered by the mortgage are sustained. It is further ordered, adjudged, and decreed that the exceptions to that part of the report which finds that the mills, machinery, etc., at Millview, Florida, are covered by the mortgage, are overruled; and it is further ordered, adjudged, and decreed that all other exceptions to said report not herein specifically passed on shall remain open to be disposed of at a future day of the court."

On the 18th of June, 1896, a decree had been passed amending the decree of reference to Richard Jones, special master, so as to authorize and instruct him to report the names of all the creditors of the defendant the Southern States Land & Timber Company, Limited, and the amount due to each (other than the names and amount due to the debenture holders secured by the deed of trust dated on the 17th of May, 1889); also what liens any of said creditors may have upon any of the property of the company, and a description of the property upon which the liens may be claimed; also what property is covered by the deed of trust of date May 17, 1889. The report of the special master, Richard Jones, was filed September 19, 1896. In it this passage appears:

"The creditors other than the holders of the debentures secured by the deed of trust of May 17, 1889, who claim a lien upon any of the property of said Southern States Land and Timber Company, are the judgment creditors named in class A of this report, and I have heretofore stated the personal property upon which they have a lien; and the manner in which such lien arose was that they were diligent, and secured judgments against said defendant before the decree pro confesso was entered in this cause in favor of the complainants, and said judgment creditors were decreed by this honorable court on July 27, 1896, 'to have a lien upon all the assets of the defendant not covered by the mortgage, and recognizes the right in them paramount to the other creditors to be paid out of such assets and effects.'"

The report is elaborate, covering all the ground embraced in the reference. The interveners filed very numerous exceptions to it, of which those relating to the creditors Charles Seales and John J. Fitzgerald were sustained. The complainants also filed 21 exceptions to the report, of which those numbered 14, 15, 17, 18, 19, 20, and 21, not necessary to be set out here, were sustained. All other exceptions to the report were overruled, and that report in all other respects confirmed, by a decree passed the 4th of February, 1897. The exceptions of the complainants that were overruled are as follows:

"(1) Because said master reports that the judgment creditors who have obtained judgments against the Southern States Land and Timber Company prior to the decree pro confesso rendered on November 4, 1895, have liens upon all the assets of the said company not covered by the mortgage of May 17, 1889, and have priority over the other creditors, and are entitled to be paid first out of such assets and effects. The bill in this cause is a general creditors' bill, and

the said judgment creditors, having obtained their judgments subsequent to the filing of the bill in this cause, thereby acquired no lien superior to the other creditors of said Southern States Land and Timber Company.

"(2) Because the bill filed in this cause is a bill for the administration of the assets of an insolvent corporation, and a distribution thereof among all the creditors of such corporation, and the said judgment creditors, having obtained their judgments subsequent to the filing of the bill in this cause, thereby acquired no lien superior to the other creditors of said Southern States Land and Timber Company.

"(3) Because the master reports among the property upon which said judgment creditors of said Southern States Land and Timber Company have a lien certain logs which the receivers had on hand on June 11, 1895, and valued at \$17,567.65, because said master has failed to deduct, from said sum of \$17,567.65, 86<sup>9</sup>/<sub>10</sub> per cent. of the value of said logs, which 86<sup>9</sup>/<sub>10</sub> per cent. of said logs were cut from the lands covered by said deed of trust of May 17, 1889, and were therefore covered by said deed of trust.

"(4) Because the master has reported among the property upon which said judgment creditors of said Southern States Land and Timber Company have a lien certain logs of the value of \$30,030.68, and which logs the receivers took possession of at the time of their appointment, because said master has failed to deduct, from said sum of \$30,030.68, 86<sup>9</sup>/<sub>10</sub> per cent. of the value of said logs, which 86<sup>9</sup>/<sub>10</sub> per cent. of said logs were cut from the lands covered by said deed of trust of May 17, 1889, and is therefore covered by said deed of trust.

"(5) Because the master has reported among the property upon which said judgment creditors of said Southern States Land and Timber Company have a lien certain lumber of the value of \$47,924.88, and which lumber the receivers took possession of at the time of their appointment, because said master had failed to deduct, from said sum of \$47,924.88, 86<sup>9</sup>/<sub>10</sub> per cent. of said lumber, which 86<sup>9</sup>/<sub>10</sub> per cent. of said lumber was manufactured from logs cut from lands covered by said deed of trust of May 17, 1889, and is therefore covered by said deed of trust, and is not subject to said lien of said judgment creditors.

"(6) Because the master reports among the property upon which said judgment creditors of said Southern States Land and Timber Company have a lien certain lumber of the value of \$30,010.75, and which lumber the said receivers had on hand on the 11th day of June, 1895, because said master has failed to deduct, from said sum of \$30,010.75, 86<sup>9</sup>/<sub>10</sub> per cent. of the value of said lumber, which 86<sup>9</sup>/<sub>10</sub> per cent. of said lumber was manufactured from logs cut from lands covered by said deed of trust of May 17, 1889, and is therefore covered by said deed of trust, and is not subject to said lien of said judgment creditors.

"(7) Said complainants separately except to so much of said master's report as fails to include, in the property covered by said deed of trust of May 17, 1889, 86<sup>9</sup>/<sub>10</sub> per cent. of \$30,030.68, the value of certain logs which the receivers took possession of at the time of their appointment, and which 86<sup>9</sup>/<sub>10</sub> per cent. of said logs were cut from the lands covered by said deed of trust of May 17, 1889, and is therefore covered by said deed of trust.

"(8) Because said master's report fails to include, in the property covered by said deed of trust of May 17, 1889, 86<sup>9</sup>/<sub>10</sub> per cent. of \$47,924.88, the value of certain lumber which the receivers took possession of at the time of their appointment, and which 86<sup>9</sup>/<sub>10</sub> per cent. of said lumber was manufactured from logs cut from the lands covered by said deed of trust of May 17, 1889, and is therefore covered by said deed of trust.

"(9) Because said master fails to find that all the creditors of said Southern States Land and Timber Company, including the holders of the debentures secured by said deed of trust of May 17, 1889, are entitled to share pro rata in the distribution of the property and assets of said company not covered by the deed of trust of May 17, 1889.

"(10) Because said master fails to find that the holders of the debentures secured by said deed of trust of May 17, 1889, are entitled to participate in the property and assets not covered by the deed of trust of May 17, 1889, in the proportion which the whole amount of the debentures and interest thereon, viz. \$113,593-16s. bears to the whole indebtedness of said Southern States Land and Timber Company.

"(11) Because said master includes in the description of property upon which

said creditors (who have obtained judgments prior to November 4, 1895) have liens the railroad equipments of the Pensacola and Mobile Railroad Company, a corporation, which railroad and equipments were taken possession of by the receivers in this cause at the time of their appointment. Four hundred and ninety-three shares of the capital stock of said corporation are pledged to secure the payment of the debentures mentioned and described in the deed of trust of May 17, 1889.

"(12) Because the said master has included in the property which he reports as covered by liens in favor of the intervening judgment creditors the following personal property, to wit:

1 locomotive, 'Baldwin'.....	£5,000
1 " 'Shay'.....	750
1 " 'Montour'.....	1,500
1 " 'Mooney'.....	3,500
1 caboose.....	250
26 flat cars.....	3,250
4 " ".....	200
1 hand car.....	15
1 push car.....	6

—Although there is no testimony that the said property, or any part thereof, was in Escambia county at the time the executions in favor of said creditors were placed in the hands of the sheriff of Escambia county, Florida, or at any time thereafter.

"(13) Because the testimony of P. K. Yonge (the only testimony on the subject) shows that the said property was not at said time and times in said county."

"(16) Because the said master has included, in the statement made by him of the personal property reported by him to be covered by the lien of the judgment creditors, merchandise, stocks in stores, etc., of the value of \$21,888.14, although there was no testimony before the master of the amount or value of said property of the defendant the Southern States Land and Timber Company, Limited, at the date of the placing of the executions issued upon the judgments in favor of the interveners in the hands of the sheriff of Escambia county, Florida, or at any time thereafter."

April 10, 1897, the circuit court passed its decree of foreclosure and sale in customary form, providing, in default of the debtor company's making full payment of specified amounts, the whole of the property should be sold in the manner prescribed by the decree. This decree reserves all questions of priority among the several parties to the suit, and the method or rule of distribution of the funds arising from the sales, and all the questions left open in the decrees on the reports of the special masters, John E. Mitchell and Richard Jones, for a future decree herein. The purpose of this decree is declared to be to direct a sale of the property in the hands of the receivers, and to procure their discharge from the management of the same, and not to prejudice the rights of any of the parties hereto. From this decree of April 10, 1897, and the decree of February 4, 1897, and the decree of July 27, 1896, the complainants were allowed an appeal.

From the decree of the court rendered May 30, 1896, denying the petition of James McDonnell and others leave to file demurrers to parts of the original bill of complaint, and from the decree rendered July 27, 1896, whereby the court overruled the exceptions of interveners to that part of the report of the special master, John E. Mitchell, which finds that the mill machinery at Millview, Fla., is covered by the mortgage described in the original bill of complaint, and from the decree rendered on February 4, 1897, which

sustains additional exceptions filed by the complainants on the 7th of December, 1896, to the report of Special Master Jones, numbered, respectively, 14, 15, 17, 18, 19, 20, and 21, and from the decree rendered on the 10th of April, 1897, whereby the court ordered the property in the hands of the receivers to be sold without providing any means by which the interveners might obtain a credit upon the purchase money of such personal property as they might bid in at such sale by crediting upon their respective judgments such amounts as they might be entitled to receive from the property so purchased, the interveners, as cross appellants, were allowed an appeal.

Numerous errors are assigned by the appellants and by the cross appellants. From the very nature of the case, these exceptions are fragmentary in their character, and more or less related to and dependent on each other. Taken altogether the exceptions of the appellants and of the cross appellants on the whole record, a substantial summary of which, so far as it affects the real issue in the case, we have just made, embrace and present three questions: (1) Did the interveners, by putting their claims in judgment after the filing of the original bill and the seizure of the property by the receivers, acquire an equitable lien or preference against the property of the mortgagor company not covered by the mortgage? (2) Did the mortgage bondholders have a lien on the logs, and sawn lumber made therefrom, that came into the hands of the receivers at the time they took possession or subsequently? (3) How should the assets not subject to the mortgage or to judgment liens be distributed?

We believe that a clear answer to the foregoing questions will enable the circuit court to proceed with the administration of this estate without falling into any substantial error. It is urged that the original bill, brought by a mortgage bondholder who had not put his claim in judgment, and who sued only on his own behalf and on behalf of such other bondholders as should choose to come in and bear part of the expense of the litigation against the mortgagor company and the trustees in the mortgage, did not present such a case as gave the circuit court jurisdiction in equity over the property of the mortgagor company not covered by the mortgage; that the property of the mortgagor company could not be treated as a trust estate subject to administration in equity until the insolvency of the company was declared by decree; that until, either on the prayer of the complainant or on the court's own motion, the court passed a decree calling in all creditors, such creditors could proceed at law in any court of competent jurisdiction to put their claims in judgment against the debtor company, and thereby secure such lien upon the property of the debtor company as is given to judgments by law. It is, however, conceded that as all the property of the debtor corporation was in the custody of the court at the time the judgments at law were rendered, no legal lien could attach to any of the property. But it seems to be insisted that the judgment creditors were prevented from attaining this right by the wrongful act of the circuit court in seiz-

ing the unmortgaged property at the complainants' suit, and that, therefore, these creditors have an equitable right in the property thus seized, equivalent to the legal lien they would otherwise have acquired. If in seizing the unmortgaged property the circuit court went beyond its jurisdiction, the first impression would be that its action in that respect might be disregarded. But experience and more mature reason have taught that this cannot be done without causing greater injury than is likely to be caused by this act of the court. It is clear, as the interveners and the circuit court alike concede, that the judgments of the interveners carry no legal lien against any of the property of the debtor company. It seems to be equally clear and equally conceded that when a court of equity, at the suit of a proper party, has by a decree declared that the corporation is insolvent, and ordered notice to all creditors to present their claims, then it has jurisdiction to administer the corporate estate as a trust fund. But this concession seems to rest the jurisdiction of the unmortgaged property on the action of the court subsequent to the seizure, and not on the facts existing at the time of the seizure, and to give, not to the antecedent fact of insolvency, but to its indefinitely deferred declaration by the court, the force that converts the corporate property into a trust estate fit for equitable administration. On the contrary, the sound doctrine is that "when a corporation becomes insolvent, it is so far civilly dead that its property may be administered as a trust fund for the benefit of its stockholders and creditors. A court of equity, at the instance of the proper parties, will then make those funds trust funds, which in other circumstances is as much the absolute right of the corporation as any man's property is his." This cannot better be done or be better evidenced than by seizing the property; and, when a court does take into its possession the assets of an insolvent corporation, it will administer these assets on the theory that they in equity belong, first, to the creditors; and, if there is more than sufficient to satisfy the creditors, then to the stockholders rather than to the corporation itself. There are degrees of insolvency, and it does not necessarily reach that extremity which excludes stockholders before this jurisdiction in equity supervenes. The chief object and duty of a court of equity in taking possession of an insolvent estate is to preserve it and secure its distribution among the creditors, according to their rights therein at the time of taking it into possession, or (where these are not simultaneous) at the institution of proceedings to that end. The bill in this case clearly shows the insolvency of the corporation to have existed at the time the suit was brought. The filing of the bill and the seizure of the property were substantially simultaneous. The corporation at the same time solemnly admitted that the averments of the bill on this subject, as on all others, are substantially true. We do not understand the interveners as now questioning the fact that the insolvency did exist as charged in the bill. And we think, in such a case as this, no less than in the case of an insolvent banking corporation thus brought into liquidation to be wound up by ju-

dicial process at the suit of a creditor, whether he sues in his own right or on behalf of himself and other creditors, the rule of distribution is the same. It is founded upon the principle of equality, in which equity delights; and unless a claimant had, previously to the filing of the bill, obtained a lien at law upon some portion of the property to be distributed, or could establish a superior equity existing at the time of the filing of the bill, he should not be allowed a preference. The question at issue is not the right of the creditor to sue and obtain judgment against the corporation not yet dissolved, but the question relates wholly to the rights of creditors in the estate which the court of equity has seized and is proceeding to administer. And the same reasons, or reasons equally strong as those which have settled the question that a judgment subsequently acquired in another court, or in the same court in another suit, does not create a legal lien on any of the property being administered, exclude the holder from acquiring thereby an equitable lien or right of preference in the assets. There are always, to a greater or less extent, certain claims against such an estate, having sometimes a legal lien, and often only an equitable right of such a high character that the court of administration will not defer their payment until the full administration of the estate, but will require their prompt payment, even if it becomes necessary to expose a portion of the property to sale for that purpose before a final hearing is reached. Of such claims are public taxes, and unpaid charges for labor and material, and the necessary supplies furnished for the preservation or operation of the estate within a reasonable time next before its seizure by the court of equity. The court will, in whatever way may appear best, protect itself, and parties having a bona fide interest, against collusion and fraud, whenever it may appear in the conduct of the parties to the suit. No such vice is even suggested to affect the institution and progress of this suit. We believe it has been the uniform practice in this circuit for more than 20 years, in conducting administrations of this kind, to recognize the liens as they existed at the institution of the suit. It would, in our opinion, impede and embarrass the proceedings of such an administration, discredit the court, and do despite to the rule of equality in which equity delights, to suffer such a claim for preference as is made by the interveners here to prevail. We therefore hold that the interveners did not, by putting their claims in judgment, acquire any better right than they had at the institution of this suit. We believe that this holding is in accordance with all the more recent and better considered of the adjudged cases bearing on the questions involved. *Hollins v. Iron Co.*, 150 U. S. 371, 14 Sup. Ct. 127; *Richmond v. Irons*, 121 U. S. 27, 7 Sup. Ct. 788, and the cases therein cited.

In regard to the second question, we concur with the learned judge of the circuit court that, "by the terms of the mortgage, the defendant had a right 'to enjoy the mortgaged premises, and to receive the profits thereof, and to let, deal with, and manage the same in the ordinary course of business,' which was to cut and re-

move the logs for the mills, to manufacture lumber from them, and to pledge or sell that lumber. The purchaser of such lumber acquired a good title to it. The title to the logs from which the lumber was made must then have been in the corporation to enable it to so use and deal with them, and, in the exercise of its right or claim of right to do this, an injunction to prevent waste could not have been maintained against it."

Touching the third question, it is to be observed that, under the ninety-second and the eighth of the equity rules, the complainants in this case will be entitled to a decree for any balance that may be found to be due them, "over and above the proceeds of sales" of the property on which their mortgage has been foreclosed, and to have execution issue thereon in the form used in the circuit court in suits at common law in actions of assumpsit. Therefore, as to any unsatisfied balance that may remain due the complainants, after the appropriation to their demand of the proceeds of the property upon which they have foreclosed their mortgage, they are on a par with other general creditors who are or may become parties to this proceeding. Such fund, then, as shall be ascertained to exist free from the lien of the complainants' mortgage or other lien that may be found to have existed at the institution of the suit, must be divided pro rata among all the creditors who establish their claims, including the complainants, to the extent of the balance of their debt, if any, remaining unsatisfied after the appropriation thereto of the proceeds of the mortgaged property.

The decrees of July 27, 1896, and February 4, 1897, are hereby reversed, so far as they conflict with the views expressed in this opinion; all the other decrees appealed from are affirmed; and the cause is remanded to the circuit court, with instructions to so amend and modify the decrees of July 27, 1896, and February 4, 1897, as to make them conform to the views herein expressed, and to otherwise proceed in the case as equity may require; the costs of this court, including cost of transcript, to be equally divided between the appellants and the cross appellants.

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FIRST NAT. BANK OF COVINGTON, KY., et al. v. DE PAUW et al.

(Circuit Court of Appeals, Seventh Circuit. May 2, 1898.)

No. 385.

CONSTRUCTION OF A WILL—DEFEASIBLE ESTATE—DEATH WITHOUT ISSUE.

Testator, by a provision of his will, gave a fee absolute in certain property to his grandchildren, though containing no words of inheritance. In the next provision he stated "that the property willed by me to the said grandchildren should be held in common, and, if either of them should depart this life without leaving living issue, then and in that case the survivor or heirs of his body shall inherit all the property and estate devised to both of them." *Held*, that under the rule in Indiana the latter words referred to a death during the life of the testator, and, both devisees surviving him, each took an absolute estate in fee simple. 75 Fed. 775, reversed.

Appeal from the Circuit Court of the United States for the District of Indiana.

John R. Wilson and Ferdinand Winter, for appellants.

Charles L. Jewett, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. This suit was brought by the appellants, the First National Bank of Covington, Ky., the First National Bank of Troy, Ohio, the Trenton Banking Company of Trenton, N. J., the Hazelton National Bank of Hazelton, Pa., the Union National Mt. Joy Bank of Mt. Joy, Pa., judgment creditors of Charles W. De Pauw, against the said Charles W. and others concerned, to determine his interest in real estate levied upon, which had been devised to him by the last will of Elijah Newland, duly approved and admitted to probate on December 28, 1894, in Floyd county, Ind. The following clauses of the will only are pertinent to the present question:

"(4) I give and bequeath to my dearly beloved wife, Margaret Ann Newland, my town residence in the city of New Albany on lots as follows [description], with all household and kitchen furniture; also my family carriage and horses; also thirty thousand dollars in bonds, stocks, notes, and mortgages, to be selected by her.

"(5) I give and bequeath to my two grandsons, Newland T. De Pauw and Charles W. De Pauw, all my remaining estate, real, personal, and mixed, consisting of indebtedness due me in bonds, mortgages, and notes of hand, and all my lands situate in Floyd, Washington, Lawrence, and White counties, and any lands which may be possessed by me, and all my chattels upon the farms in Floyd, Washington, and Lawrence counties.

"(6) I have heretofore given to Newland T. De Pauw real estate to the value of \$10,000, and I have given to Charles W. De Pauw cash to the amount of \$6,000. I desire that of the property devised C. W. De Pauw should have \$4,000, and that the property willed by me to the said grandchildren should be held in common, and, if either of them should depart this life without leaving living issue, then and in that case the survivor or the heirs of his body shall inherit all the property and estate to both of them.

"(7) It is my desire that, should my dear wife desire it, that in place of the town residence bequeathed to her that she should take \$10,000 in stocks or mortgages, etc., and that the town residence should, in that case, go to my grandchildren, Newland T. De Pauw and Charles W. De Pauw.

"(8) I hereby appoint my dear wife, Margaret Ann Newland, Newland T. De Pauw, and Charles W. De Pauw executors of this, my last will and testament, and I desire that no security be required of them or their bonds as executors."

This will was framed and written by the testator on May 30, 1887. His wife died August 20, 1893, and his death occurred on December 16, 1894. Some years after the making of the will he was put under guardianship as insane. James G. Harrison was appointed administrator with the will annexed on January 22, 1895, by the Floyd circuit court. Newland T. De Pauw was born September 5, 1856, was married October 15, 1879, and has two children, born, respectively, on August 22, 1880, and April 1, 1886. Charles W. De Pauw was born June 15, 1859, married February 22, 1888, and has never had a child. The fair value of the testator's property, consisting of bank stock, notes secured by mortgage, live stock and chattels on farms, and other personal property, and various farms in Indiana, was about \$100,000; the personalty and realty being nearly of equal value.



The controlling question in the case is whether the words of the sixth clause of the will, "if either of them shall depart this life without leaving living issue," refer only to a death of either of the devisees before the demise of the testator, or to a death occurring at any time whether before or after that of the testator. There is, of course, no question of the cardinal rule "that the intention of the testator expressed in his will shall prevail, provided it be consistent with the rules of law." The contention of the appellants is that "the state of Indiana has an established policy and a settled rule of interpretation which determine the meaning of this will." That rule is alleged to be "that where an estate is devised in terms denoting an intention that the primary devisee shall take the property in fee or absolutely on the death of the testator, coupled with a devise over in case of his death without issue living, the words refer to a death without issue during the lifetime of the testator, and that the primary devisee surviving the testator takes the estate in fee or absolutely." This doctrine, it is insisted, is established by the decisions of the supreme court of the state in the following cases: *Harris v. Carpenter*, 109 Ind. 540, 10 N. E. 422; *O'Boyle v. Thomas*, 116 Ind. 243, 19 N. E. 112; *Hoover v. Hoover*, 116 Ind. 498, 19 N. E. 468; *Heilman v. Heilman*, 129 Ind. 59, 28 N. E. 310; *Wright v. Charley*, 129 Ind. 257, 28 N. E. 706; *Borgner v. Brown*, 133 Ind. 391, 33 N. E. 92; *Fowler v. Duhme*, 143 Ind. 248, 42 N. E. 623; *Tindall v. Miller*, 143 Ind. 337, 41 N. E. 535; *Moore v. Hare*, 144 Ind. 573, 43 N. E. 870; *Antioch College v. Branson*, 145 Ind. 312, 44 N. E. 314. A review of these cases is not necessary. In *Fowler v. Duhme*, supra, where the question is elaborately discussed, the court, after stating the rule "that a devise in fee may not be cut down by subsequent provisions of the will unless the intention to do so is manifest from words as clear, certain, and effective as those which created the fee," proceeds to say:

"Another rule, and that which is of the greatest significance in the construction of the will before us, is, as said in *Wright v. Charley*, supra, 'that where real estate is devised in terms denoting an intention that the primary devisee shall take a fee on the death of the testator, coupled with a devise over in case of his death without issue, the words refer to a death without issue during the lifetime of the testator, and that the primary devisee surviving the testator takes an absolute estate in fee simple.' This rule may be said to be almost, if not entirely, free from conflict upon the decisions, and there is no doubt of its adoption in this state and that it is supported by the vast weight of authority."

The rule is reaffirmed in *Moore v. Gary* (Ind. Sup.) 48 N. E. 630. The distinction asserted between the will of *Fowler*, passed upon in the case quoted, and that of *Newland* in this case, on the ground that in the latter no words of inheritance are used, is not substantial. The meaning of the fifth clause of this will is the same as if after the names of the devisees there had been inserted the words "and their heirs forever," or "in fee simple"; and the presumption is not admissible that *Newland* did not understand the effect of the words employed in that clause to be to give to the devisees the entire interest in the property—the fee simple of the real estate. Indeed, it is only those who have a measure of technical learning who would be likely to apprehend a necessity for the use of the word "heirs" in the expression of a grant or a devise in order to create an estate in

fee, and not merely an estate for life; and, without first denying to the fifth clause of this will its plain and presumably well-understood meaning, it is impossible to say that no violence is done to the words there employed by construing them, in connection with the sixth clause, as creating a base fee in the first takers. The expressed desire that the property given to the grandchildren "be held in common," whatever its force, could, of course, take effect only after the death of the testator, but plainly is equally applicable and binding, if binding at all, during the joint lives of the devisees, whether the estates devised are of one character or the other; and it is therefore of no necessary significance that that expression is immediately followed by the provision that upon the death of either devisee without living issue the survivor "shall inherit all the property and estate (devised) to both of them." It is not perceived why that provision, found as it is at the end of the sixth clause, has a different force from what it would have if placed at the end of the fifth clause, and no sufficient reason has been advanced for taking it out of the rule so often and clearly declared by the supreme court of the state, in the light of which, in the absence of clear expression or necessary implication to the contrary, the testator must be presumed to have intended that his will should be read.

Reference has been made to *Abbott v. Essex Co.*, 18 How. 202; *Britton v. Thornton*, 112 U. S. 526, 5 Sup. Ct. 291; *O'Mahoney v. Burdett*, L. R. 7 H. L. 388. But, even if inconsistent, those cases contain nothing which could justify us in disregarding the settled rule of the state where the property is, and where the testator lived and died. In *Abbott v. Essex Co.* it seems to have been assumed without question that the death referred to of one of the devisees "without any lawful heirs of their own," which was held to mean a definite failure of issue, might occur after the death of the testator. The question considered was whether the will gave "estates in fee tail general, with cross remainders in fee simple," or "a fee simple conditional, with executory devises over." In *Britton v. Thornton* the expression of the will was "dying in her minority," which, of course, might be after the death of the testator. The decree below is reversed, with directions to proceed in accordance with this opinion.

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FRICK CO. v. NORFOLK & O. V. R. CO. et al.

NORFOLK BANK FOR SAVINGS & TRUSTS v. GODWIN et al.

(Circuit Court of Appeals, Fourth Circuit. March 16, 1898.)

Nos. 254 and 255.

**1. DOMICILE OF CORPORATION—PRINCIPAL OFFICE.**

Where the place of the chief office of a corporation is not designated by its charter, vote of its stockholders, or resolution of its directors, it is where its stockholders and directors usually meet, where it elects its officers, and conducts its financial operations.

**2. SAME—CHANGE OF LOCATION.**

The general officers of a railroad company cannot, by changing the location of their offices for the more convenient dispatch of business, remove the

principal office of the company from the place at which it has been established by its stockholders and directors.

8. **MECHANICS' LIENS—TIME OF FURNISHING MATERIALS—ERECTING ENGINES.**  
Where a contract for furnishing engines provides for placing them in position and for a 30-days test, the limitation within which a lien therefor may be perfected does not begin to run until they are placed in position, adjusted, and put in operation.
4. **SAME—ENGINES NECESSARY TO OPERATION OF RAILROAD.**  
Engines for the purpose of generating electricity for propelling cars are "engines necessary to the operation" of an electric railroad, within the meaning of Code Va. 1887, § 2485, giving a prior lien to employes and persons furnishing certain supplies to transportation companies.
5. **SAME—MATERIALS AND LABOR CLAIMS.**  
Materials and labor furnished in the erection of car barns, train sheds, power and boiler houses, depots, and workshops, and rebuilding an hotel belonging to a railroad company, are not supplies necessary to the operation of such road, within the meaning of Code Va. 1887, § 2485, giving a prior lien for necessary supplies to transportation companies.
6. **SAME—PERFECTING LIEN—LIMITATIONS.**  
Where materials and labor are furnished to a railroad as they are from time to time ordered, and not in fulfillment of a single contract, the limitation within which a lien therefor may be perfected begins to run against each item at the time it is furnished.
7. **SAME—CONTRACTOR OR LABORER—PREFERRED LIEN.**  
One who lays the track, constructs the overhead line, and strings the feeder wire for an electric railroad at an agreed price per foot or mile is a contractor, and not a laborer, within the meaning of Code Va. 1887, § 2485, giving a prior lien to certain employes and laborers.

Appeals from the Circuit Court of the United States for the Eastern District of Virginia.

Jas. E. Heath, Jas. E. Heath, Jr., and George McIntosh, for appellant Frick Co.

Richard B. Tunstall and F. M. Whitehurst, for appellant Norfolk Bank for Savings & Trusts.

Richard B. Tunstall, for appellees Norfolk & O. V. R. Co. and others.

John B. Jenkins and Robert M. Hughes, for appellees Godwin and others.

Before SIMONTON, Circuit Judge, and JACKSON and PAUL, District Judges.

PAUL, District Judge. These causes are here on appeals by the Frick Company, the receivers of the Pottsville Iron & Steel Company, White & Dodson, and Frank R. May, appellants in No. 254, against Norfolk & Ocean View Railroad Company and others, appellees, and by the Norfolk Bank for Savings & Trusts, trustee, appellant in No. 255, against T. W. Godwin & Co. and G. S. W. Brubaker, appellees, from a decree of the circuit court for the Eastern district of Virginia rendered in the cause of the Walker Manufacturing Company against the Norfolk & Ocean View Railroad Company and others. As they are here on appeals from the same decree, they will be considered together.

The suit in the circuit court was brought by the Walker Manufacturing Company to enforce a lien claimed by it upon the franchises, gross earnings, and all the real and personal property of the Nor-

folk & Ocean View Railroad Company. A receiver was appointed in said suit to take charge of the property of the said railroad company, and the cause was referred to a master to take an account of the debts and liabilities of the said railroad company, the liens on its property, and their priorities. The appellant in No. 254 and the appellees in No. 255 severally filed their petitions of intervention in said cause, praying to be made parties therein, and claiming that they were supply lien creditors of said railroad company under the provisions of Code Va. 1887, §§ 2485, 2486.

Section 2485, Code Va. 1887, is as follows:

"Sec. 2485. All conductors, brakemen, engine-drivers, firemen, captains, stewards, pilots, clerks, depot or office agents, store-keepers, mechanics, or laborers, and all persons furnishing railroad iron, engines, cars, fuel, and all other supplies necessary to the operation of any railway, canal or other transportation company \* \* \* shall have a prior lien on the franchises, gross earnings, and all the real and personal property of said company, which is used in operating the same, to the extent of the moneys due them by said company for such wages or supplies. \* \* \*

The mode of perfecting such lien is prescribed by section 2486, Code Va. 1887, as amended by the act of assembly of February 15, 1892, which is as follows:

"Sec. 2486. No person shall be entitled to the lien given by the preceding section unless he shall, within ninety days after such supplies are furnished or services rendered, file in the clerk's office of the court of the county or corporation in which is located the chief office in this state of the company against which the claim is \* \* \* a memorandum of the amount and consideration of his claim verified by affidavit, which memorandum the said clerk shall forthwith record in the deed-book and index the same in the name of the said claimant, and also in the name of the company against which the claim is. Any such claim may be enforced in a court of equity." Laws 1891-92, p. 362.

The grounds of exception to the master's report, and the assignment of error in each of the cases brought up by the appellants, present questions sufficiently different from those raised by the others to require a separate examination and discussion of the merits of each claim upon which appeal was taken from the decree of the circuit court. There is, however, one general ground of exception to the findings of the master which the circuit court overruled, applicable alike to nearly all of these claims. The statute (section 2486, Code Va. 1887, as amended) provides that "no person shall be entitled to the lien given by the preceding section unless he shall, within ninety days after such supplies are furnished or service rendered, file in the clerk's office of the court of the county or corporation in which is located the chief office in this state of the company against which the said claim is \* \* \* a memorandum of the amount and consideration of his said claim verified by affidavit. \* \* \*" The claims of the appellants in No. 254 were filed in the clerk's office of the corporation court of the city of Norfolk. The claims of the appellees in No. 255 were filed in both the clerk's office of the corporation court of the city of Norfolk and in the clerk's office of the county court of Norfolk county. The master reported that the claims of the appellants in No. 254 were not filed in the proper office; that the chief office of the Norfolk & Ocean View Railroad Company was not in the city of

Norfolk, but at Ocean View, in the county of Norfolk; and that the claims, in order to become liens under the statute, should have been filed in the clerk's office of the county court of Norfolk county.

The original charter of the Norfolk & Ocean View Railroad Company, which incorporated the said company as the Norfolk & Ocean View Railroad & Hotel Company, fixed no place at which the company should have its chief office in this state. Nor did the amended charter, which changed the name of the company to the Norfolk & Ocean View Railroad Company, designate the place of its chief office. It was, therefore, left for the stockholders or board of directors to locate the chief office of the company. The company was originally incorporated February 27, 1879, and the evidence shows that from that time until it went into the hands of a receiver, on the 21st day of February, 1896, the meetings of its stockholders and directors were held in the city of Norfolk. It is conceded that its chief office was in the city of Norfolk until September, 1895. But the record shows that the stockholders continued to hold their meetings in the city of Norfolk until February 19, 1896. In pursuance of an act of the general assembly of Virginia (Acts 1891-92, p. 428), railroad companies are required to report annually to the auditor of public accounts, among other things, the county or corporation in which the principal office of such company is located. In June, 1895, the defendant company reported its chief office at Norfolk. This is the place at which, as the evidence shows, it had been since 1879. It had up a sign at 16 Bank street, in the city of Norfolk, and the directory of Norfolk showed the chief office of the company to be located in that city. In September, 1895, some of the officials of the railroad company moved their business offices to Ocean View, and in June, 1896, the receiver reported the chief office of the company as being at Ocean View. Such removal was done without the direction or approval of the stockholders or directors. No notice was given to the public or to these lien creditors by the directors, or by any one else authorized to make or approve the change, that the chief office of the company had been removed from Norfolk city to Ocean View.

The location of the principal office of a corporation is an important matter in Virginia, affecting, as it does, the jurisdiction of her courts, service of process, and other legal proceedings. Code Va. 1887, §§ 3214, 3227. To change the place of its principal office without due notice to the public and by competent authority may work serious detriment to persons having important business relations with the corporation. How grave these consequences may be this case abundantly shows, where liens of creditors amounting to thousands of dollars are sought to be defeated because they are, it is claimed, not recorded in the clerk's office of the county or corporation where the railroad company had its chief office. To say that the general officers of a railroad company, who find it convenient for the dispatch of business to change their location to some other point on the line, can thereby change the location of the principal office of the company from the place at which it has been established by the stockholders and directors, would be to invest the ministerial officers of a

corporation with an authority they do not possess. If such power as this can be conceded to the general officers of a corporation, then the chief office of a corporation, instead of having the permanent location and fixed character contemplated by the law, might be the subject of such frequent changes as to lead to great inconvenience, irregularity, confusion, and injustice. The charter of the railroad company failing to designate the place of the chief office, and no place being designated by vote of the stockholders or resolution of the directors, the place of the chief office can be implied and established from the acts of the stockholders and directors. The place of the principal office of a corporation is where its stockholders and directors usually meet, where it elects its officers and conducts its financial operations. The record in this case shows that the railroad company held the meetings of its stockholders and directors in the city of Norfolk from its organization to the time it was placed in the hands of a receiver. No meeting of the stockholders or directors was ever held at Ocean View. On the 17th of December, 1895, more than three months after, it is alleged, the principal office was removed to Ocean View, the stockholders held a meeting in Norfolk at which directors of the company were elected to hold office until June 1, 1896. The directors were, at that meeting, authorized to increase the capital stock of the company from \$50,000 to \$200,000, and to increase the bonded debt from \$300,000 to an amount not exceeding \$500,000. Various adjourned meetings of the stockholders were held between this date and the appointment of a receiver, all of which were held at Norfolk. At one of these meetings, held February 11, 1896, an amendment to the charter of the company by an act of the legislature of Virginia, changing the name of the company to the Norfolk & Ocean View Railroad Company, was accepted, and the officers of the company were directed to give proper notice thereof to all persons doing business with the company. The secretary was authorized to issue \$50,000 of new stock, and to call in \$50,000 of the old stock, to procure a new book, seal, etc., for the company, and to cancel the old stock taken in. These facts establish unquestionably the place of the principal office of the company to have been at Norfolk after the several administrative offices had been removed to Ocean View.

The case of *Coal Co. v. Haslett* (Ga.) 10 S. E. 435, was an action for damages brought by the defendant in error in the city court of Atlanta, the city being in Fulton county, Ga. The act incorporating the coal company did not designate any place where its principal office should be. The defendant below filed a plea in abatement to the effect that the Dade Coal Company was located in the county of Dade, the plea stating:

"All of the defendant's coal-mining operations are located in Dade county, and all of its books relating to the shipment of the product of its coal mines are kept in Dade county, at its offices at the said Dade coal mines, at a place known as 'Coal City'; its superintendent and agents having charge of its coal-mining operations are also at its said mines at said Coal City, and all of its mining operations are carried on in said county of Dade; its office in Atlanta is for the purpose of electing its officers and for the purpose of conducting its financial operations."

The court sustained the demurrer to this plea, holding that:

"Upon the face of the plea itself, the proper court in Fulton county had jurisdiction of the case, inasmuch as the plea showed affirmatively that it had an office in Atlanta for the purpose of electing its officers and for the purpose of conducting its financial operations. The act of the legislature incorporating this company approved February 21, 1873, does not by any of its provisions locate this company in any particular county of this state. It can carry on its mining operations in any county by the terms of the act. The company, therefore, had a right to establish its principal place of business in any county in this state; and the company having chosen to locate its office in Atlanta, 'for the purpose of electing its officers and for the purpose of conducting its financial operations,' we think that gave the proper court in Fulton county jurisdiction in this case, and there was no error in sustaining the demurrer to this plea."

In *Jossey v. Railway Co.*, 28 S. E. 273, the supreme court of Georgia says:

"The business of a railroad corporation, because of its nature, must of necessity be conducted in places other than that fixed by its charter as the place of location of its principal office. While the latter place must be the point at which the corporation as a corporate entity resides, it is indispensable to its business that it shall be enabled elsewhere to establish offices of a purely administrative character; and a distinction must be taken between the principal office of a corporation and these administrative offices which may from time to time be created by the corporation for the more convenient transaction of the business for the conduct of which it was created. It must have a place at which it may be sued, at which its corporate functions may be performed; but this does not negative the right to establish other places for the transaction of the industrial business of the corporation."

These decisions are in consonance with the provisions of the Virginia statutes, fixing the place where suits may be brought against, and process served upon, a corporation, and the statute requiring railroad companies to report to the auditor of public accounts the place of its principal office. We are of opinion that, under the evidence in this cause, the circuit court erred in finding that the principal office of the Norfolk & Ocean View Railroad Company was at Ocean View, in Norfolk county, and not in the city of Norfolk. The claims which were filed in the corporation court of the city of Norfolk were properly filed.

We will consider the errors assigned by the several appellants to the action of the circuit court in disallowing their respective claims as constituting liens on the franchises, gross earnings, and real and personal property of the defendant railroad company superior to the lien of the mortgage bondholders:

First. The claim of the Frick Company: Prior to the month of April, 1895, the Norfolk & Ocean View Railroad & Hotel Company, now the Norfolk & Ocean View Railroad Company, operated, by steam, a narrow-gauge railroad from Norfolk to Ocean View, a distance of about nine miles. Its stockholders and directors determined to change the track of said railroad from a narrow-gauge road operated by steam to a broad-gauge road operated by electricity. In pursuance of this purpose, it is alleged, the railroad company contracted with the Philadelphia Construction Company to construct a portion of its electric road and to furnish it two engines. The construction company applied to the Frick Company

to furnish these engines. The Frick Company, on the 22d day of March, 1895, made a proposal to the Philadelphia Construction Company to sell two of its tandem compound engines, and on the 1st day of April, 1895, the Philadelphia Construction Company accepted the proposal. The provisions of this contract, material to this discussion, were as follows:

"Engines to be delivered by us (Frick Co.) f. o. b. cars at Norfolk, Va., freight to power house to be paid by Frick Company. Trucking and expense of placing on foundation to be borne by Frick Company. We (Frick Co.) will furnish the services of one competent mechanic to superintend and assist in the erection of above machinery, board and traveling expenses of our (Frick Co.) mechanic to and from Waynesboro, Pa., to be paid by Frick Company. All extra expense caused Frick Company by failure on the part of purchaser to make preparations to receive this machinery, delays caused by not promptly furnishing foundations, suitable assistance and common labor, \* \* \* the purchaser is to pay such extra expense occasioned Frick Company, and the payment for machinery as agreed below not to be deferred by reason of said failure on the part of purchaser, but the same to be paid promptly as in case of no delay. We agree to ship from our works first engine in 45 days after execution of this contract, and second engine in 55 days. Price to be, f. o. b. cars at power house, Norfolk, Va., as above specified, \$11,164.00, net cash. Payments to be made on receipt of machinery, \$5,582.00 by note at 60 days, with interest, and balance after 30 days' trial by note for \$5,582.00, at 60 days, with interest. Notes indorsed to satisfaction of Frick Company." "If notes are given for balance, same to be indorsed or secured and made payable in bank, bearing interest from date of delivery of machinery."

The Frick Company's proposal contained this provision:

"All contracts are subject to acceptance and approval by the Frick Company's executive board."

So far as the record shows, there was no further correspondence between the Frick Company and the construction company. Reinhardt, the president of the Frick Company, testifies that it was some time after the order was taken by their agent, Holt, before the same was finally accepted. He says: "We did not accept it at all until we had the assurance of the Norfolk and Ocean View Railroad Company, and to indorse the notes, and these engines were furnished according to the contract." Further, in answer to this question by counsel for the defendant railroad company: "Q. I would ask you how the Norfolk and Ocean View Railroad Company ratified the contract with the Philadelphia Construction Company,"—he said: "They ratified it with that letter and a verbal promise. They agreed to indorse the notes there, and then after we got that letter we accepted the order." The letter referred to is as follows:

"Executive Offices of the Norfolk & Ocean View Railroad and Hotel Company,  
633-635 Drexel Building.

"Philadelphia, Pa., April 16, 1895.

"The Frick Co., Waynesboro, Pa.—Dear Sirs: In regard to the recent inquiry of your president in regard to indorsements of the notes which are to be given in payment for the tandem compound engines you are building for the Norfolk & Ocean View, I beg leave to say that, if you desire, these notes will be indorsed by the railroad company to whom you are furnishing the engines. Hoping this is satisfactory, that there will be no delay in the delivery, I am,

"Yours, very truly,

Norfolk & Ocean View R. R. Co.,

"Charles H. Barritt, President."

After the receipt of this letter, the Frick Company proceeded with the execution of its contract, delivered the engines to the Norfolk



& Ocean View Railroad Company, and placed the same on foundation. The railroad company indorsed one note for the construction company for \$5,582, which was delivered to the Frick Company. This note went to protest. The other note for \$5,582, stipulated for in the proposal, was not given.

The construction company has filed no claim against the railroad company for the engines, and there is nothing in the record to show that it has been paid for them. From the energy with which the trustee of the railroad company resists the allowance of this claim as a lien, but takes no exception to its allowance as a general debt, we must conclude that the railroad company did not pay the construction company for these engines.

Much light is thrown upon the intimate relations between the railroad company and the construction company by the record. It shows that the construction company and the executive board of the railroad company occupied the same room in the Drexel building in Philadelphia as the office of both. It further shows that the Pottsville Iron & Steel Company of Pottsville, Pa., sold to this same construction company in May, 1895, certain trusses and purlins for the car barn of the Norfolk & Ocean View Railroad Company. This purchase was made by the construction company through one A. Langstaff Johnston, whom the construction company terms "our engineer." About the same time the railroad company itself made two contracts for the purchase of materials of various kinds of the Pottsville Iron & Steel Company through the agency of the same person, Johnston, whom the president of the railroad company styles "our Mr. A. Langstaff Johnston." It is apparent from this examination of the record that the Norfolk & Ocean View Railroad Company was the real purchaser of these materials, and that in these transactions the construction company was making the purchases through its agent, Johnston, for the railroad company. These transactions, it will be observed, were nearly contemporaneous with the purchase of the Frick engines, and it is apparent that the purchase of the Frick engines was made in the same way; that the railroad company, the beneficiary in the contract, was the substantial purchaser; that credit was given by the Frick Company to the railroad company; and that the Frick Company looked to the railroad company for payment. The railroad company clearly regarded the contract in the same way when its president wrote the letter of April 16, 1895, wherein he said: "The notes, if you desire it, will be indorsed by the railroad company to whom you are furnishing the engines."

The master was correct in allowing the whole of the Frick Company's claim as a debt against the railroad company, and there was no exception taken to his so allowing it. It remains to be considered whether he was right in classing the Frick Company among the general creditors, or whether the claim should have been reported as a lien for supplies furnished for the operation of the railroad, and as such having priority over the mortgage bonds. He assigns as a reason for refusing to report this claim as a lien that it was not filed within 90 days after the supplies were

furnished. The claim was filed in the clerk's office of the corporation court of Norfolk city on the 15th day of January, 1896. The contract provided that trucking and placing the engines on foundation should be at the expense of the Frick Company, and that it should furnish one competent mechanic to superintend and assist in the erection of the machinery; the board and traveling expenses of the mechanic from and to Waynesboro, Pa., to be paid by the Frick Company. All extra expenses caused the Frick Company by the failure of the purchaser to receive the machinery, by delay to promptly furnish foundation, suitable assistance, common labor, etc., was to be paid by the purchaser. It also provided for a 30-days trial of the engines by the Norfolk & Ocean View Railroad Company. The engines arrived at Norfolk in the month of July, 1895. In the month of September following the Frick Company sent its mechanic to Norfolk to finish up and start the machinery, but, the railroad company not being ready for this work, the mechanic returned to Waynesboro, Pa., and came again the last of October, 1895, and the work necessary to start the engines was completed on the 5th day of November, 1895. Counsel for the appellee, the trustee, insist that the 90 days within which the appellant the Frick Company could file its claim should begin to run in July, 1895, when the engines arrived at Norfolk. Counsel for the Frick Company contend that the 90-days limitation did not begin to run until the 5th day of November, 1895; that the engines were not fully erected, the connections adjusted, and the machinery put in operation until that date; and that this is the date at which, in the language of the statute, they were furnished. Besides, they contend that, as the railroad company had 30 days in which to test the engines after they were put up, the Frick Company may reasonably contend that the 90-days limitation did not commence to run until the expiration of the 30 days allowed for testing after the engines were put up.

We think the engines were not furnished to the railroad company, at least, until they were placed in position, adjusted, and put in operation. This was on the 5th day of November, 1895, within the statutory limitation, and it is not necessary to discuss the effect of the provision in the contract for a testing period of 30 days. The claim was duly filed.

The remaining objection raised before the master to the allowance of this claim as a lien prior to the mortgage bonds is that it is not for supplies necessary to the operation of the railroad. The statute gives a prior lien to all persons furnishing "railroad iron, engines, and all other supplies necessary to the operation of any railroad, canal, or other transportation company." This is without question a railway company, and the fact that the motive power used is electricity, instead of steam, as was the case before the road was changed from a narrow-gauge to a broad-gauge track, does not of itself bar this claim from the benefit of the statutory provision for giving a prior lien to the claims of persons furnishing supplies necessary to the operation of the road. The contention that the engines for which a lien is given by the statute are only such as are

used on a railroad where the trains are drawn by steam power is without merit. These engines are for the purpose of generating electricity, which is the propelling power on the electric railway, as the steam engine furnishes the propelling power on the ordinary railroad. The statute does not limit the lien given to the vendor to locomotive engines used in propelling cars by steam. The language of the statute is: "Engines \* \* \* necessary to the operation of any railway, canal, or other transportation company." It embraces engines that may be used by steam railroads, steamboats, canalboats, electric railways, or by any other kind of transportation companies. These engines are not, as further contended, a part of the permanent construction of the railway, and therefore not embraced within the supply lien law. Though they are stationary, yet they are indispensable to create the force that propels the cars, and they are clearly "engines \* \* \* necessary to the operation of the road."

Second. The receivers of the Pottsville Iron & Steel Company, petitioners, appeal from the decision of the circuit court, and assign as error the failure of that court to allow its claim a prior lien for supplies to the Norfolk & Ocean View Railroad Company necessary to its operation. This claim is for trusses and purlins for car barn, for anchor bolts for train sheds, for erecting trusses and purlins for power and boiler houses, for erecting crane, and for furnishing and erecting trusses for workshop, and for steel columns for car depot and workshop. These are supplies and labor furnished for the construction of permanent buildings which are properly part of the railway plant. These buildings are not in themselves supplies necessary to the operation of the railway. They are buildings erected for the protection and preservation of the cars, engines, and other machinery, just as roundhouses and car sheds are used by steam railroads for the protection and preservation of their locomotives and coaches. Their character as property is distinct from that of necessary supplies as defined by section 2485, Code Va. 1887. And there is no error in the holding of the circuit court as to this claim.

Third. The appellant Frank R. May assigns as error the refusal of the circuit court to sustain an exception filed by him to the report of the master. The exception overruled by the circuit court was taken on the ground that the appellant's claim was due for supplies, and should have been reported as constituting a lien on the franchise, gross earnings, and real and personal property of the railroad company. The record shows that this claim is for rebuilding an hotel belonging to the railroad company. The first item of the account is, "To amount contract for rebuilding hotel, \$11,500.00." The other items are for extra work done in connection with the hotel as directed by the architect and superintendent, and as agreed by the president of the railroad company. This hotel may be a very desirable adjunct to the railroad as affording accommodations for its passengers and for persons seeking Ocean View as a seaside resort, but the purposes for which it is used make it such a distinct piece of property that it cannot be confounded with the rail-

road proper in such way as to bring the cost of its construction, repair, and furnishing under the head of labor and supplies necessary to the operation of the railroad, giving it a prior lien as such. The decision of the circuit court was correct.

In case No. 255 the appellees Godwin & Co. claimed a lien for labor and supplies furnished to the railroad company necessary to its operation. Their account commenced July 1, 1895, and ended February 10, 1896. Godwin & Co. were manufacturers and repairers of machinery, and their account is for labor of their smiths and machinists for repairs made from time to time to the machinery of the railroad company, and for materials used in such work. The master in his report allowed as a lien so much of the account, \$270.79, as accrued within 90 days before the ending of the account. To this finding of the master Godwin & Co. excepted on the ground that they were entitled to a lien for the full amount of their claim, \$1,674.24, as it was for supplies and labor furnished on a continuing contract and running account, and that the statutory limitation of 90 days for recordation of their claim did not begin to run until the 10th day of February, 1896, that being the date at which the last of the supplies and labor was furnished. The circuit court sustained the exception, and allowed the whole account as a prior lien for supplies and labor. From this decision of the circuit court the Norfolk Bank for Savings & Trusts, trustee, appealed, assigning as error that:

"The court erred in that it sustained the exceptions of T. W. Godwin & Co. to the report of Special Master W. L. Williams, which was filed November 14, 1896; and in that it adjudged that the said T. W. Godwin & Co. was entitled to a supply lien for \$1,645.24, and interest from February 10, 1896, upon the franchises, gross earnings, and all the real and personal property of the Norfolk & Ocean View Railroad Company, prior to the lien of the holders of the bonds secured by the deed of trust made by the said defendant railroad company and dated May 1, 1895."

For Godwin & Co. it is contended that their account from July 1, 1895, to February 10, 1896, was a continuous, running account, and that the limitation of 90 days within which the same is required by the statute to be recorded in order to perfect the lien as a prior lien did not begin to run until the last charge in the account. The case of *Fidelity Insurance Trust & Safe-Deposit Co. v. Roanoke Iron Co.*, 81 Fed. 439, decided by the circuit court for the Western district of Virginia, is cited as sustaining this contention. In that case the court, construing section 2485 of the Code of Virginia of 1887, held that where supplies are furnished under one contract, the deliveries being from day to day, the items are so connected as to form one transaction, and the limitation of 90 days must commence at the date of the last delivery. In that case there was a single contract for the sale of a quantity of iron ore at a fixed price per ton, and the deliveries were from day to day, or at other short intervals.

In *Central Trust Co. v. Chicago K. & T. Ry. Co.*, 54 Fed. 598, the court, construing a Missouri statute similar to the Virginia statute, said:

"If the materials were furnished under a single contract, and were in fulfillment thereof, the items of the account would be continuous, and the material man would have ninety days from the date of the last item within which to file his account and perfect his lien. \* \* \* On the other hand, if the several items of the account, or a portion of them, are furnished under separate contracts, then the lien should have been filed ninety days from the date of the last item under each independent contract."

Applying this doctrine to the account of Godwin & Co., the claim that the limitation of 90 days must be applied to the date of the delivery of the last item cannot be sustained. The account as filed is due to the Virginia Iron Works, another firm name under which the members of the firm of Godwin & Co. conducted business, and a great number of the charges are for work done, generally, by the hour, by the machinists, smiths, carpenters, and laborers of the Virginia Iron Works, in repairing the trucks, car wheels, axles, bond rails, etc., of the railroad company. A number of the charges are for drayage, and a large number for bolts, castings, small lots of iron, steel, etc., for repairs. The work and material were not embraced in a single contract; and an inspection of the account shows that, from the diversity of the character of the services rendered and the supplies furnished, they could not have been contemplated and estimated for in advance, so as to include them in a single contract at a fixed price. That they were not embraced in a single contract, but were furnished on separate and distinct orders, is clearly established by the evidence. One of the partners of the firm, A. L. Woodworth, testifies as follows:

"By Mr. Jenkins (attorney for Godwin & Co.): Q. Were all of the labor, supplies, and material furnished there necessary for the operation of the road? A. Yes, sir. Q. And none for new construction? A. None. Every item was for repairs. Cross-examination by Mr. Tunstall (attorney for the trustees): Q. You mean for operating supplies? A. Yes, sir; current requisites for the operation of the road. They were current repairs. Q. Was there any general contract for the whole thing? A. None. Q. You just furnished things as they ordered them from time to time? A. We furnished labor and material for repairs as they ordered them. Q. And the labor and material furnished were on these dates? A. Yes, sir."

The evidence not only fails to show that the labor and materials were furnished under a single continuing contract, but completely refutes that contention. In our judgment, the master was correct in applying the statutory limitation at a date 90 days before the last item of the account was furnished, and the circuit court erred in holding that the limitation began to run at the date of the charge of the last item in the account.

The second question for our consideration in case No. 255 is that arising on the claim of the appellee G. S. W. Brubaker. This claimant, in his memorandum of his claim filed in the clerk's office, stated that the amount claimed was due him by the railroad company "for labor and work done and furnished for and about the erection of trolley poles and wires, the laying of the tracks, and the grading of the roadbed of said company, in the county of Norfolk and in the city of Norfolk, Virginia, for the purpose of adapting the said railroad for standard-gauge service, and to the use of electricity as a motive power in the operation of the said road, and of furnishing electric power for

the operation thereof." The railroad company furnished all the materials, and Brubaker agreed to furnish all his own tools and labor for the work he undertook to do, at the following prices:

"(a) Lay the track and place in complete order ready for operation for the sum of thirty (30) cents per lineal foot of track. Special work, double price. (b) Bond the track with Johnson rail bonds for the sum of one hundred and twenty-five (\$125) per mile of track. (c) Construct the overhead line according to the specifications for the sum of three hundred and ninety-five (\$395) dollars per mile of trolley. (d) String the necessary feeder wire for the sum of sixty dollars (\$60) per mile."

The master refused to report the claim as a lien for labor, stating his reason therefor as follows:

"This is the claim of a general contractor for building a new electric road, and I do not think it comes within the purview of the supply lien law. The legislature of Virginia, at its last session, thought it necessary to provide a lien for such cases as this, and gave a mechanic's lien on railroad beds and tracks."

To this report Brubaker excepted. The circuit court sustained the exception, and allowed the claim as a supply lien. From this holding of the circuit court the Norfolk Bank for Savings & Trusts, trustee for the bondholders, took this appeal. Of the assignments of error it will be necessary for us to consider only the following:

"The court erred in that it sustained the exceptions of G. S. W. Brubaker to the report of Special Master W. L. Williams, which was filed November 14, 1896, and in that it adjudged that the said G. S. W. Brubaker was entitled to a supply lien for \$6,056.26, and interest from September 3, 1895, upon the franchises, gross earnings, and all the real and personal property of the Norfolk & Ocean View Railroad Company prior to the lien of the holders of the bonds secured by the deed of trust made by the said defendant railroad company, and dated May 1, 1895."

The Virginia statute (section 2485, Code 1887) designated the employes to whom the statute gives a prior lien on the franchises, gross earnings, and real and personal property of a railroad, canal, or other transportation company. The list includes conductors, brakemen, engine drivers, firemen, captains, stewards, pilots, depot or office agents, storekeepers, mechanics or laborers, and all persons furnishing railroad iron, engines, cars, fuel, and all other supplies necessary to the operation of any railway, canal, or other transportation company. Contractors are not embraced in this list. It is therefore sought to bring this claim for work and labor done within the class designated as laborers. A question very similar to this arose under an Indiana statute which gave a first and prior lien on the corporate property and on its earnings of any corporation doing business in that state to its employes for all work and labor done and performed by them for the corporation from the date of their employment. One Vane made a contract with a telegraph company to put up six additional wires between certain designated points on and along the telegraph poles owned by the company; to attach such wires to the proper fixtures and appendages to the poles,—the company agreeing to pay him \$45 per mile for the wires put and strung upon the poles, the company agreeing to furnish all the wire and other necessary materials. Vane filed his claim under the statute, and sought to enforce the same against the property of the telegraph company, claiming a statutory

lien thereon as an employé of the corporation. The claim was resisted by the receivers of the company on the ground that Vane did not occupy in his transactions with the telegraph company the relation of an employé, but that of a general contractor. The circuit court for the district of Indiana held that Vane was not an employé of the telegraph company. Woods, J., delivering the opinion, said:

"To be entitled to the benefit of this statute, and of others of like character since enacted, I think it clear that the employé must have been a servant, bound in some degree at least to the duties of a servant, and not, like the petitioner, a mere contractor, bound to produce or cause to be produced a certain result of labor, to be sure, but free to dispose of his own time and personal efforts, according to his pleasure, without responsibility to the other party." *Bankers' & Merchants' Tel. Co. of Indiana v. Bankers' & Merchants' Tel. Co. of New York*, 27 Fed. 536.

On appeal, the supreme court sustained the circuit court. It said: "It seems clear to us that Vane was a contractor with the company, and not an employé, within the meaning of the statute,"—and quoted the language of the circuit judge above quoted as expressive of its own views. *Vane v. Newcombe*, 132 U. S. 220, 10 Sup. Ct. 60.

In *Railroad Co. v. Wilson*, 138 U. S. 501, 11 Sup. Ct. 405, the court said:

"The terms 'officers' and 'employés' both alike refer to those in regular and continued service. Within the ordinary acceptation of the terms, one who is engaged to render service in a particular transaction is neither an officer nor an employé. They imply continuity of service and exclude those employed for a single transaction."

It cannot be successfully contended that the term "laborer" is more comprehensive than the term "employé," or that the former includes a more extensive class of services than the latter. The provisions of the statute as to persons to whom labor liens are given are clear and explicit. There is no necessity, as urged by counsel for the appellee, to resort to other provisions of the Code to explain them and to give them a more extended application.

We are of opinion that Brubaker was a contractor with the railroad company, and not a laborer, within the meaning of the statute, and his claim cannot be classed as a supply lien under the provisions of section 2485 of the Code of Virginia of 1887, and the circuit court erred in holding it as constituting such a lien.

We affirm the decree of the circuit court in cause No. 254, in holding that the claim of the appellants the receivers of the Pottsville Iron & Steel Company, of Frank R. May, and of White & Dodson are not supply liens. We reverse it as to its holding that the principal office of the Norfolk & Ocean View Railroad Company was at Ocean View, and not at the city of Norfolk, and as to finding that the claim of the Frick Company was not a supply lien. We reverse said decree as to its finding that Godwin & Co. and G. S. W. Brubaker, appellees in case No. 255, are entitled to supply liens for their respective claims. And these causes are remanded to the circuit court, with instructions to amend the decree in conformity to this opinion.

## SIMPLEX DAIRY CO. v. COLE et al.

(Circuit Court, S. D. New York. March 26, 1898.)

## 1. FOREIGN CORPORATIONS—CERTIFICATE TO DO BUSINESS—NEW YORK.

Under Laws N. Y. 1892, c. 687, § 15, providing that "no foreign stock corporation doing business in the state without such certificate [of authority to do business] shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate," the remedy is merely suspended until such time as the certificate is procured.

## 2. CONTRACT—SPECIFIC PERFORMANCE.

Where a contract provided for the transfer of a patent, for the organization of a corporation and carrying on business, and for cash subscriptions to a certain amount of stock within 60 days, the patentee having become an incorporator, a director, and an officer, and attended directors' meetings, he cannot refuse to carry out the contract because the whole amount of the cash subscriptions was not paid in within the specified time.

This was a suit in equity by the Simplex Dairy Company against Walter Cole and others for the reformation and enforcement of a contract.

Fabius M. Clark, for complainant.

Herbert F. Andrews, for defendant Walter Cole.

Bristow, Opdyke & Wilcox, for defendant James G. Cannon.

W. H. Van Steenberg, pro se.

George B. Kirkbride, pro se.

TOWNSEND, District Judge. The complainant, which is the assignee of a certain written contract between one Kirkbride, its assignor, and the respondent Walter Cole, by the bill herein asks for a reformation of said contract, its enforcement as reformed, and for other relief. Said written contract, inter alia, provided for the transfer to complainant's assignor by said Cole of his patent No. 478,736, dated July 12, 1892, and for the organization by complainant's assignor of a corporation for developing the invention therein claimed, and carrying on business under said patent; for obtaining within 60 days from May 10, 1895, the date of said agreement, bona fide subscriptions to its stock, so as to put into its treasury at least \$18,750 in cash; and for making certain payments to said Cole, and discharging certain liens on said patent.

Counsel are at issue as to whether complainant's assignor, Kirkbride, within the 60 days or subsequently, did obtain the bona fide subscriptions, and pay the same into the treasury of the company as agreed, and, if not, whether such requirement was waived by the respondent Cole. Kirkbride did not obtain actual bona fide subscriptions for \$18,750 within 60 days from May 10, 1895. But, within 30 days from said date, he wrote Cole that he had "received the promised subscription to \$25,000 stock, and same will be formally made soon as the patents are in proper shape, and my friends are so advised by our attorney." On May 25th he had written Cole, saying: "I can do nothing with selling stock until the new patents are issued. My attorney here confirms what Mr. Parker said,—the process must be protected; otherwise no investment is safe. So, we will bend all our energies in that direction now." In the face of



further information to this effect, Cole became one of the incorporators, a director, and an officer, of the company, and attended its directors' meetings, and continued to assist in its management as late as the spring or summer of the following year. In fact, the total amount of bona fide subscriptions for said \$18,750 were afterwards obtained, and have been paid in, so far as called for; the sum already paid in being \$17,276.75. The complainant contends, and the respondents practically admit, that the respondent Cole orally agreed, provided Kirkbride fulfilled his agreement, to also convey to this complainant the patent thereafter obtained for the process carried on by said patented apparatus, and that he has not made said conveyance. It is unnecessary to detail the evidence as to the causes of the failure of the parties to comply with their agreements. I find that the complainant or its assignor did subsequently comply with the requirements of said agreement, and that its failure to technically comply with said requirements was in part due to the failure of the respondent Cole to keep his agreements, or to his inexcusable interference with the efforts of complainant; that the respondent Cole has, by his conduct, waived compliance with said requirements as to the time of obtaining bona fide subscriptions; and that no time having been fixed for the payment of the whole of said sum of \$18,750 into the treasury, and the sum of \$17,776.50, being all that was called for, having been paid in, this issue should be determined in favor of complainant. The original agreement further provided for a payment of \$1,000 to said Cole, which it is claimed has not been paid. As to this point, respondent's counsel says:

"Assuming for the moment that Mr. Cole's salary was to be \$100 per month, it appears from this account that the company has overpaid him the sum of \$891. I am unable to find any evidence that Mr. Cole's salary was to be \$100 per month. Mr. Cole testifies that his salary was to be \$200 per month."

The original agreement provided for a payment to Cole of \$100 per month before the organization of the company, and "not less than \$100 a month" thereafter. It does not appear that any new agreement was ever made. This defense is not sustained. The complainant is a foreign corporation. Section 15 of chapter 687 of the Laws of 1892 of the State of New York provides as follows:

"No foreign stock corporation doing business in this state without such certificate [of authority to do business] shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate."

Complainant was incorporated July 9, 1895. The contract in suit was assigned November 18, 1895. It procured its certificate from the secretary of state, February 5, 1896. The respondent therefore claims that "complainant cannot sue upon any contract made by it prior to February 5, 1896," and cites, in support of said claim, *Crefeld Mills v. Goddard*, 69 Fed. 141. The writer sat with two of the judges of the circuit court of appeals at the hearing of said case on a writ of error. The opinion of Judge Wallace was affirmed. Judge Wallace there held that the remedy on the contract was merely suspended until such time as said certificate

should be procured. *Pipe Co. v. Connell*, 86 Hun, 319, 33 N. Y. Supp. 482; *Neuchatel Asphalt Co. v. Mayor, etc.* (Com. Pl.) 33 N. Y. Supp. 64. Irrespective of this point, and even if respondent is not estopped to set up this plea, it does not appear that the complainant is "doing business" in this state. *Gilchrist v. Railroad Co.*, 47 Fed. 593; *Chase's Patent Elevator Co. v. Boston Towboat Co.*, 152 Mass. 432, 28 N. E. 300. It is not alleged, and it does not appear, that the contract was made in this state. *Shelby Steel Tube Co. v. Burgess Gun Co.*, 8 App. Div. 444, 40 N. Y. Supp. 871; *O'Reilly v. Greene* (City Ct. N. Y.) 40 N. Y. Supp. 360. It is sufficiently proved that the original contract was intended to include the process, and that subsequent oral agreements were made to the same effect. Let a decree be entered for complainant in accordance with this opinion.

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NEDERLAND LIFE INS. CO., Limited, v. HALL.<sup>†</sup>

(Circuit Court of Appeals, Seventh Circuit. January 22, 1898.)

No. 466.

**COSTS—WRIT OF ERROR—MOTION FOR NEW TRIAL.**

An order denying a motion for a new trial is not reviewable, and where without special reason therefor such a motion is transcribed and printed as part of the record, its cost will not be taxed against defendant in error.

In Error to the Circuit Court of the United States for the Northern Division of the Northern District of Illinois.

This was an action at law by Fannie Gideon Hall against the Nederland Life Insurance Company, Limited, on a policy on the life of Elbert Mills Hall. Verdict and judgment were given for plaintiff, and the defendant sued out this writ of error. On January 10, 1898, this court rendered an opinion reversing the judgment, and remanding the case for a new trial. 27 C. C. A. 390, 84 Fed. 278. The case is now heard on a motion for taxation of costs.

Edward G. Mason, Henry B. Mason, and Henry E. Mason, for plaintiff in error.

John M. Hamilton and James A. Fullenwider, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

**PER CURIAM.** The defendant in error has moved for a taxation of costs against the plaintiff in error. It appears that a little more than 32 pages of the printed record and a corresponding portion of the transcript are given up to a motion filed in the court below for a new trial. It has often been decided that the granting or denying of a motion for a new trial is a discretionary act, which will not be reviewed on writ of error. It follows that, unless there be a special reason therefor, a motion for a new trial should not be included in the transcript of the record taken for the purpose of prosecuting a writ of error. It is therefore ordered that the costs in this case, caused by transcribing and printing the motion for a new trial, be not taxed against the defendant in error; or that, if already taxed, the amount thereof be deducted upon payment of the balance of the costs taxed. The costs of this motion shall be taxed against the plaintiff in error.

<sup>†</sup> Rehearing denied March 5, 1898.

**PARK HOTEL CO. v. FOURTH NAT. BANK OF ST. LOUIS.**

(Circuit Court of Appeals, Eighth Circuit. April 18, 1898.)

No. 966.

**1. CORPORATIONS—AUTHORITY OF PRESIDENT—NEGOTIABLE PAPER.**

The general authority of the president of a business corporation to make and discount its promissory notes gives him no power to make a note of the corporation payable to his own order, and one who discounts such a note cannot recover thereon against the corporation without showing special authority for its execution.

**2. PRINCIPAL AND AGENT—SCOPE OF AGENCY—NOTICE.**

To the general rule that the acts and contracts of a general agent within the scope of his powers are presumed to be lawfully done and made, there is an exception as universal and inflexible as the rule. It is that an act done or a contract made with himself by an agent on behalf of his principal is presumed to be, and is notice of the fact that it is, without the scope of his general powers, and no one who has notice of its character may safely recover upon it without proof that the agent was expressly and specially authorized by his principal to do the act or make the contract.

**3. CORPORATIONS—POWER TO MAKE ACCOMMODATION PAPER.**

It is ultra vires of a corporation to make accommodation paper, or to guaranty the payment of the obligations of others.

**4. SAME—RATIFICATION.**

A contract which a corporation has no power to make, it has no power to ratify, and no power to estop itself from denying.

**In Error to the Circuit Court of the United States for the Eastern District of Arkansas.**

This writ of error challenges a judgment for \$14,528 in favor of the Fourth National Bank of St. Louis, the defendant in error, and against the Park Hotel Company, a corporation, the plaintiff in error, upon a promissory note in these words:

"St. Louis, Mo., Dec'r 3rd, 1894.

"On February 1st, 1895, after date, I, the Park Hotel Co. of Hot Springs, Ark., promise to pay to the order of the Fourth National Bank of St. Louis, Mo., fifteen thousand dollars, for value received, with interest at the rate of eight per cent. per annum from maturity until date.

"The Park Hotel Co.,

"By Ed. Hogaboom, Pres't.

"Ed. Hogaboom."

The bank alleged in its complaint that this note was executed in renewal of a note of the hotel company of like amount, which was executed by it to the bank, for value received, on February 28, 1891, and which was extended from time to time, upon payment of interest, until December 3, 1894, when the note in suit was made in its stead. The hotel company denied that it made either of these notes; that it ever received any consideration for them; that it ever paid any interest on them; that they were ever extended at its request, or with its knowledge; denied that its president, Ed. Hogaboom, ever had any authority to make them; and averred that the entire transaction was one between Ed. Hogaboom and the bank, of which it never had any knowledge, and to which it never assented. At the close of the trial of the issues thus raised, the court below instructed the jury to return a verdict for the bank, and this charge is the error assigned. The essential facts upon which this instruction rests are these: In 1891 the Park Hotel Company was a corporation engaged in the construction and furnishing of an hotel, and afterwards in the operation of it, at Hot Springs, in the state of Arkansas; and Ed. Hogaboom was its president. On February 28, 1891, without paying the corporation any consideration therefor, and without the knowledge or consent of any other officer or agent of the hotel company, Hogaboom made a promissory note in this form:

"St. Louis, Feb'y 28, 1891.

"On June 28, 1891, after date, for value received, I, the Park Hotel Co. of Hot Springs, Ark., promise to pay to the order of Ed. Hogaboom fifteen thousand dollars, for value received, with interest at the rate of eight per cent. per annum from maturity until paid.

The Park Hotel Co.,

"By Ed. Hogaboom, Pres't."

—indorsed his name upon it, pledged, as collateral security for its payment, 666 shares of the stock of the State Savings Bank & Trust Company of Hot Springs, which he owned, and whose face value was \$16,650, discounted it at the Fourth National Bank of St. Louis, and procured from that bank, and spent for his own benefit, the proceeds of the discount. He renewed this note, obtained extensions of the time of payment of the debt it evidenced, and paid the interest on it, and \$1,500 of the principal, until it was finally evidenced by the note of December 3, 1894, in suit. The bank sent notice of the maturity of the various notes which Hogaboom made to the hotel company at Hot Springs; but all these notices were received by Hogaboom, and none of the other officers or employes of the company were aware of this transaction, or of the existence of any of these notes, until about May 1, 1895, when one of the notices fell into the hands of the manager of the hotel. In August of that year the manager informed the treasurer of the corporation of his receipt of this notice, and all the directors were notified of the existence of the note of December 3, 1894, early in the month of March, 1896. Between May 1, 1895, and February 19, 1896, Hogaboom paid the interest on, and obtained several extensions of the time of payment of, this note; and on that day he paid the bank \$1,500 of the principal of the debt, and gave it his three individual notes, for \$4,500 each, payable in 30, 60, and 90 days from that date, respectively. The bank took these notes on account of the note in suit, but it retained the latter as collateral security for the payment of the three individual notes. In May, 1896, Hogaboom failed, and then the bank brought this action. On February 28, 1891, when the bank discounted the original note, Hogaboom represented that he had authority to borrow \$20,000 for the hotel company, and that he was borrowing the money which he obtained by the discount of the note of that date for that corporation; and the officers of the bank believed these representations, but pursuant to the custom of that bank, in the words of the president, to "take the last indorser's check for the proceeds of such a note, showing that he, as indorser or guarantor, obtained the money. He can't go back on us, and say that he did not receive a consideration for the indorsement,"—the bank placed the proceeds of the discount to the individual credit of Hogaboom, and paid it out on his individual check. The hotel company never received any of the proceeds, or any credit or benefit from any of the proceeds, of the transaction.

J. M. Moore, for plaintiff in error.

George B. Rose (U. M. Rose and W. E. Hemingway, on brief), for defendant in error.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge, after stating the case as above, delivered the opinion of the court.

Unless the hotel company is estopped from contesting the validity of the note in suit, this judgment must stand or fall by the transaction of February 28, 1891. The only consideration for this note is a discount by the bank of the note of that date. If the discount of that note did not charge the hotel company with any liability to the bank, then, unless it is estopped from making this defense, it never became liable upon any of the renewals of that note, because they were without consideration, and the bank knew that

fact when it took them. We lay aside, therefore, for the moment, the question of estoppel, and turn to the consideration of the transaction of February 28, 1891. The note which the bank discounted on that day was signed, "The Park Hotel Co., by Ed. Hogaboom, Pres't," was payable to the order of Ed. Hogaboom, and was indorsed by him. The bank discounted it, paid the hotel company nothing on account of it, placed all the proceeds of the discount to the credit of Hogaboom, and paid them out on his check. The legal result of the transaction was that Hogaboom had made the corporation's accommodation note, payable to his own order, and the bank had discounted it, and paid him the proceeds of it. There is no evidence in this record that Hogaboom was ever specially authorized by the hotel company to make this note, and to discount it for his own benefit, or to make any note of the corporation payable to his own order, or any contract of the corporation with himself. The bank seeks to recover on the ground that Hogaboom had general authority to conduct the business of the hotel company, and to make and discount its commercial paper. The briefs and arguments of counsel exhaustively discuss this question under the by-laws of the corporation and the statutes of Arkansas. There is an objection to the recovery in this case, however, which lies deeper, and is liable to be more fatal in its consequences, than any answer we might give to that question. It is that the execution of this note was not within the scope of the general power of the president to make commercial paper of the corporation. General authority to conduct the business and to issue the promissory notes of a corporation is authority to do those acts for corporate purposes, and in the interest of the corporation, only. It does not include the power to do them for the exclusive benefit of others, to the detriment of the corporation. And while a promissory note, made by an agent or officer having such authority, in the usual form, and taken by a stranger in the ordinary course of business, carries with it the presumption that it was issued for corporate purposes, and under lawful authority, a note issued by such an agent, payable to himself, is accompanied by no such presumption, but is itself notice that it is without the scope of his general power, and that it does not bind his principal, unless its execution was specially authorized by the corporation, through its directors or officers, other than the agent to whom it is payable. Such a note is a danger signal, which the discounter or purchaser disregards at his peril. It is notice to him that, if it is contested, he cannot recover upon it, under any general authority in the agent, or at all, unless he proves that the agent was specially authorized to make that particular transaction, or to make contracts of the corporation with himself. To the general rule that the acts and contracts of a general agent, within the scope of his powers, are presumed to be lawfully done and made, there is an exception as universal and inflexible as the rule. It is that an act done or a contract made with himself by an agent on behalf of his principal is presumed to be, and is, notice of the fact that it is without the scope of his general powers, and no one who has notice of its char-

acter may safely rely or recover upon it without proof that the agent was expressly and specially authorized by his principal to do the act or to make the contract. *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557; *Bank v. Wagner (Ky.)* 20 S. W. 535, 537; *Smith v. Association*, 78 Cal. 289, 293, 20 Pac. 677; *Mor. Priv. Corp.* § 517; *State Nat. Bank v. Newton Nat. Bank*, 32 U. S. App. 52, 58, 14 C. C. A. 61, 64, and 66 Fed. 691, 694; *Bank v. Armstrong*, 152 U. S. 346, 352, 14 Sup. Ct. 572; *Chrystie v. Foster*, 26 U. S. App. 67, 72, 9 C. C. A. 606, 609, and 61 Fed. 551, 553; *Bank v. Atkinson*, 55 Fed. 465, 472, 474; *Clafin v. Bank*, 25 N. Y. 293, 295, 299, 301; *Gallery v. Bank*, 41 Mich. 169, 2 N. W. 193; *Chamberlain v. Wool-Growing Co.*, 54 Cal. 103. This exception is a striking illustration of the policy of the law to prevent the possibility of conflict between the duty and the personal interest of an officer or agent. It prohibits him from acting for both himself and his principal wherever their interests clash, and makes every act and contract in which he violates the inhibition voidable at the election of his principal. It forbids him to act at the same time as vendor and purchaser, or as lender and borrower, or as promisor and promisee. It forbids him to sell as the agent of his principal, and to buy for himself; to lend as the agent of his principal, and to borrow for himself; to promise as the agent of his principal, and to accept the promise and reap the benefits himself. *McKinley v. Williams*, 36 U. S. App. 749, 752, 20 C. C. A. 312, 313, and 74 Fed. 94, 95, and cases cited; *Donovan v. Campion*, 27 C. C. A. 177, 85 Fed. 71, 73. In *West St. Louis Sav. Bank v. Shawnee Co. Bank*, supra, the cashier of the bank made his own note, payable to the order of the bank, indorsed his official signature upon it, and borrowed money of one whom he told that he intended to use it to pay the bank for some stock which he had purchased of it. The lender sued the bank on the indorsement, and sought to hold it by virtue of the general power of a cashier to indorse and rediscount the commercial paper of the bank. The supreme court conceded the existence of the general rules that the cashier has power to indorse and rediscount the commercial paper of the bank, and that, if he has made a bona fide rediscount of its paper, his acts will be binding, because of his implied power to transact such business, and then added:

"But certainly he is not presumed to have power, by reason of his official position, to bind his bank as an accommodation indorser of his own promissory note. Such a transaction would not be within the scope of his general powers, and one who accepts an indorsement of that character, if a contest arises, must prove actual authority before he can recover. There are no presumptions in favor of such a delegation of power. The very form of the paper itself carries notice to a purchaser of a possible want of power to make the indorsement, and is sufficient to put him on his guard. If he fails to avail himself of the notice, and obtain the information which is thus suggested to him, it is his own fault, and, as against an innocent party, he must bear the loss."

In *Smith v. Association*, 78 Cal. 289, 293, 20 Pac. 677, and *Bank v. Wagner (Ky.)* 20 S. W. 535, 537, the agents made the notes of their corporations, payable to their own order, and then indorsed

and discounted them, as in the case at bar; and the same rule was applied. The supreme court of Kentucky said:

"Now the notes bear upon their face the conclusive evidence of the fact that they were issued by Mr. Mathews, as agent, to himself, as principal, which was notice of itself to the appellants that the notes were void at the instance of the company, which destroyed their immunity as innocent purchasers. Consequently they could not recover thereon unless they could show that the company, by its superior officer, authorized so to do, or by its board of directors, with like authority, authorized Mr. Mathews to thus issue the notes because, the appellants being, *prima facie*, not innocent purchasers,—the notes being void upon their face,—they, in order to recover from the company, must show that they were issued rightfully and properly by the company's agent, which they have failed to do."

If, therefore, we concede that Hogaboom had general power to make and discount the promissory notes of the hotel company, yet the note of February 28, 1891, was not binding upon that corporation, under its denial of its execution in its answer, because his general authority gave him no power to make a note of the corporation payable to his own order, and the bank failed to prove that he had any special authority so to do.

There is another reason why the note of February 28, 1891, was not binding upon the hotel company. It is that it was an accommodation note, that the bank had notice of that fact when it discounted the paper, and that it was beyond the powers of the corporation to make a note of that character. The form of the note, as we have seen, deprived the bank of the immunity of an innocent purchaser, and gave it notice that Hogaboom had no power to make it under his general authority, and that, if the corporation contested it, it must discover and prove special power in him to do so. It gave the bank notice of every fact that a reasonably diligent inquiry to find and prove Hogaboom's special authority to make the note would have discovered, and such an inquiry would certainly have brought to its knowledge the fact that the corporation had given no such authority, but that Hogaboom had made the note for his own accommodation. Moreover, the bank knew from the transaction itself that the hotel company received no consideration for the note, and that it had actually discounted the accommodation note of that corporation for the benefit of Ed. Hogaboom. The fact that Hogaboom told the president of the bank, when he applied for the loan, that he was borrowing the proceeds of the note for the hotel company, and the fact that the president understood that the bank was loaning to the hotel company, are not forgotten. But this contract was not made by what these parties said or understood, but by what they did. Hogaboom presented to the bank the note of the corporation, signed by himself as its president, payable to his own order, and indorsed by himself. He informed the bank that he wanted to borrow money on it for the hotel company. That statement was notice to the bank that this note was not one which the corporation had given to Hogaboom for value, and that it was one which he had made without paying any consideration to the corporation for it, in order to enable him to borrow money. With this knowledge, the bank dis-

counted the note, and instead of paying its proceeds to the hotel company, which it now claims was the borrower, it placed them all to the individual credit of Hogaboom, and paid them out on his individual check. It is said that the bank is not liable for Hogaboom's misapplication of the fund. Let the proposition be conceded. But it was not Hogaboom, and it was the bank, which applied the proceeds of this note to Hogaboom's use. It was the bank, and not Hogaboom, which placed the proceeds of the discount to his individual credit, pursuant to a custom of its own, so that, in the words of its president, the indorser "can't go back on us, and say that he did not receive a consideration for the indorsement." The bank cannot escape the knowledge or the effect of that which it did itself, and it discounted a note which it knew that the president of the hotel company had made payable to himself, without giving any consideration therefor to the corporation, and paid all the proceeds of the discount to the individual. In other words, it discounted the accommodation note of the corporation, with knowledge of its character, and paid the proceeds of the discount to the party accommodated. Nor did it ever give any consideration but the proceeds of this discount for the note of December 3, 1894, on which this judgment rests, or for any of the other renewals of the original note of February 28, 1891, so that they were all mere accommodation notes of the corporation; and this to the knowledge of the bank, because the bank took them, and knew well what consideration was paid for them. But it is ultra vires of a corporation to make accommodation paper, or to guaranty the payment of the obligations of others. *Lyon, Potter & Co. v. First Nat. Bank of Sioux City*, 85 Fed. 120, 122; *National Park Bank v. German-American Mut. W. & S. Co.*, 116 N. Y. 281, 292, 22 N. E. 567; *Central Bank v. Empire Stone-Dressing Co.*, 26 Barb. 23; *Bridgeport City Bank v. Same*, 30 Barb. 421; *Farmers' & Mechanics' Bank v. Same*, 5 Bosw. 275; *Morford v. Bank*, 26 Barb. 568; *Genesee Bank v. Patchin Bank*, 13 N. Y. 309; *Ætna Nat. Bank v. Charter Oak Life Ins. Co.*, 50 Conn. 167; *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; *Davis v. Railroad Co.*, 131 Mass. 258; *Culver v. Real-Estate Co.*, 91 Pa. St. 367; *Hall v. Turnpike Co.*, 27 Cal. 255; *Madison W. & M. Plank-Road Co. v. Watertown & P. Plank-Road Co.*, 7 Wis. 59; *Lucas v. Transfer Co.*, 70 Iowa, 541, 549, 30 N. W. 771. Here, too, is the answer to the contention that the hotel company is estopped from contesting the validity of these notes. A contract which a corporation has no power to make, it has no power to ratify, and no power to estop itself from denying. *Bank v. Kennedy*, 167 U. S. 362, 371, 17 Sup. Ct. 831; *Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co.*, 163 U. S. 564, 581, 16 Sup. Ct. 1173; *Central Transp. Co. v. Pullman's Palace-Car Co.*, 139 U. S. 24, 59, 60, 11 Sup. Ct. 478; *Railway Co. v. Hooper*, 160 U. S. 514, 524, 530, 16 Sup. Ct. 379. If the hotel company had ever received any consideration for these notes, and if the bank had not had notice that the corporation received nothing for them, those facts would have removed the notes from the category of accommodation paper, and the corporation might have been estopped from denying their



validity. *Lyon, Potter & Co. v. Sioux City Nat. Bank*, 85 Fed. 120, 122. But the hotel company received no consideration for them, and the bank knew it; so that the notes fall without the limits of voidable contracts, and there is no basis for an estoppel. The result is that the bank was not entitled to a judgment in this case, (1) because the note on which it sued, and the original note of which that was a final renewal, were accommodation notes of the hotel company, and hence beyond the powers of that corporation to make, or to validate by ratification or estoppel, and the bank was charged with knowledge of their character, by its discount of the original note for the sole benefit of its indorser, and by the form of that note; and (2) because it failed to prove that the president of the hotel company was specially authorized to make the original note on behalf of the corporation, payable to his own order, and to discount it, and receive the proceeds of it himself. The judgment must be reversed, and the case must be remanded to the court below, with directions to grant a new trial, and it is so ordered.

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**BROWER v. LIFE INS. CO. OF VIRGINIA.**

(Circuit Court, W. D. North Carolina. April 29, 1898.)

**1. USURY—WHAT LAW GOVERNS.**

When a citizen of North Carolina borrows money of a Virginia corporation, promising to repay the principal sum at the home office in Virginia, the question whether the contract is usurious must be determined by the Virginia law, though the loan is secured by a mortgage on North Carolina lands.

**2. SAME.**

Where one borrowing money from a life insurance company takes from it, as a condition of making the loan, an endowment policy, and assigns it to the company, contracting to make monthly payments thereon, sufficient in the end to extinguish the loan, but in the meantime to pay interest on the whole amount of the loan at the full legal rate, the transaction is usurious under the laws of Virginia.

A. E. Holton, for plaintiff.

MacRae & Day, for defendant.

**SIMONTON**, Circuit Judge. The plaintiff instituted his proceedings in the state court of North Carolina. They have been removed into this court. The facts of this case are these:

The Life Insurance Company of Virginia is a corporation of the state of Virginia. Besides being engaged in the business of life insurance, it is authorized by its charter to lend its surplus profits on mortgages or loans of real estate. For many years it has been engaged in making such loans. Under its fixed rules, no loans are made except to persons who hold policies in the company, either life policies or endowment policies. The plaintiff, John M. Brower, a citizen of the state of North Carolina, resident at Mt. Airy, in that state, desiring to improve certain real estate in that town, wished to borrow the sum of \$5,000. He made application to Mr. Carter, an attorney at law, at Mt. Airy, who examined titles for the company, to effect a loan for him. Carter explained to him the rule of the

company, limiting its loans to policy holders; and Brower qualified himself by subscribing to three endowment policies in the Life Insurance Company of Virginia, one for \$1,000, and two for \$2,000 each. He then made application for a loan of \$5,000 for the term of seven years, interest 6 per cent. per annum, payable monthly, on the last Saturday of each month, at such place as lender may direct, the loan to be secured by mortgage of real estate. The original application for \$5,000 was withdrawn, and three separate applications of the same kind were made,—one for \$1,000, and two for \$2,000 each. The real estate of Brower which he wished to improve was in three separate parcels, and this division of the sum needed was made for convenience. The application was granted. The insurance company furnished Brower \$1,000, and took his bond in the penal sum of \$2,000, of which this is a copy:

"Know all men by these presents, that I, John M. Brower, of Mount Airy, in the county of Surry and state of North Carolina, am held and firmly bound unto the Life Insurance Company of Virginia in the sum of two thousand dollars, to be paid to said company, its successors or assigns, at its home office in Richmond, Virginia, to which payment well and truly to be made I bind myself, my heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with my seal, and dated at Mount Airy, N. C., this 21st day of January, one thousand eight hundred and ninety-three.

"The condition of this obligation is such that whereas, the said John M. Brower has made application to said the Life Insurance Company of Virginia for the advancement to him by said company of one thousand dollars, by way of anticipation of the value, at its maturity, of an endowment of one thousand dollars, evidenced by a certain certificate or policy No. 3,211, issued by said company to said John M. Brower; and whereas, said company has advanced to said John M. Brower the sum of one thousand dollars by way of said anticipation: Now, therefore, if the above-bounden John M. Brower, his heirs, executors, and administrators, or any of them, shall pay or cause to be paid unto said company, its successors or assigns, the just sum of one thousand dollars, seven years from the 28th day of January, A. D. 1893 (or at and upon the maturity of the endowment set forth and provided for in said certificate or policy, if that shall sooner happen), together with interest thereof during said period and until paid, at the rate of six per cent. per annum from the date last mentioned, payable monthly on the last Saturday of each and every month, and shall also pay or cause to be paid unto said company, its successors or assigns, the sum of twelve (\$12.00) dollars, on the 28th day of January, A. D. 1893, and on the last Saturday of each and every month thereafter, as and for the monthly payments or installments on said endowment, the certificate or policy of which endowment the said John M. Brower hereby assigns, transfers, and sets over unto said company as security for the faithful performance of this bond, and shall also pay or cause to be paid all fines which become due thereon, and shall also pay or cause to be paid all taxes and assessments on the property conveyed in the deed of trust given to secure this bond, and also all premiums on the policy or policies of fire insurance assigned to said company as additional security, until the maturity of the said endowment, then the above obligation to be void; otherwise, to remain in full force and virtue: provided, however, and it is hereby expressly agreed, that if at any time default shall be made in the payment of said interest or of the said monthly payments or installments on said certificate or policy, or of said fines, if any shall have become due, for the period of six months after the same or any part thereof shall have become due, or if the taxes and assessments on the property conveyed in the deed of trust given to secure the faithful performance of this bond be not paid when due, or if the insurance policy or policies on the said property be allowed to expire without renewal, or if the premiums thereon be not paid when due, then, and in either or any such case, the whole principal sum aforesaid shall, at the election of said company, its successors or assigns, immediately thereupon be-

come due and payable, and payment of said principal sum, together with all monthly payments, interest, and fines then due, and all costs and disbursements, including said taxes, assessments, and insurance which shall have been paid by said company, may be enforced and recovered at once, either by foreclosure of the deed of trust given to secure this bond or otherwise, anything hereinbefore contained to the contrary notwithstanding: and provided, further, that payment of said principal sum shall be made to the said the Life Insurance Company of Virginia at its home office in the city of Richmond, Va., and all other sums herein provided for may be paid at said home office, or to the duly-authorized local treasurer of said company at his office in Mount Airy, N. C.; and provided, further, that nothing herein contained shall operate to impair or suspend the right of said the Life Insurance Company of Virginia to enforce the payment and recovery of said principal sum, either by foreclosure of the deed of trust given to secure this bond or otherwise, at once upon default being made in the payment of said principal sum, when the same shall become due and demandable according to the terms of this bond.

"Witness: W. F. Carter.

John M. Brower. [Seal.]"

To secure this bond, he and his wife executed a deed of trust to J. W. Ashby and W. F. Carter, as trustees, covering a lot of land at Mt. Airy, with power of sale in case of default in any of the covenants in the deed. Afterwards another loan of \$2,000 was made, secured by the same sort of bond, and by a similar deed of trust to the same trustees, covering another lot in the town of Mt. Airy. The last \$2,000 was never loaned, because Brower had begun to make default on the preceding loans. The third endowment policy was surrendered, the company paying him \$116. On this had been paid \$140. Default having been made on the two deeds of trust, the Life Insurance Company of Virginia threatened action under them, and Brower filed his complaint, charging the whole transaction as usurious, and praying an injunction. The cause comes into this court, and, an answer having been filed and testimony taken, is now heard on the merits.

The following is a copy of the endowment policy:

"The Endowment Fund of the Life Insurance Company of Virginia.

"No. 3,211.

Richmond, Virginia.

10 Shares.

"Amount, \$1,000.00.

"This certifies that John M. Brower, of Mount Airy, county of Surry, state of North Carolina, has subscribed for, and is the owner of, ten shares, of one hundred dollars each, in the endowment fund of the Life Insurance Company of Virginia; and that in consideration of the monthly payment of one dollar and twenty cents per share hereof to be made on the last Saturday of each month beginning on the 20th day of January, 1893, the Life Insurance Company of Virginia doth hereby promise and agree to pay to the holder herein named the sum of one hundred dollars for each share hereof, seven years after the 28th day of January, 1893, subject to the conditions named on the back hereof, which are hereby referred to and made a part hereof.

"In witness whereof, the said the Life Insurance Company of Virginia hath, by its president and secretary, signed and delivered this instrument at Richmond, Virginia, this 20th day of January, 1893.

"Jas. W. Pegram, Secretary.

"G. A. Walker, President."

There are two questions in this case. One is, is this a usurious contract? The other is, by the law of which state, Virginia, or North Carolina, must this be determined? The last question may be first met.

The contract expressly provides that the payment of the principal sum must be made at the home office, at Richmond, Va. No express

provision is made as to the place for the payment of interest. For convenience sake, no doubt, it could be paid either to the agent in North Carolina or at the home office in Virginia. It is an established rule of law that the performance of contracts is to be governed by the law of the place of performance, and, if the interest allowed by the place of performance is higher than that at the place of contract, the parties may stipulate for the higher interest without incurring the penalties of usury. *Miller v. Tiffany*, 1 Wall. 310. This is the law also in North Carolina, as laid down by *Ruffin*, C. J., in *Arrington v. Gee*, 27 N. C. 594, and by *Pearson*, C. J., in *Roberts v. McNeely*, 52 N. C. 506. And also by the courts of Virginia the same doctrine is established. *Nickels v. Association*, 93 Va. 387, 25 S. E. 8. Nor is this rule affected by the fact that this loan is secured by a mortgage of realty in another state. *Campion v. Kille*, 14 N. J. Eq. 229; *De Wolf v. Johnson*, 10 Wheat. 377; *Story*, *Conf. Laws*, §§ 287, 293, 303. So, it must follow that, in deciding whether this contract be usurious or not, it must be discussed in the light of the Virginia statute on the subject. If there be any authoritative decision of the supreme court of that state construing such statute, it must be followed by this court. There is, so far as the research of counsel or of the court can ascertain, no case passing precisely on this question. It must therefore be discussed in the light of the general law.

Is the transaction in question tainted with usury? The rate of interest in Virginia is 6 per cent. per annum. That of North Carolina 8 per cent. per annum. The requisites to form a usurious transaction are: (1) A loan, either express or implied; (2) an understanding that the money lent shall or may be returned; (3) that a greater rate of interest than is allowed by statute shall be paid. *Lloyd v. Scott*, 4 Pet. 205.

Chief Justice Gaston, of North Carolina, in his own luminous way, expresses it thus:

"To constitute a loan usury, it is necessary that there should be an agreement between the parties for the lender to take a greater profit by way of discount or interest on the amount loaned than after the rate of six dollars for the forbearance of one hundred dollars for one year. It signifies not in what shape the agreed profit upon the money lent is to accrue. It is sufficient that such profit should exceed the legal rate in order to bring the transaction within the statute. It is also wholly unimportant in what form, by what device, or under what pretense this reservation of unlawful profit be made, if, according to the agreement of the parties, it is designed as a profit upon the sum advanced."

He adds:

"The hope or confident expectation of some collateral benefit from making the loan does not necessarily show a corrupt agreement to take exorbitant interest." *Shober v. Hauser*, 20 N. C. 91.

See, also, *Bank v. Owens*, 2 Pet. 527; *Lloyd v. Scott*, *supra*.

Let the transaction in the case at bar be analyzed and examined in the light of this clear exposition of the law. There are two contracts made almost contemporaneously, and in great measure the one, the loan, dependent on the other, the policy. The loan was secured by a bond, providing for the payment of interest at the rate

of 6 per cent. per annum, payable monthly, on the principal, for the period of seven years. This is not in itself usurious, notwithstanding the short period in which increments of interest fall due. *Meyer v. City of Muscatine*, 1 Wall. 384, 391. The bond is also conditioned for the prompt payment of the installments on the endowment policy. Does this make the transaction usurious? What is the practical operation of this arrangement? The borrower gives his bond, say, for \$1,000, bearing interest at 6 per cent. per annum, payable monthly, secured by a mortgage of real estate. He also, as a part of the contract,—a condition precedent to the loan,—takes out an endowment policy for a certain number of shares, each valued at \$100, on which he agrees to pay \$1.20 per share each month, and, under the terms of the loan, at once assigns this policy to the lender. These monthly installments go into the hands of the lender, and, by the hypothecation, are the property of the lender, and so remain until the debt is matured, and are then, in the aggregate, applied to the debt. If they be discontinued, apparently all of the installments will be forfeited. So, the lender on a loan of \$1,000 gets each month, towards the ultimate payment of the sum loaned, \$12, and yet simultaneously with each of the said installments gets interest monthly on the whole sum loaned. Thus, if the contract be carried out, at the end of three years and a half, 42 months, the lender will have in hand, applicable to his loan of \$1,000, the sum of \$504; and yet it will be receiving at the same time from the borrower at the rate of 6 per cent. per annum upon the whole sum lent. Evidently, under this practical operation of the contract, the lender gets more than the legal rate of interest on his loan. To put it in another form: The loan is for \$1,000. Two classes of securities are placed in the hands of the lender, both inseparably connected and parts of the same transaction. By the one,—the mortgage,—he is secured the full interest on his loan for seven years. By the other, he is placed monthly in possession of funds which gradually extinguish the amount loaned. At the end of the seventh year the lender will get full interest on the original loan, and will have in hand an aggregate of installments equal to the amount of the original loan,—his property by hypothecation. If he lends \$1,000, and gets each month \$12 on the policy, he will have received in 84 months (7 years) \$1,048. In *Insurance Co. v. Kittle*, 2 Fed. 113, there is a transaction very similar to this, which *McCrary*, circuit judge, with the concurrence of Mr. Justice Miller, held usurious. In that case the policy concurrent with the loan was a life policy, under which the borrower certainly obtained a valuable protection, for his death pending the loan will pay it in full. In this case the borrower is given only an easy and convenient way of depositing with the lender his installments for the payment of his debt, and has no contingent advantage, even if he die before the debt has matured. In *Miller v. Insurance Co.*, 118 N. C. 612, 24 S. E. 484, a transaction in all respects like this was declared usurious.

It is not the question whether the defendant corruptly, by trick or design, obtained a larger rate of interest than 6 per cent. per annum. This is the language of the Virginia Code:

"Sec. 2817. Legal Rate of Interest. Legal interest shall continue to be at the rate of six dollars upon one hundred dollars for a year, and proportionately for a greater or less sum, or for a longer or shorter time; and no person upon any contract shall take for the loan or forbearance of money or other thing above the value of such rate.

"Sec. 2818. Contracts, &c., for More, Illegal. All contracts and assurances made, directly or indirectly, for the loan or forbearance of money or other thing, at a greater rate of interest than is allowed by the preceding section, shall be deemed to be an illegal consideration as to the excess beyond the principal amount so loaned or forborne."

It appears from what has been said that, under this contract of loan, the defendant, the Life Insurance Company of Virginia, reaps a larger profit on the loan of its money than at the rate of 6 per cent. per annum, and that the transaction is usurious.

The complainant also seeks damages because the defendant did not lend the last \$2,000 of the \$5,000 asked for. The report of the standing master on this point is confirmed. He saw no evidence to sustain the claim. It seems somewhat an inconsistent position on the part of the complainant to attack the loan because it is usurious, and then to seek damages because it was not made. Considering the whole case, it is ordered that the account between the parties be restated on these principles. Let the plaintiff be charged with the loan of \$3,000, which has been made, with interest thereon at the rate of 6 per cent. per annum payable monthly, and be credited with all sums paid for this interest, and also with all sums paid on the endowment policies, interest on these last-named sums to be allowed at the rate of 6 per cent. per annum from the several days of payment. For the balance thus ascertained, the complainant must make payment to the defendant, and, failing therein, the lands covered by the deeds of trust must be sold by the standing master for the purpose of satisfying the same. The case will be recommended to the standing master, to restate the account; or, if the parties can agree upon a proper statement, so much of this reference can be dispensed with, and a decretal order can be prepared providing for the time and place and terms of sale; costs to be paid by defendant.

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CITY OF CHICAGO v. BAKER.

(Circuit Court of Appeals, Seventh Circuit. April 18, 1898.)

No. 458.

**1. MUNICIPAL CORPORATIONS—POLICE POWER—CLOSING STREETS.**

An ordinance closing a street in Chicago at the place where it was crossed by a railroad track was not an exercise of the police power of the city, and, if property is injured by such closing of a street, the owner is entitled to damages.

**2. SAME—ILLINOIS STATUTE.**

Rev. St. Ill. c. 145, § 1, provides compensation for damage caused to property by the vacation of a street or alley; and if, before that enactment, the vacation of a street was an exercise of police power, for which there was no right of compensation, the statute abolished that doctrine.

**3. SAME—DAMAGES.**

In Illinois it is not essential to a right of action against a city for damages sustained by closing a street that the property alleged to be injured should abut the closed portion of the street.

## 4. SAME—EVIDENCE.

In an action for damages to property by the closing of a street, proof of decrease in rental value of neighboring property is not admissible.

Error to the Circuit Court of the United States, Northern District of Illinois, Northern Division.

T. J. Sutherland, for plaintiff in error.

Clarence S. Darrow, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The defendant in error was given judgment against the city of Chicago, in the sum of \$5,000, for damages caused to property on the southwest corner of Clark street and Twenty-First street by the vacation of the latter street where crossed by the tracks of the Lake Shore & Michigan Southern and the Chicago, Rock Island & Pacific Railway Companies. Besides the city, those companies were made defendants to the action, and damage attributed to the elevation of their tracks, as well as to the vacation of the street, was claimed; but, under the peremptory instruction of the court, those companies were found not guilty.

The radical proposition of the plaintiff in error, that "the ordinance, under which Twenty-First street, near the plaintiff's premises, was closed, was passed by the city in the exercise of its police powers, and hence no right of action accrued to the plaintiff by reason of the same, or of any acts done in pursuance thereof," we do not deem tenable. The right to regulate the use of streets is recognized to be a police power, but no decision has been cited, and we know of none, in which it has been held or said that the power to vacate streets is of that character; and, as we conceive, it could not be regarded as of that quality in a particular instance because exercised in connection with the exercise of another power conceded to be of that kind, like the power to compel the elevation of railroad tracks. When in this instance the city determined that the railroad tracks adjacent to the property of the defendant in error should be elevated, it was a matter of choice on the part of the city, and was made a matter of agreement between the city and the railroad companies, what streets should have subways, and what should be closed; and, when it was determined that Twenty-First street should be closed where crossed by the railroad tracks, if there resulted to the property of the defendant in error a special injury, for which he was otherwise entitled to compensation, it would be an exceedingly harsh and unjust conclusion to say that the harm resulted from the exercise of a police power, and was therefore *damnum absque injuria*, or remediless. If there could have been doubt on the question, it was removed by an act of the legislature of Illinois (section 1, c. 145, Rev. St. Ill.), which, after defining the "power to vacate or close any street or alley, or portion of the same," provides that, "when property is damaged by the vacation or closing of any street or alley, the same shall be ascertained and paid as provided by law." In, instead of this meaning no more than the constitutional provision that "private property shall not be taken or damaged for public use without just compensation," etc., it is a specific provision that there shall

be compensation for damage caused to property by the vacation of a street or alley, or a portion thereof; and if before that enactment the vacation of a street could have been regarded as an exercise of police power, for the injurious results of which there could be no right of compensation, the statute to that extent abolished the doctrine, and established the rule for such cases that the individual, when sacrificed for the benefit of the public, shall not go uncompensated.

The second proposition advanced is that the plaintiff had no cause of action because the closed portion of the street was not adjacent to his property; but, while it is conceded that no one can recover for an injury suffered in common with the public, it is not essential to the right of action, under the decisions in Illinois, that the property alleged to have been injured should abut upon the vacated portion of the street. See *Rigney v. City of Chicago*, 102 Ill. 64; *City of Chicago v. Union Building Ass'n*, Id. 379; *Little v. City of Lincoln*, 106 Ill. 353; *City of East St. Louis v. O'Flynn*, 119 Ill. 200, 10 N. E. 395; *Chicago Anderson Pressed-Brick Co. v. City of Chicago*, 138 Ill. 628, 28 N. E. 756; *Parker v. Catholic Bishop*, 146 Ill. 158, 34 N. E. 473; *City of Chicago v. Burcky*, 158 Ill. 103, 42 N. E. 178. While no part of Twenty-First street within a rod of the property of defendant in error was closed, yet egress and ingress which had existed to and from the west were cut off, leaving no immediate communication with the next cross street in that direction; and in that respect, at least, he suffered a special inconvenience in the use and enjoyment of his property, for which he should receive compensation. Whether there were other elements of special injury, we do not decide. The mere cutting off of travel along the street would seem to be a common injury, for which individual relief is not allowed.

It remains to consider whether the court erred in the admission of testimony. Witnesses were permitted to testify that the rents paid for neighboring properties were less after than before the vacation of the street. Under decisions in New York, directly in point, this testimony was incompetent. *Jamieson v. Railway Co.*, 147 N. Y. 322, 41 N. E. 693; *Witmark v. Railroad Co.*, 149 N. Y. 393, 44 N. E. 78. But it is argued that in Illinois the evidence was competent, because "it is the well-settled rule in Illinois that the proof of sales of property similarly located is competent evidence, as bearing on the question of the value of property sought to be taken or damaged." The cases referred to are *Culbertson & Blair Packing & Provision Co. v. City of Chicago*, 111 Ill. 551; *Elmore v. Johnson*, 143 Ill. 530, 32 N. E. 413; *Peoria Gaslight & Coke Co. v. Peoria Terminal Ry. Co.*, 146 Ill. 372, 34 N. E. 550; *Railroad Co. v. Haller*, 82 Ill. 208, and cases there cited. When the question is of the value of a particular property the rule seems to be general, though not universal, that proof may be received of sales of other like properties similarly situated. *Lewis, Em. Dom.* § 443. When there has been an actual taking of property, and the value thereof is directly and necessarily in issue, the pertinency and force of such evidence are so apparent that the propriety of admitting it has been generally recognized; and it has been held in some instances to be proper for the purpose of showing the value of property damaged and not taken, though in such cases the value of



the property injured is not in direct issue, and can be of incidental importance only. The issue in that class of cases is the amount of damage done to the property,—the depreciation in its value attributable to the cause complained of; and the light thrown on that question by the sales of other property, though competent, it is clear must be uncertain. In *Hohmann v. City of Chicago*, 140 Ill. 226, 230, 29 N. E. 671, it was said:

"To make the evidence of any value, it would be necessary to show a substantial identity of conditions in all respects; but no offer was made to do that, if, indeed, proof of that character would have been possible."

In *Railroad Co. v. Haller*, *supra*, it was said:

"What the property would sell for before and after the road was constructed would be one of the modes of ascertaining the damages, if the price was shown to be reduced by reason of the building of the road. But it would not be the only means of determining the question. So would its rental value be another, where the property was held for rent, but the latter mode would not be a proper criterion where it was not held for that purpose. If there was no other property of the same value or description in the place, which had been sold, then other modes would have to be resorted to than the proof of the sale of such property before and after the damage done."

The plain implication here is that the evidence of rental values of the property injured, only, is admissible. That being so, there can, of course, be no evidence of that character when the property is not held for the purpose of rent. It is to be observed, in passing, that the declaration in this case does not show the existence of buildings on the premises of the defendant in error, nor for what purposes the lots had been used. In *Railroad Co. v. White*, 166 Ill. 375, 46 N. E. 978, the court, after stating the character of evidence which is admissible in such cases, said, "It is not proper, however, to show how other property was specifically injured." No case in Illinois or elsewhere has been cited wherein it was held that proof of rental values of other properties than that in direct issue was competent. We cannot believe that evidence of that character can, in general, be promotive of just conclusions, and it is beyond doubt that the evidence offered in this case was deceptive and misleading in its tendency. It was doubly so because the reductions in rents which were shown were attributed by the witnesses largely to an increase of dust, cinders, smoke, and steam, credited to the elevation of the railroad tracks, and not solely to the vacation of the street; and neither by the evidence, nor by the instructions of the court, was the jury furnished a basis for determining to what extent the rental values proved were affected by the vacation of the street alone. It is therefore impossible to say that the evidence was harmless. Our holding is that it was incompetent. The judgment below is reversed, with instruction to grant a new trial.

## WALDRON et al. v. JOHNSTON.

(Circuit Court, S. D. Georgia, E. D. March 2, 1898.)

**GAMING CONTRACTS—DEALING IN FUTURES.**

A contract for the future delivery of cotton, made merely to speculate in differences on the rise and fall of the price without any intention to deliver or receive cotton, is void as a gaming contract, not only under Code Ga. § 3671, but also under the general law as announced by the supreme court of the United States.

This was an action of assumpsit by Waldron & Taintor against James H. Johnston.

Garrard, Meldrim & Newman, for plaintiffs.

Erwin, Du Bignon, Chisholm & Clay and Saussy & Saussy, for defendant.

**SPEER, District Judge.** The case presented for decision is this: An auditor finds that the defendant is indebted to the plaintiffs on their demand in the sum of \$3,035.37. The defendant has filed exceptions to the report upon the material ground that the conclusions of law which the auditor draws from his findings of fact are erroneous. The finding of fact not excepted to, and therefore admitted to be true, upon which I think the decision must depend, is as follows:

"I find that the defendant during the same period resided in Savannah, Georgia, and was there engaged in mercantile pursuits, and that he employed the plaintiffs to make contracts for the future delivery of cotton in New York, with the intention of realizing upon the differences in values arising under said contracts in the New York market before the time for the delivery of said cotton arrived. I further find that he never intended to deliver or receive cotton under said contracts, but relied on his agents to avoid this contingency. I find that the defendant's intention not to deliver or receive cotton, but simply to realize upon the differences in values, was known to the plaintiffs, and that they so managed his business as to carry out this intention, and did, so far as he was concerned, avoid the delivery of cotton."

It is insisted by the defendant that this finding affords an instance of a gaming contract which the courts will not lend their aid to enforce. Code Ga. § 3671, provides as follows:

"Gaming contracts are void, and all evidences of debt or encumbrances or liens on property executed upon a gaming consideration are void in the hands of any person."

The statute is not enacted to favor a defendant who has engaged in transactions of this character, but as an expression of a definite and fixed policy to discourage and prevent transactions which the law-making power has determined to be *contra bonos mores*. The topic has been repeatedly discussed by the supreme court of the state. In *Cunningham v. Bank*, 71 Ga. 400, transactions in "futures," similar to those now before the court, were declared to be "wagering," "gambing," "immoral," and "illegal contracts." The transactions thus stigmatized by the supreme court of the state, to quote its description, was "the purchase of certain cotton with the intention and understanding of both parties that the cotton was not to be delivered to or received by the defendant; that there was to be a settlement at a future day, when the defendant was to receive or pay the differences between the

contract price and the market price." The same case was again before the supreme court and was reaffirmed. 75 Ga. 366. A note which had been given to the payees, the consideration of which was money to be expended by them in the purchase of "cotton futures" for and on account of Cunningham, was held to be void. In *Walters v. Comer*, 79 Ga. 796, 5 S. E. 292, where the defendant dealt with the plaintiffs in their own name and on their own responsibility, and where *Comer & Co.* admitted that this was done for the purpose of purchasing "cotton futures," the supreme court held it "to be a wagering contract, and that plaintiffs could not recover for services or losses incurred in forwarding the transaction." In *Alexander v. State*, 86 Ga. 246-249, 12 S. E. 408, the supreme court further held that the business of buying and selling "cotton futures" was not protected by the interstate commerce clause of the constitution of the United States.

The plaintiffs relied upon the cases of *Warren v. Hewitt*, 45 Ga. 501, and *Heard v. Russell*, 59 Ga. 25. These are, however, clearly distinguishable from the cases above cited. In both of these cases, which are deemed by their counsel to be favorable to the plaintiffs' view of the transactions, the court found that the contracts were for the purchase of cotton for future delivery. To purchase cotton for future delivery is a very different thing from speculating in the differences which may in future exist because of the rise or fall of the market. The one transaction is not inimical to the policy of the law; the other is denounced, not only by the statute, but by reiterated decisions of the supreme court, expressed with all the emphasis of which the eminent jurists composing it were capable. It is, moreover, true that the salutary principle expressed in the Georgia statute and by these repeated decisions of the supreme court of the state received high sanction and approbation in numerous and controlling decisions of the supreme court of the United States. As early as March 3, 1884, in the case of *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160, the supreme court held as follows:

"If, under guise of a contract to deliver goods at a future day, the real intent be to speculate in the rise or fall of prices, and the goods are not to be delivered, but one party is to pay to the other the difference between the contract price and the market price of the goods at the date fixed for executing the contract, the whole transaction is nothing more than a wager, and is null and void."

It would be difficult to discover a condition more precisely identical with that found to exist by the auditor in this case in his first finding hereinbefore recited. Equally apposite to his second finding is the following declaration of the court:

"When the broker is privy to the unlawful design of the parties, and brings them together for the very purpose of entering into an illegal agreement, he is particeps criminis, and cannot recover for services rendered or losses incurred by himself on behalf of either in forwarding the transaction."

This decision, in which the opinion of the unanimous court was rendered by Mr. Justice Mathews, was again by a unanimous court cited with approbation in *Embrey v. Jemison*, 131 U. S. 336, 9 Sup. Ct. 776. There, also, Mr. Justice Harlan, speaking for the court, declared:

"In the present case, according to the averments in the plea of wager, the plaintiff was the broker who effected the purchases of future-delivery cotton.

He was privy to the unlawful design of the parties; represented one of them in all the transactions; and advanced the money necessary to carry, and for the express purpose of carrying, these cotton 'futures' on account of the defendant. His position, therefore, was not that of a person merely advancing money to or for one of the parties to a wager, without having himself any direct connection with the making or execution of the contract of wager itself. He was, in every sense, *particeps criminis*."

It is insisted, however, that a contrary doctrine has been established by the decision of the supreme court in the case of *Bibb v. Allen*, 149 U. S. 482-505, 13 Sup. Ct. 950, where the decision was rendered by Mr. Justice Jackson. An examination of this case, however, will readily disclose the fallacy of this contention. In *Bibb v. Allen*, it was, to quote from the language of Justice Jackson on page 490, 149 U. S., and page 953, 13 Sup. Ct., "shown by the correspondence and by other testimony in the case that there was no agreement or understanding between the plaintiffs and defendants that the cotton sold for future delivery was not in fact to be actually delivered. \* \* \* It was also testified by both the plaintiffs and defendant Bibb that there was no understanding or agreement, either express or implied, between them, at the time of entering upon the transactions or during their progress, that the cotton sold for account of the principals was not to be delivered at the time stipulated in the contracts of sale made for their account." And again: "The undisputed testimony establishes that the sales were not wagers, but that the cotton was to be actually delivered at the time agreed upon." If these statements of the learned justice be contrasted with the finding of the auditor in this case, the cases are readily distinguishable. Indeed, *Bibb v. Allen* is conclusive authority for the defendant in the case at bar, for, after holding that the evidence shows a contract made *bona fide* for the actual delivery of cotton itself, the learned justice remarks: "It is not questioned that, if the transactions in which the parties are engaged were illegal, the agent cannot recover either commission for services rendered therein or for advances and disbursements by him for his principal;" citing *Story*, Ag. §§ 330, 334, and *Irwin v. Williar*, *supra*. The learned justice brings to assist the cogency of his own reasoning upon the law the custom of perhaps the most authoritative organization of the cotton trade itself when he declares, on page 491, 149 U. S., and page 953, 13 Sup. Ct.: "In addition to this, it is shown that the rules and regulations of the New York Cotton Exchange recognized no contracts except for the sale and purchase of cotton to be actually delivered."

From the considerations of these authorities, the conclusion is obvious and inevitable that, while a contract made in good faith for the future actual delivery of cotton itself is enforceable, yet, however ingenious may be the device to avoid the law, whenever it appears that the transaction in "futures" is made merely to speculate in differences on the rise and fall of the market, and this is known to both parties, the policy of the law commands the court to withhold its assistance to either party. Whether it be true, as insisted, that this policy, if respected by the courts, will serve to discourage dangerous speculation, will encourage the business community to that orderly and legitimate traffic and industry which is the sure precursor of success to the indi-

vidual and large prosperity to the public, will withhold from the youthful or the uninformed those temptations towards daring ventures which often result in bankruptcy and ruin, and will make it more difficult for skillful operators to manipulate for their own profit the rise and fall in the prices of the great staples upon which the welfare of the people depends, it may not be here profitable or appropriate to discuss. It is sufficient to ascertain what is the definite policy of the law, and to obey it. The exceptions are sustained, and a judgment for the defendant will be directed.

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In re ORPEN.

(Circuit Court, N. D. California. April 11, 1898.)

1. EXTRADITION—EVIDENCE—CERTIFICATE OF DIPLOMATIC OFFICER.

Where the certificate required by the act of August 3, 1882 (22 Stat. 216), to depositions, warrants, or other papers offered in evidence in extradition cases, is signed by the chargé d'affaires ad interim, the court will take judicial notice that such chargé was, at the time such certificate was given, the principal diplomatic officer of the country where it was given.

2. SAME—REQUISITION AND MANDATE.

A requisition from the foreign government and mandate from this government are not necessary, under Rev. St. § 5270, to initiate proceedings in extradition before a committing magistrate, and it is sufficient if it appears that the complaining witness is acting for the foreign government.

3. EVIDENCE—DYING DECLARATION.

It is not necessary that the declarant should have said, in so many words, that she was speaking under a sense of impending death, but it is sufficient if it satisfactorily appears that the dying declaration was made in the knowledge of impending death.

Charles Page, for British consul general.

Wal. J. Tuska, for Orpen.

MORROW, Circuit Judge (sitting as committing magistrate). This is an application by the British consul general at San Francisco, as the representative of the kingdom of Great Britain and Ireland, for the extradition of Arthur Herbert Orpen for the crime of murder alleged to have been committed at Auckland, colony of New Zealand, on December 25, 1897. The application for the apprehension of the accused was made on January 13, 1898. A warrant of arrest was duly issued and served by the United States marshal on January 19, 1898.

Miss Susan Harriet Campbell McCallum died at a private hospital in the city of Auckland, New Zealand, on Saturday night, December 25, 1897. She had been under the care of Dr. Arthur Herbert Orpen. At about 11:30 a. m. of that day Dr. Orpen, in the name of Arthur Herbert, purchased a steerage passage on the steamship Alameda, for San Francisco, and took passage on the vessel under the name of Arthur Herbert. The vessel sailed for San Francisco on the afternoon of December 25, 1897, and arrived in San Francisco, with Dr. Orpen on board, on January 19, 1898. On January 13, Mr. J. W. Warburton, her British majesty's consul

general at San Francisco, made affidavit before me, charging, upon information and belief, that Arthur Herbert Orpen, sometimes known as Arthur Herbert, did, on the 25th day of December, A. D. 1897, at the city Auckland, in the colony of New Zealand, within the dominion and jurisdiction of her Britannic majesty, commit the crime of murder upon Susan Harriet Campbell McCallum, by means to the affiant unknown. It was alleged, in the affidavit, among other things, that the accused was a fugitive from justice, and was seeking an asylum within the territory of the United States; that the facts had been communicated to affiant in part by cable from the chief of police at Wellington in said colony of New Zealand, and in part by telegram from Sir Julian Pauncefote, her Britannic majesty's ambassador extraordinary and plenipotentiary to the United States. Application was made for a warrant of arrest, to be issued for the apprehension of the accused, under the provisions of the treaty between Great Britain and the United States proclaimed November 10, 1842. A warrant was thereupon issued, the accused was arrested, and held to await the arrival of the evidence tending to establish his guilt. The identity of the prisoner is admitted.

In support of the complaint, certain papers were presented and admitted in evidence provisionally, subject to objections which were to be further considered. It is objected that these papers have not been certified so as to entitle them to be admitted in evidence. The certificate is as follows:

"American Embassy, London, February 25, 1898.

"I, Henry White, *chargé d'affaires ad interim* of the United States of America, hereby certify that the annexed papers, being copies of the warrant of arrest and the information and depositions and exhibit upon which the said warrant was granted, proposed to be used upon an application for the extradition from the United States of Arthur Herbert Orpen, charged with the crime of murder, alleged to have been committed in the British colony of New Zealand, are properly and legally authenticated, so as to entitle them to be received in evidence for similar purposes by the tribunals of Great Britain and her colonies, as required by the act of congress of August 3, 1882. And I further certify that the signature 'F. H. Villiers,' on the page numbered (2) of these documents, at the foot thereof, is the proper handwriting of the Hon. F. H. Villiers, one of the assistant undersecretaries of state for the foreign affairs of her Britannic majesty.

"In witness whereof I hereto sign my name and cause the seal of this embassy to be affixed this 25th day of February, 1898.

"[Seal.]

Henry White,

"*Chargé d'Affaires Ad Interim* of the United States to Great Britain."

Section 5 of the act of August 3, 1882, provides as follows:

"That in all cases where any depositions, warrants, or other papers or copies thereof shall be offered in evidence upon the hearing of any extradition case under title sixty-six of the Revised Statutes of the United States, such depositions, warrants, and other papers, or the copies thereof, shall be received and admitted as evidence on such hearing for all the purposes of such hearing if they shall be properly and legally authenticated so as to entitle them to be received for similar purposes by the tribunals of the foreign country from which the accused party shall have escaped, and the certificate of the principal diplomatic or consular officer of the United States resident in such foreign country shall be proof that any deposition, warrant or other paper or copies thereof, so offered, are authenticated in the manner required by this act." 22 Stat. 216.

It is objected that the certificate of Henry White, *chargé d'affaires ad interim* of the United States to Great Britain, is not the certificate of the principal diplomatic or consular officer of the United States, resident in such foreign country. I am of the opinion that this objection is covered by the decision of Judge Brewer in *Re Herres*, 33 Fed. 165, where the court took judicial notice that a vice consul, who was temporarily filling the place of the consul, was the principal consular officer of the United States in the province of Ontario, in the dominion of Canada. The same rule would authorize me to take judicial notice that Henry White was, on the 25th day of February, 1898, the principal diplomatic officer in London. But whatever doubt I may have had on this subject has been removed by the following certificate received by telegraph from the secretary of state at Washington:

"Washington, D. C., April 9th, 1898.  
"Hon. W. W. Morrow, Circuit Judge of the U. S., San Francisco, Cal.: In the matter of the extradition case of Arthur Herbert Orphen, alias Arthur Orpen, now before you, I have the honor to inform you, at the instance of the British ambassador here, that on February twenty-fifth, 1898, Mr. Henry White was *chargé d'affaires ad interim* of the United States in London, and was the principal diplomatic officer of the United States resident in Great Britain on that day. Sherman."

It is further objected that no requisition has been made upon this government by the British government for the return of the accused, and no mandate has been issued by this government as a foundation for the present proceedings. The requisition and mandate are not required preliminarily by section 5270 of the Revised Statutes. In the case of *In re Herres*, *supra*, this question was considered, and it was held that a preliminary mandate was unnecessary to initiate proceedings before the committing magistrate, and it was sufficient if it appeared by the proceedings that the complaining witness was acting for the foreign government. To the same effect are *In re Mineau*, 45 Fed. 189, and *In re Adutt*, 55 Fed. 376, and the proceedings in *Benson v. McMahon*, 127 U. S. 457, 8 Sup. Ct. 1240. In the present case it sufficiently appears that the consul general is acting for and on behalf of the British government in prosecuting the complaint against the accused.

The next objection is that it does not appear, from the testimony submitted by the British government, that the crime of murder has been committed as charged, or that there is probable cause for believing that the prisoner committed such crime. It appears that the accused has been for a number of years a practicing physician at Auckland, New Zealand. On the afternoon of Wednesday, December 22, 1897, he called at a private hospital in that city, and stated to a Miss Ogilvie, in charge of the hospital, that he had a female patient that he was going to send to the hospital at 8 o'clock that night, and asked that she be received. The patient was Miss Susan Harriet Campbell McCallum. The doctor said the patient had gastritis, and that he wanted her carefully nursed. He said that where she was she had improper diet. Some one had given her strong tea, which had caused her to vomit, and that was the reason he wanted her removed. The patient was received at

the hospital that night. The next day, Thursday, December 23d, Dr. Orpen visited his patient at the hospital between 9 and 10 o'clock in the morning, in the afternoon about 3 o'clock, and again at about 9 o'clock in the evening. At the first visit, the doctor examined the womb of his patient. She was in a very bad condition, very weak, vomiting, suffering great pain, general abdominal pain, temperature abnormal, and very cold and clammy. When the doctor called in the afternoon he was accompanied by Dr. Purchas, and the patient was again examined. Dr. Orpen called alone in the evening and twice the next day, first at about 9 or 10 o'clock in the morning, and the last time in the evening about 9 o'clock. On this last visit he asked Miss Ogilvie what she thought of the case, and she replied that she thought that she was going to die. The doctor said, "So do I." The doctor did not return to the hospital and did not again see his patient. She died on the following night. Between the last visit of the doctor and the death of Miss McCallum, Dr. Orpen left Auckland hurriedly on the steamer Alameda for San Francisco. The post mortem examination of the body of the deceased disclosed the fact that Miss McCallum died from general peritonitis, following the effects of a wound inflicted in the uterus. The medical testimony was to the effect that the wound should not have been there under any legitimate treatment. The inference to be drawn from this fact is that a criminal abortion had been committed upon the young lady, which was the cause of her death, and the association of Dr. Orpen with the case, and his peculiar conduct in connection therewith, indicate that he performed the operation.

A document entitled, "The Deposition of Susan Harriet Campbell McCallum, taken at the private hospital, Hepburn street, Auckland, when the deponent is lying dangerously ill," is a part of the record in the case. It is objected, on behalf of the accused, that this document is not admissible in evidence—First, because it is not a deposition taken in any legal proceeding pending at the time it was taken; and, second, because it cannot be admitted as a dying statement. I am of the opinion that any paper certified as required by section 5 of the act of August 3, 1882, is necessarily admissible in evidence. In *re Wadge*, 21 Blatchf. 300, 16 Fed. 332; In *re Breen*, 73 Fed. 458. The weight and effect to be given to the evidence are for the magistrate to determine under the law of the state where the examination is being held.

The statement of the deceased is as follows:

"My name is Susan Harriet Campbell McCallum. I am a single woman. I am known here as Mrs. Sparks. My birthplace is Port Chalmers. It is about twelve months since I went to live with Mrs. Steele, at Remuera. After that I was at Smith's, of Avondale. Latterly I have been living at Mrs. Basten's, in Vincent street, Auckland. Then I went to live with Mrs. Allworthy, housekeeper to Mr. Reid, of Motutapu. I have been lodging with Mrs. Metcalfe in Haven street, Auckland, for about the last three months. I saw Dr. Orpen about two months ago. He gave me some pills. I took them twice a day for about a week. They had no effect. I did this because I believed I was in the family way. I went to Dr. Orpen again. He put me on a couch, and passed an instrument into me. After that I felt as if I were going to faint. I walked home. This operation was performed by Dr. Orpen at his office at Coombe's



Arcade, Queen street. The Saturday before last I had a miscarriage. That would be on the 11th of December. The operation was performed on the previous Thursday, the 9th December. I was very ill on the 11th December. Dr. Orpen came to see me at Haven street on the following Monday, the 13th December, and has been to see me every day since,—sometimes twice a day. I was admitted here on Wednesday last, the 22d December, at 8 p. m. Dr. Orpen came to see me here yesterday twice. He came at 10 in the morning, and in the afternoon met Dr. Purchas here. Dr. Orpen has been to see me here three times to-day. Dr. Purchas has also been to see me to-day. If anything happens to me, will you communicate with my father, who is the harbor master at Dunedin? I would like my body to be sent home. I am making this statement because I think it probable that I may die soon. I have some money in the Auckland Savings Bank, and Mrs. Metcalfe has my book. My father will settle any expenses.

Her  
"Susan Harriet Campbell X McCallum.  
mark

"Taken and sworn this twenty-fourth day of December, 1897, at midnight, the deponent making her mark, being too weak to sign her name.

"Before me,

[Signed] Albert J. Allom,

"A Justice of the Peace for the Colony of New Zealand."

It is objected that it does not appear from this statement that the deceased was under a sense of impending death at the time she made the statement. The rule, as stated in Tayl. Ev. § 718, is that it is not "necessary that the declarant should have expressly said, in so many words, that he was speaking under a sense of impending death. It will be enough if it satisfactorily appears, in any mode, that the declarations were really made under that sanction; as, for instance, if that fact can be reasonably inferred from the evident danger of the declarant, or from the opinions of the medical or other attendants stated to him, or from his conduct, such as settling his affairs, taking leave of his relations and friends, giving directions respecting his funeral, receiving extreme unction, or the like. In short, all the circumstances of the case may be resorted to, in order to ascertain the state of the declarant's mind." From all the surrounding circumstances, and from the statement itself, I am of the opinion that the statement was made in the knowledge of impending death, and that it should be received as a dying declaration tending to establish the guilt of the accused. It follows that the evidence is sufficient to warrant me in believing that the crime of murder was committed as charged in the complaint, and that the accused is guilty of the offense. The proper certificate will be prepared.

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#### DEERING HARVESTER CO. v. WHITMAN & BARNES MFG. CO.

(Circuit Court, N. D. Ohio, E. D. September 9, 1897.)

No. 5,463.

#### TRADE-MARK—ACQUISITION.

The stamping of letters and figures upon the pieces of machinery going to make up the machines of which they severally form a part is presumably for the purpose of identifying the several parts; and, if it serves also to denote the manufacturer, that is incidental only, and does not create a trade-mark.

This was a suit in equity by the Deering Harvester Company against the Whitman & Barnes Manufacturing Company for alleged infringement of a trade-mark.

Banning & Banning, for complainant.

Charles Baird and Robert H. Parkinson, for defendant.

SEVERENS, District Judge. In this case I am satisfied that the letters and figures stamped upon the pieces of machinery by the complainant, and upon which it sets up its claim for trade mark or marks, were intended in their primary purpose to designate the several pieces of machinery, one from another, in order to give information to its own employes, and its customers who should use its machines, of the identity of the piece thus designated; and that, if the use of such letters and figures in the manner in which they are employed serves also to denote the manufacturer, this is incidental to the principal purpose. The claim of a multitude of trade-marks for the purpose of designating the several parts which go to make up the various combinations exhibited by the several machines which the party manufactures, is very unusual and extraordinary. As a general thing, a trade-mark is a common one, designating generally the thing upon which it is impressed as of the manufacture of the party seeking to establish a claim to the exclusive right thereto. It may be possible to establish a right to such heterogeneous trade-marks, but I think the rational inference from such a course would be that the marking is for the identification of the thing rather than the manufacturer. Upon the evidence in the record, I do not think the defendant can be held to be engaged in the sale of the obnoxious articles under a pretense that such articles were actually manufactured or originally supplied by the complainant. The defendant has done no more than was fairly necessary to enable the public to identify the things wanted from other pieces in the machines of which they severally form a part. In my judgment, the trade-mark cases decided by the supreme court of the United States, especially the more recent ones, are quite decisive of this case against the complainant. *Manufacturing Co. v. Trainer*, 101 U. S. 51; *Lawrence Mfg. Co. v. Tennessee Mfg. Co.*, 138 U. S. 537, 11 Sup. Ct. 396; *Coats v. Thread Co.*, 149 U. S. 563, 13 Sup. Ct. 966; *Mill Co. v. Alcorn*, 150 U. S. 460, 14 Sup. Ct. 151. It does not appear to me that the case of *Singer Mfg. Co. v. June Mfg. Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, is opposed to this conclusion. In view of these decisions, it seems unnecessary to go into a discussion of the cases at large. The result is that the bill must be dismissed.

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R. HEINISCH'S SONS CO. v. BOKER et al.

(Circuit Court, S. D. New York. March 18, 1898.)

**1. UNFAIR COMPETITION—USE OF PROPER NAME—INJUNCTION.**

Defendants, former agents for the firm of R. H.'s Sons, complainant's assignor, which firm enjoyed a high reputation as manufacturers of shears, entered into a contract with one H., a former member of that firm, by which they acquired, among other things, the right to use his name upon all their

goods. H., on withdrawing from the firm, had conveyed to it all his interest in its property, assets, and business; and defendants, in a contract with the firm, had admitted that it was the "sole owner of the H. trade-mark." Defendants at once began to make and sell shears stamped with H.'s name, and packed in a manner similar to complainant's goods, so as to lead the ordinary purchaser (but not, it was claimed, the trade) to believe them the same. At the same time, defendants continued to style themselves, upon signs, in circulars, etc., "agents for R. H.'s Sons." It appeared that nothing had ever been done under any clause of the contract, except that conveying the right to use the name; and the real object appeared to have been solely to acquire, under cover of the other clauses, a claim to that name. *Held*, that the circumstances clearly indicated fraudulent intent, and that complainant was entitled to an injunction against the use of the name, and to an accounting.

2. SAME—DECEIT OF PURCHASER.

In a suit to restrain unfair use of a trade-name, the criterion of unfair competition is whether ordinary purchasers, as distinguished from members of the particular trade, are deceived.

3. SAME—NATURAL CONSEQUENCES OF ACTS.

Where parties act in such a manner as naturally tends to deceive the public, they must be presumed to have contemplated the natural consequences of their acts.

4. SAME—ATTITUDE OF COURTS OF EQUITY.

Courts of equity keep pace with new developments in competition for public favor, and insist that it shall be won only by fair trade.

This was a suit in equity by the R. Heinisch's Sons Company against Carl F. Boker and others to enjoin alleged infringement of a trade-mark, and unfair competition in trade.

Rowland Cox, for complainant.

John J. Gleason, for defendants.

TOWNSEND, District Judge. More than 60 years ago one Rochus Heinisch began the business of making shears and scissors, and shortly thereafter established a factory at Newark, N. J., where said business has ever since been continuously carried on. In 1871 he sold said business to his three sons, Rochus, Jr., Edmund E., and Henry C. Heinisch, who carried it on as co-partners, under the firm name of R. Heinisch's Sons, until 1877, when said Henry C. Heinisch withdrew from the firm, and assigned to it all his right, title, and interest in its property, assets, and business. At that time the parties executed an agreement whereby said firm, complainant's assignors, sold to H. C. Heinisch the stock of goods in the partnership store, and agreed "to sell to the said Henry C. Heinisch all goods or wares manufactured by them, \* \* \* and to turn over and transfer to the said H. C. Heinisch all orders received by them from other quarters for goods of their manufacture." And said H. C. Heinisch agreed "not to sell or manufacture any other goods in the line or of the kind manufactured by the said party of the second part." In 1878 said agreement was assigned to defendants' predecessors, with the consent of the complainant's assignors; and they (complainant's assignors) extended the terms of said agreement for five years, and agreed to manufacture for defendants' predecessors another quality of shears to be known as the "Trenton" brand. In 1883, upon the termination of said agreement, certain disputes arose between the parties, which resulted in an agreement between H. C. Heinisch and defendants' predecessors whereby

he agreed not to engage for 10 years in the manufacture or sale of shears in competition with the business either of complainant's or defendants' predecessors. In 1888 complainant's assignor and defendants executed an agreement which described complainant's assignor as "sole proprietor of the Heinish trade-mark in cutlery, and manufacture of the same," and constituted defendants their selling agents for four years, unless sooner terminated, and wherein complainant's assignor agreed to furnish his goods to defendants; said goods to be "known and designated as Heinish quality goods," and "to be stamped with the regular Heinish name, or with special brands." In 1892 the complainant corporation was organized, and all the rights of said Rochus Heinish and of said firm were duly assigned to it. Upon the termination of said 1888 agreement, on May 1, 1892, the complainant corporation resumed the sale of the Heinish goods. June 10, 1892, said H. C. Heinish made an agreement with defendants to manufacture for and sell to them, as his agents, a certain kind of shears patented by him. Said agreement contained further provisions, as follows:

"Third. The parties of the first part shall have the right to manufacture, or cause to be manufactured, any other kinds or styles of shears or other cutlery which they may desire to make and place on sale, with the name 'H. C. Heinish,' which words shall constitute a trade-mark, to be duly registered and adopted by the parties as such, which said trade-mark, for all uses and purposes except its use upon said patented shears, shall be the property of and belong to the parties of the first part forever. Fourth. The party of the second part will impart to the parties of the first part any special information he may have or acquire as to the best methods of cutlery manufacture; and, in consideration of the covenants therein contained, he hereby sells, assigns, and transfers to the parties of the first part, all his right, title, and interest in and to said trade-mark, subject only to the agreements herein contained in regard to the said patented tailor's shears. Fifth. In consideration of the covenant on the part of the party of the second part herein contained, the parties of the first part hereby covenant and agree to and with him to pay to him, during his natural life, upon all shears or cutlery upon which they shall use the said trade-mark (other than said patented tailor's shears), a royalty of three per cent. upon the sale price of all such shears sold by them; and after his death they agree to pay to his legal representatives a royalty of one and one-half per cent. upon such sale price of all such shears sold by them, so long as they shall use said trade-mark."

The shears manufactured by said Rochus Heinish acquired a high reputation in the markets of the world, and said reputation has increased, and is now enjoyed by the complainant. In order to identify his goods, said Rochus Heinish affixed to them the name "R. Heinish"; and said name, alone or as part of the name "R. Heinish's Sons," has been continuously used by his successors in business upon said shears and its labels, and otherwise; and certain distinct boxes, cards, and labels have also been used to identify said goods, which have been known in the markets as "Heinish Shears." The defendants sell goods, so stamped, boxed, labeled, and advertised under the name "H. C. Heinish," as to lead the ordinary purchaser to believe that their goods are the goods of complainant. After the termination of said agreement of 1892 with complainant, the defendant for years continued to make use of two signs at the sides of the doorway of their store, having thereon the words "R. Heinish's Sons," and continued to use postal cards notifying dealers that they were "sole agents for R.

Heinisch's Sons shears." The attempt to explain this conduct as the result of inadvertence on the part of this astute business corporation is more impressive than silence would have been. No such explanation is attempted for the imitation of size, shape, color, collocation, and general appearance of complainant's labels. In view of the previous relations of the parties, it is clear that the acts of the defendants were the result of deliberate attempts on their part to appropriate the business and reputation which belongs to complainant, or of such gross negligence as to disentitle them to the favorable consideration of a court of equity.

The further contention of defendants, that the trade is not misled, if true, is immaterial. It is clear that the devices adopted by defendants deceive ordinary purchasers. The law, firmly established by repeated decisions in this circuit, enjoins every artifice which promotes unfair trade. It is immaterial that professedly innocent individuals contribute to infringe upon the good will of the proprietor, and impose upon the ignorance of the incautious purchaser. A court of equity keeps pace with the rapid strides of the sharp competitors for the prize of public favor, and insists that it shall be won only by fair trade.

The defendants contend that, in any event, they have a right to use the name "Heinisch," or "H. C. Heinisch," upon their goods. H. C. Heinisch sold to complainant in 1877 "all his right, title, and interest in and to all the property, assets, and business of R. Heinisch's Sons." In 1888 the defendants admitted that complainant was "sole proprietor of the Heinisch trade-mark." In 1892 H. C. Heinisch sold his name to them, as a trade-mark. Except for his connection with his patented shears, it does not appear that this transaction represented anything except the purchase of the right to make profit out of the Heinisch trade-name. It is true that the ingeniously worded contract purported to provide that H. C. Heinisch should impart "any special information he may have or acquire as to the best methods of cutlery manufacture." But said contract further gave to defendants the right to manufacture any kind of "cutlery which they desire to make and place on sale with the name 'H. C. Heinisch,'" and provided that said name should be "the property of and belong to the parties of the first part forever." In fact, defendants' goods were manufactured for them, according to the order of their manager, Hawkins, by the firm of Clayton Bros., at Bristol, Conn. H. C. Heinisch never had any communication with said manufacturers, and said shears were not made under his instructions or directions, but said Hawkins "had entire control of the manufacture." They were, however, stamped, boxed, labeled, and sold under the name "H. C. Heinisch," so arranged as to simulate the original Heinisch goods. When H. C. Heinisch made this contract, in 1892, allowing the perpetual use of his name, all that he did was to look at some samples of the goods which defendants were to have manufactured for them, and to express his satisfaction with them, as he considered them equal, if not superior, to the original Heinisch goods. Although ostensibly the chief object of said agreement was to secure the right to the H. C. Heinisch patent, not a single pair of tailor's shears has ever been manufactured under said patent. Judging from the conduct of defendants, the actual object of said contract was to appropriate the reputation of

the Heinisch shears by the purchase of the name "H. C. Heinisch," which, as a "trade-mark for all uses and purposes, except its use upon said patented shears, shall be the property of and belong to the parties of the first part forever." This is not the case of a sale of a good will in connection with a plant or a growing business. H. C. Heinisch had sold all his "right, title, and interest" in the Heinisch business in 1871; and defendants in 1888 had admitted that plaintiff's assignors were "sole proprietors of the Heinisch trade-mark." Nor is this a case where the party allowing the use of his name on certain goods has associated himself in business with the manufacturers thereof. It does not appear that H. C. Heinisch ever invested any money in said business, or undertook any supervision over, or exercised any skill in, the manufacture of said goods. It thus appears that, while neither of the ostensible objects of said contract has been carried out, the Heinisch name, attempted to be sold thereunder, has been so used as to deceive the public. In these circumstances, it must be presumed that the defendants contemplated the natural consequences of their acts, irrespective of those carefully worded provisions of said contract which apparently were never intended to have any effect. The complainant is therefore entitled to an accounting, and to an injunction restraining the use of the name "Heinisch," or "H. C. Heinisch," on defendants' shears (other than said patented shears), labels, postal cards, and otherwise, in any way which will interfere with complainant's enjoyment of the benefit of its trade-name. The form of the decree will be determined after submission of proposed forms by counsel.

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WESTERN ELECTRIC CO. v. CAPITAL TELEPHONE & TELEGRAPH CO. et al.

(Circuit Court, N. D. California. March 29, 1898.)

No. 12,129.

**1. PATENT—PRIOR INVENTION—MULTIPLE SWITCHBOARD.**

The Firman patent, No. 252,576, for a "multiple switchboard for telephone exchanges," granted January 17, 1882, was not anticipated by the British patent, No. 4,903, issued to Scribner May 14, 1880; the evidence showing that Firman reduced his invention to practice before the first step was taken to secure the Scribner patent.

**2. SAME—NOVELTY.**

Claim 1 of the Firman patent, No. 252,576, for "the combination of two or more switchboards at the central office exchange system, to each of which the same telephone lines are connected, whereby any two of these lines may be connected together upon either of the multiple switchboards," is not void for want of novelty because of the prior state of the art, as shown in the British patent, No. 13,487, for a telegraphic dial switchboard, and the strap switchboard, or the switchboard in use in New Haven and Meriden, Conn., in 1878.

**3. SAME.**

Claim 2 of the Firman patent, No. 252,576, for "the combination of two or more multiple boards, to which the lines of the terminal stations are connected, and means are described whereby the switchman may readily ascertain what lines are in use," is void for want of novelty.

**4. SAME—INFRINGEMENT.**

The multiple switchboard described in claim 1 of the Perrin patent, No. 315,332, is substantially the same as the invention described in claim 1 of the Firman patent, No. 252,576; and its use, although in combination with the automatically operated visual indicator, is an infringement of that patent.

**5. SAME—INJUNCTION.**

After a trial upon the merits in a case which puts in issue the validity of a patent and the question of an infringement, the complainant is entitled to a decree showing what issues were decided in his favor, and to an injunction against infringement, though defendants discontinued their infringement after the suit was commenced.

**6. DEPOSITIONS—TIME OF TAKING.**

Depositions not taken within the time prescribed by equity rule 69 cannot be read in evidence, when timely objection is made.

Barton & Brown, George L. Roberts, and E. S. Pillsbury, for complainant.

John H. Miller, L. T. Hatfield, and C. O. Bulkley, for defendants.

DE HAVEN, District Judge. Upon the calling of this case for final hearing, the complainant moved to exclude from the record the deposition of Charles H. Aldrich, and certain documents printed in the defendants' record, and specifically referred to in the motion. The grounds of the motion, as stated, are:

"That said deposition was improperly and irregularly taken and filed, and is wholly irrelevant and immaterial, and that said documents were not proven, or properly offered, and are incompetent, irrelevant, and immaterial."

The deposition was not taken within the time prescribed or permitted by rule 69 (equity rules), and the complainant made this objection at the time of the taking of the deposition. The motion to exclude this deposition must therefore be granted, as the rule referred to is imperative, that testimony taken after the time prescribed shall not be read at the time of the hearing. *Wooster v. Clark*, 9 Fed. 854. Upon the other branch of the motion, nothing further need be said, than that some of the documents referred to are incompetent as evidence, not having been properly proven, and others are not relevant to the issues made by the pleadings, and one of them, the purported agreement between the American Bell Telephone Company and the Western Electric Company, does not appear to have been formally offered in evidence, nor accompanied by proof of its authenticity. The motion will be granted, and the defendants will be allowed an exception to this ruling.

Having disposed of this preliminary question, I proceed to the consideration of the case on the merits.

This is a suit in equity for an alleged infringement of patent No. 252,576, granted on January 17, 1882, to the Western Electric Manufacturing Company, as the assignee of Leroy B. Firman, who is alleged in the bill of complaint to have been the original and first inventor of the invention described in said letters patent, and entitled "Multiple Switchboard for Telephone Exchanges." The complainant asks for an injunction and an accounting. The defendants, in their answer, deny that Firman was the original or first inventor of the multiple switchboard, and, among other matters, allege that:

"On November 29, A. D. 1879, there was filed in the patent office of the United Kingdom of Great Britain and Ireland a provisional specification, and on the 28th

day of May, 1880, a complete specification, under patent No. 4,903, of the year 1879, granted to Charles E. Scribner, and sealed on May 14, 1880, fully disclosing and describing a system of multiple switchboards, in which the same telephone lines are connected to the first of the multiple switchboards, and thence to respectively corresponding blocks in the second, and so on through the series, so that any two of the lines can be connected together on either of the multiple switchboards as specified in the first and principal claim of the complainant's patent; thus anticipating and carrying into effect the useful functions which constitute the alleged grounds and meritorious feature upon which the complainant's patent was granted."

In respect to the alleged infringement the defendants aver:

"That they have never at any time made or sold any multiple switchboards of any kind, character, or description whatsoever; but the defendant corporation, the Capital Telephone & Telegraph Company, has used in its business of conducting a telephone exchange a multiple switchboard manufactured under, and distinctly claimed and patented and fully protected by, various and sundry letters patent of the United States granted to Thomas J. Perrin on the 7th day of April, 1885, and at other dates, and not in accordance with the description or claims of the complainant's patent, and that such multiple switchboard used by the defendant corporation follows the principles disclosed and described in the expired United States letters patent of Charles E. Scribner, and in said expired English patent of Charles E. Scribner, more nearly and closely than those defined and claimed in the complainant's patent."

The questions arising in the case have been carefully and elaborately presented in the evidence submitted, and also in the arguments of counsel.

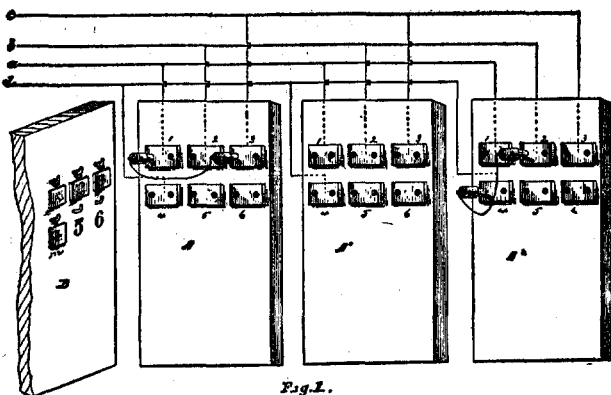
1. The claim of the defendants that the alleged invention of Firman described in the patent issued to complainant was anticipated by the British patent, No. 4,903, issued to Charles E. Scribner, may be disposed of in a few words. While the latter patent antedates that of the patent in suit, still the evidence shows that Firman had reduced his alleged invention of the multiple switchboard to practice early in the year 1879, not later than March of that year, several months prior to the date of the Scribner patent, and also before the first step taken to secure that patent. This patent therefore cannot be held to anticipate the alleged invention of Firman.

2. It is, however, insisted by the defendants that, in view of the prior state of the art, there is a want of novelty in the alleged invention described in the patent in suit; that it exhibits nothing more than mechanical skill, and is a mere duplication of old devices; and that claim 2 of the patent is void because it is an aggregation of old devices, and not a legitimate combination. In order to clearly understand the force of these objections to its validity, it will be necessary to state with more particularity the nature of the alleged invention described in complainant's patent. The claims of the patent are:

"(1) The combination of two or more switchboards at the central office of a telephone exchange system, to each of which the same telephone lines are connected, whereby any two of these lines may be connected together upon either of the multiple switchboards. (2) The combination of two or more multiple boards, to which the lines of the terminal stations are connected, and means, as described, whereby the switchman may readily ascertain what lines are in use."

The device covered by complainant's patent is shown by the drawing filed with the specifications of the patent, and of which the following figure is a copy:





In the specifications filed by Firman, he sets forth the prior state of the art in this language:

"Prior to my invention the individual lines were grouped upon a single switch-board at the central office, or grouped upon two or more boards. In the latter case, trunk lines were used when it was necessary to connect a line of one board with a line of another board. A large exchange was thus divided up into a number of exchanges, which could be worked together, when occasion required, as one, by means of trunk lines between the boards. When the number of subscribers increased so that a single switchman could not do the amount of switching required, I gave the switchman an assistant. I soon found, however, that a single switchboard would not accommodate the number of attendants necessary to do the switching for an exchange of four or five hundred subscribers."

The specifications then proceed:

"I find, by the use of my new system of multiple switchboards, as hereinafter described, an exchange of a thousand or more subscribers may be successfully handled. My invention consists in providing two or more switchboards, instead of one, as heretofore, and so connecting the several lines therewith that any two lines can be connected on either of the boards, and also apparatus whereby attendants at a given board may, without delay, see what lines are connected at other boards than their own."

Then, after a reference to the multiple boards, and the manner in which the several telephone lines entering the exchange are connected with each of such boards, the specifications describe the apparatus, consisting of an indicator or dummy board, and its mode of operation, by means of which the attendants at the several switchboards can be made to see what lines are connected at other boards than their own. This is the description:

"The indicator or dummy board, B, is placed in sight of all the attendant switchmen. I prefer to arrange the multiple boards in line, and place the annunciator or dummy board centrally in front of them, so that an attendant, by looking back, can see the numbers upon the annunciator or dummy. There must be a number, or other target, corresponding to each subscriber's terminal plate or switch. \* \* \* Suppose lines a and c are connected at multiple board, A, and lines b and d at multiple board, A', as shown by cords and plugs. The switchmen at the boards, immediately on making these connections, notify the attendant at the dummy, who thereupon hangs up the shields or targets, m, over the figures 1 and 3 and 2 and 4; and in the same manner, when any line is connected upon either of the multiple boards the figure which indicates its number is covered, and a switchman, by glancing at the dummy, sees what lines are

connected. \* \* \* The dummy board or indicator should be large enough to accommodate targets or figures which may be readily distinguished by all of the switchmen. Figures may be marked upon the shields or targets, and thus the lines in use may be determined by observing the numbers indicated by the figures upon the targets."

The question of the validity of claim 1 of the patent in suit will be first discussed. As before stated, the defendants insist that this claim is without novelty; and, for the purpose of sustaining their contention, they offered evidence in relation to certain switchboards designed for, and used in, the operation of the electric telegraph prior to the alleged invention of Firman. The telegraphic switchboards thus claimed to embrace the elements found in claim 1 of the complainant's patent are what is known as the "Dial Switchboard," described in the British patent, No. 13,487, granted to François M. A. Dumont, February 7, 1851, and the "Strap Switchboard." It would serve no useful purpose to enter into a discussion of the evidence in relation to the structure or the manner of operating these telegraphic switchboards when it was desired that telegraph lines terminating at such boards should be connected. The essential differences between each of these boards and the multiple boards referred to in claim 1 are pointed out in the testimony of the expert witnesses for the complainant, and need not be repeated here. It is sufficient to say that I have given the evidence on this point careful consideration, and my conclusion is that neither of these switchboards can be said to be anticipatory of the multiple switchboard referred to in claim 1 of the patent in suit. So, also, in regard to the telephone switchboard used in New Haven and Meriden, Conn., in the year 1878, and which is also claimed by the defendants to embody the subject-matter of claim 1 of complainant's patent. That appears to have been a single switchboard, intended only for the accommodation of a small number of lines, and did not, in my opinion, in its construction or operation, involve the principle or conception of "the combination of two or more switchboards at the central office of a telephone exchange system, to each of which the same telephone lines are connected, whereby any two of these lines may be connected together upon either of the multiple switchboards," which is the invention set forth in claim 1 of the complainant's patent.

The patent itself, in referring to what is known as the "trunking system," sets forth the prior state of the art, which most nearly approaches the multiple system mentioned in claim 1; and the validity of this claim, when viewed in connection with the prior state of the art thus disclosed, will now be considered. The trunking system consists of two or more independent switchboards, each being the terminal of lines of a separate group of subscribers; the boards being provided with trunk lines, by means of which the attendants can connect the lines terminating at different boards. The manner in which this connection is made is thus described in one of the briefs filed for the defendants:

"When a subscriber in one group called for another subscriber in the same group, the switching was done by the old method used on the single switchboard. If, however, the subscriber called for did not happen to be in the group of the caller, but in another group on a separate board, then the connection was made

by connecting the calling wire with one end of the trunk line, and the called for wire with the other end, thus establishing electric connection between the two subscribers' wires by means of the intervening trunk line connecting the two boards."

Under this system, each switchboard is provided with an operator, and only those lines terminating upon a given board can be connected together directly by the operator at that board. To connect two lines terminating at different boards, the services of the operators at both boards, or their attendants, are required; and, of course, more or less time would be consumed in making such connection. In the multiple system, however, each switchboard is fully equipped with appliances with which to operate it; and each board contains terminals for all of the lines entering the exchange, so that any operator is enabled to make immediate connection between any two lines of the system, at any one of the switchboards, by the insertion of the two plugs into the two switches connecting the lines which are desired to be put in telephonic communication. The evidence shows that switchboards operated in connection with trunk lines are adapted to give good service only to a limited number of subscribers entering a given exchange, and that the great advantage or utility of the multiple switchboard is found in exchanges where a large number of telephone lines are brought into a single central station. It is urged that the arrangement and electrical connection between two or more switchboards which constitute the multiple system of switchboards covered by claim 1 of the patent exhibit nothing more than mechanical skill,—a simple duplication of old devices, with no novelty. In support of this contention it is said, in substance, that by the trunking system the lines of subscribers terminating on independent boards could be connected, at the will of the operators, by means of the trunk line; that such was the result sought by the multiple system, and, to accomplish it, all that was done by Firman was to dispense with the trunk-line wire, and add a branch wire from each line entering the exchange to each of the multiple boards; and that the use of branch wires for the purpose of making electrical connections was not new, but, on the contrary, was well known to mechanics skilled in the construction and use of electrical appliances. The question of novelty or invention is one of fact, and the line which separates what is termed "judgment" or "mechanical skill" from that which may be regarded as an act of invention is sometimes not easy to discern in a given case. The solution of the question is not to be sought by considering separately the different elements entering into its structure, but the alleged invention is to be viewed as a whole, and with reference to what may be accomplished by its use. In the language of Judge Cox in the case of *Coupler Co. v. Pratt*, 70 Fed. 624:

"Invention should be determined more by an ascertainment of what the inventor has actually accomplished, than by a technical analysis of the means by which the result is attained."

And substantially this same principle was declared by the supreme court of the United States in *Loom Co. v. Higgins*, 105 U. S. 591, in which case the court, speaking through Mr. Justice Bradley, said:

"It may be laid down as a general rule, though perhaps not an invariable one; that if a new combination and arrangement of known elements produce a new and beneficial result, never attained before, it is evidence of invention."

Measured by this rule, it would seem that the multiple system of switchboards described in claim 1 of the patent may be properly regarded as an invention. It is clear from the evidence that the result accomplished by its use, in the accommodation of a large number of lines entering one exchange, could not be attained under the trunking system, with the same number of operators and with the same number of switchboards. While the structural difference between the two may not be great, still there is a difference, and it is this difference which gives to the multiple system its increased utility and advantage over the other in the service of a large exchange. Nor does this invention consist simply in the duplication of the switchboards. The illustrations put by counsel of the use of two engines where one is unable to pull a train of cars, or the addition of a second instrument when one telegraphic instrument cannot receive all of the messages passing over the line, are not applicable. It is true that one section of the multiple board may be considered as the counterpart or duplicate of each of the other sections, but the organization of several sections or boards into a unitary system, acting in combination with each of a large number of telephone lines, and whereby any two lines entering the exchange may be connected on either of said boards, is something entirely different from the addition or duplication of independent switchboards for the purpose of accommodating additional and separate groups of subscribers. The invention appears now to be a very simple one indeed, but patents for inventions have been sustained in many cases where the novelty of the invention is not more apparent than in that under consideration here. Thus, in the case of *Mast, Foos & Co. v. Dempster Mill Mfg. Co.*, 27 C. C. A. 191, 82 Fed. 333, it was held that the substitution of an internal toothed spur wheel for external toothed spur gear in the machinery of windmills, by combining the same with the pinion, pitman, and pump, constituted a patentable invention; and the court, in answer to objections somewhat similar to those urged by the defendants in this case, proceeded to say:

"Finally, the counsel for the appellee argue that there is no patentable novelty in the combination described in this claim, because internal toothed spur wheels were old and well known, and that the substitution of them for external toothed spur gear in the machinery of the windmills was nothing but a double use. This argument is always plausible and persuasive where old elements have been combined to produce a new or better result. Each element, taken by itself, has its old effect, and it is always difficult to understand how it was that the practiced eyes of skilled mechanics did not at once see and apply the necessary remedy to the troublesome evil which the invention removes."

In *Potts v. Creager*, 155 U. S. 597, 15 Sup. Ct. 194, the supreme court, after referring to the fact that it is frequently a difficult and delicate task to determine whether or not the application of an old device to the production of a new or better result rises to the dignity of an invention, said:

"And this is not the less true if, after the thing has been done, it appears to the ordinary mind so simple as to excite wonder that it was not thought of

before. The apparent simplicity of the new device often leads an inexperienced person to think that it would have occurred to any one familiar with the subject; but the decisive answer is that, with dozens and perhaps hundreds of others laboring in the same field, it had never occurred to any one before."

So, also, in the Barbed Wire Patent Case, 143 U. S. 275, 12 Sup. Ct. 443, 450, the supreme court of the United States held that it was an act of invention in Glidden to substitute a coiled wire barb for the diamond-shaped barb before patented by Kelley. The court in that case said:

"The difference between the Kelly fence and the Glidden fence is not a radical one, but, slight as it may seem to be, it was apparently this which made the barbed-wire fence a practical commercial success. \* \* \* Under such circumstances, courts have not been reluctant to sustain a patent to the man who has taken the final step which has turned a failure into a success. In the law of patents, it is the last step that wins. It may be strange that, considering the important results obtained by Kelley in his patent, it did not occur to him to substitute a coiled wire in place of the diamond-shape prong, but evidently it did not; and to the man whom it did ought not to be denied the quality of inventor. There are many instances in the reported decisions of this court where a monopoly has been sustained in favor of the last of a series of inventors, all of whom were grouping to attain a certain result, which only the last one of the number seemed able to grasp."

It is not deemed necessary to cite other cases, as it is thought the foregoing sufficiently illustrate the rule by which courts are governed in passing upon the question of novelty or invention. As already indicated, my conclusion is that claim 1 of the patent in suit is valid.

3. Is claim 2 of complainant's patent valid? The defendants insist that it is not; the grounds of their contention being that it is not a true combination, but a simple aggregation of old elements. The language of this claim is as follows:

"The combination of two or more multiple boards, to which the lines of the terminal stations are connected, and means, as described, whereby the switchman may readily ascertain what lines are in use."

This claim is for a combination consisting of multiple boards, and certain "means" whereby the switchmen at these boards may readily ascertain what lines entering a telephone exchange are in use. The "means" here referred to as one part of the combination claimed is a dummy board, so placed that it can be seen by the operators at the multiple boards. It has upon its face numbers corresponding to those of the terminal plates or switches upon the multiple boards. There is placed over each one of these numbers on the dummy board a hook, upon which a target or shield may be hung. Thus hanging a target or shield over a number on the dummy board indicates that the line coming into the terminal plate having the same number on the switchboard is in use. There is no mechanical or electrical connection between the dummy board and the multiple switchboard. Each is under independent control, and the targets upon the dummy board are placed upon or taken off from the hooks by the attendant at that board, as directed by the operators at the multiple switchboard; that is to say, when the attendant at the dummy board is informed by an operator at the switchboard that certain numbered lines terminating at the switch-

board are engaged, the attendant notes the fact on the dummy board by hanging the targets or shields over the numbers on the dummy board corresponding to the numbers of the terminal plates of the lines in use. We have in this only the act of one person registering upon an independent board what he has learned in relation to the present condition of certain lines entering the exchange, and terminating upon the multiple board. There is certainly in this no joint action of the dummy board and the multiple switchboard,—no co-operation between them for the purpose of producing any common result. The dummy board is indeed so manually operated by its attendant as to indicate what lines are connected upon the multiple switchboard, but that what is thus shown on the dummy board by the position of its targets or shields is not accomplished by reason of any co-operative action of the multiple board with the dummy board is obvious. In my opinion, this claim does not disclose a patentable combination. It was said by Mr. Justice Woods in delivering the opinion of the court in *Stephenson v. Railroad Co.*, 114 U. S. 149, 5 Sup. Ct. 777, that:

“A combination is patentable only when the several elements of which it is composed produce, by their joint action, a new and useful result, or an old result in a cheaper or otherwise more advantageous way.”

It is perhaps not necessary, in order to constitute a true combination, that each of its elements should co-act upon another, or that the action of the different parts of the combination should be simultaneous. The rule upon this subject is well expressed in the following language by Hawley, J., in *Standard Oil Co. v. Southern Pac. R. Co.*, 48 Fed. 109:

“What is the distinction between mere aggregation and a patentable combination? A combination of well-known, separate elements, each of which, when combined, operate separately, and in its old way, and in which no new result is produced which cannot be assigned to the independent action of one or the other of the separate elements, is an aggregation of parts, merely, and is not patentable. \* \* \* The parts need not act simultaneously, if they act unitedly to produce a common result. It is sufficient if all the devices co-operate with respect to the work to be done, and in furtherance thereof, although each device may perform its own particular function only.”

It is undoubtedly true that the utility of the multiple switchboard, as described in claim 1 of the patent in suit, is greatly increased by reason of the fact that it is possible for operators to be informed when certain lines are connected, so that the otherwise frequent interconnection of a third with two lines already in use can be avoided; but it by no means follows from this consideration that the means for giving such information, referred to by Firman in claim 2, constituted a patentable invention. There was certainly nothing new or novel in the dummy board, with its hooks and targets; and such board was not placed by him in combination with the multiple switchboard, so as to produce any new or novel result. My conclusion is that this claim of the patent is invalid.

4. The defendants, in their answer, allege that the multiple switchboards put in operation by the defendant, the Capital Telephone & Telegraph Company, were patented, and are protected by sundry letters patent granted to Thomas J. Perrin on the 7th day

of April, 1885. The Perrin patents referred to are respectively numbered 315,331, 315,332, and 315,333, and it appears that all the inventions patented thereby contain the principle which is thus described in the first claim of the Perrin patent numbered 315,332:

"(1) The combination, in a multiple switchboard, of a series of main lines, the terminal or connection where each of said main lines enters each switchboard, and a visual indicator at each of said terminals or connections on each board; the visual indicators of each line being automatically operated on all the boards whenever any terminal of said line is plugged."

That such multiple switchboard is substantially the same as the invention described in the first claim of the patent in suit is clearly shown by the evidence; and, such being the fact, its use, although in combination with the automatically operated visual indicator mentioned in the claim just quoted, would constitute an infringement of claim 1 of complainant's patent. It appears from the evidence that these infringing multiple switchboards were first installed by the Capital Telephone & Telegraph Company, one of the defendants herein, in the month of July, 1895, and were thereafter only used to a limited extent by that company in rendering telephone service to its subscribers, and for which service it made no charge, because only a small number of lines were in operation, and its system had not been so far completed as to warrant a charge to subscribers for the use of the lines in operation, when, on October 17, 1895, the complainant gave notice to the defendant company that such multiple switchboards were an infringement of complainant's patent, and requested the defendant to discontinue their use. The defendant company made no reply to this request, but, upon the next day after receiving it, commenced to change from the use of the multiple system of switchboards to that of the trunking system; completing the change on the 31st day of October, 1895, about one week after the filing of complainant's bill of complaint. The defendants contend that, even though the court should be of opinion that upon these facts there was an infringement of complainant's patent, the bill should be dismissed, because such infringement has ceased, and future infringement is not threatened by them. This contention is less plausible than novel. In their pleadings and proofs the defendants have sought to justify their acts, and have also put in issue the validity of complainant's patent. The case has been fully heard upon the issues thus presented, and as the complainant has established the validity of claim 1 of the patent in suit, and the fact of its infringement, it is entitled to an injunction restraining the defendants from infringing claim 1 of its patent, by the use of the Perrin multiple switchboards, or otherwise. In the case of *Potter v. Crowell*, Fed. Cas. No. 11,323, 3 Fish. Pat. Cas. 112, it was held that the discontinuance of an infringement after the commencement of a suit was not of itself sufficient to defeat an application for an injunction pendente lite. The court in that case said:

"Perhaps as safe a criterion of what is to be apprehended from defendants as can be obtained is to look at that which they have done, and in their answer justify the right to do, rather than to look to the fact of their having discontinued the alleged injury, and their declaration of want of intention of renewing

the same. The court is not prepared to say that no occasion for the exercise of its restraining power is shown in this case, when it is apparent that there was such occasion when the suit was commenced; that it has but recently ceased; that it may, if defendants feel disposed, be renewed at any time; and that the complainants claim that they apprehend a continuance of the wrong. \* \* \* Nevertheless, upon principle, it seems to the court that the right to protection which existed when this cause was commenced ought not to be defeated by anything which has thus far been asserted on behalf of the defendants, particularly as no injury can possibly result to defendants, while the allowance of the motion will insure protection to complainants."

What was said by the court in the quotation just made applies with still greater force when the question arises, as it does here, after a trial has been had upon the merits, and upon pleadings which put in issue the right of complainant to any relief. In such a case a complainant is entitled to a decree showing what issues have been determined in his favor, and one, also, which will prevent any future invasion of his rights by a defendant. The complainant is entitled to a decree in accordance with the foregoing opinion, restraining the defendants from infringing upon claim 1 of the patent in suit, by the use of the Perrin multiple switchboards, or otherwise, and for an accounting, unless the accounting shall be waived by it. Let such a decree be entered.

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EVANS et al. v. SUESS ORNAMENTAL GLASS CO. et al.

(Circuit Court of Appeals, Seventh Circuit. April 11, 1898.)

No. 397.

**PATENTS—NOVELTY IN INVENTION—GLASS CHIPPING.**

The Evans patent, No. 494,999, for alleged improvements in processes of chipping glass, consisting in covering the surface with a film of soap or other coating, applying thereto a pattern of flexible material, then submitting the glass and pattern successively to the sand blast and hot chipping compound, and finally removing the pattern and chipping compound while the latter is in a liquid condition, is void for want of novelty and invention, in view of the prior state of the art. 28 C. C. A. 24, 83 Fed. 706, affirmed on rehearing. Showalter, Circuit Judge, dissenting.

On petition for rehearing.

For prior report, see 28 C. C. A. 24, 83 Fed. 706.

Charles Turner Brown, for appellants.

L. L. Coburn and H. Gordon Strong, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge. The petition for rehearing assumes that the opinion of the court in this case was framed on the theory that, if a particular step of the Evans process did not have the novelty asserted for it in argument, the process, as a whole, must for that reason be held to lack novelty. The familiar doctrine was not overlooked, though not restated, that a process consisting of different steps, like a combination of different mechanical elements, may be new and patentable, though every step by itself be old. But when a process has no novelty unless it can be found in a particular step, and it proves to be wanting there, the entire pro-



cess necessarily lacks patentability. The argument at the hearing was understood to proceed mainly on that theory, and on that theory, as the opinion of the court shows, the appeal was decided.

Counsel who has come into the case since a rehearing was asked has been allowed to support the petition by a further brief, the scope of which will be indicated by the following quotations:

"The fifth step in the Evans process was absolutely new with him, and was not shown, described, or even suggested in the prior art. The broad idea of the use of 'glue or similar adhesive and contracting matter' was not new with Evans. The quotation just made is taken from the Stremme patent of 1867, which patent of all the prior art, utterly indefinite as it is, comes the nearest to suggesting the fifth step of the Evans method or process." "It remains that in the art of, and for the purpose of, chipping glass, ripping off a pattern with the glue thereover, and leaving glue to do the chipping upon strict lines, was new with Evans." "Thompson, like Stremme, practiced hand painting 'in covering the glass where the same is not to be chipped with a covering of paint or varnish.' \* \* \* It plainly appears in Thompson's cross-examination that two things characterized his experiments, viz. 'cutting through the glue along the edge of the pattern,' and 'simply lifting the tin foil, paper, or other covering (?) from the part of the glass which was not to be chipped.'" "This patent (Frederici) shows a suggestion, but only a suggestion, towards that which was subsequently accomplished by Evans. Frederici advises the use of a tin-foil pattern, over which a film of beeswax is spread. Then the pattern is removed, whether successfully or not does not appear. Then Frederici proposes that the parts of the glass not covered by the beeswax shall be ground, blasted, or frosted. The sum and substance of this patent is, as stated in its single claim. 'The within-described process for preparing the surface of a piece of glass, stone, or other material for the sand-blast,' etc. Does this, or anything herein contained, even suggest the removal of a pattern, with glue thereon, at a particular stage of the jellying of the glue?" "Does this Shaw patent even remotely suggest the removal of a pattern, with glue thereon, at a particular stage of the jellying of the glue? Our further contentions, not heretofore stated or not at least heretofore presented as we now present them, are these: (a) That an absolutely new result, sounding in the stripping or ripping of the pattern from the glass during a convenient period, which period is naturally and necessarily of a longer or shorter duration, according to the circumstances of temperature or convenience, is found in the patent sued upon; and (b) that the stripping, as described, (1) constitutes a new step in the process of chipping glass; (2) per se makes a new process; (3) would per se have been patentable; and (4) certainly lends patentable novelty to the first and second claims of the patent sued upon. Whether the pattern is to be stripped off five minutes or twenty-five minutes after it is coated with glue is utterly immaterial to any proper question in this case. The circuit court finds but two possible elements of novelty, namely, 'The material of the pattern and the condition of the chipping compound when the pattern is lifted off.' No contention is made as to the material of the pattern. The opinion of this court quotes from the second claim of the patent sued upon, \* \* \* and adds the erroneous statement that 'this step in the process is clearly anticipated in the prior art.' Where, how, when, by whom?" "We respectfully submit that this court has been certainly led into a serious error as to the fact in saying that 'dry, set, and liquid as used (in this case) are relative terms, and signify no more than sufficiently dry, sufficiently set, or sufficiently liquid, as determined by practice and experiment, to contribute most effectively to the desired result.'" "A careful review of this record must satisfy the court that the patentee, Evans, was the first to tell the public to rip (not lift, cut, or dig) the pattern off at all in any process having for its object the chipping of glass; second, that he was the first to tell the public to rip the pattern off with the glue thereover; third, that he was the first to tell the public at what stage of the jellying of the glue to rip this pattern off; fourth, that by this new process he was the first to tell the public how to do this ripping, and leave sharp, fine, strict, and precise lines of ornamentation." "If there was in this record no other fact than the one now to be referred to, to sustain our contentions of fact and allegations of error in

the conclusions arrived at by the court, it would be sufficient. Thompson's testimony and Thompson's patent constitute the main, not to say the sole, reliance of the defense. If his abandoned experiments had been pursued with brains and ability he might possibly have staggered up to the Evans process, but the resultant of his unsuccessful and abandoned experiment was his patent, which, far from even suggesting the ripping off of the pattern with liquid glue thereon, returns to the old, slow, tedious, inaccurate, and impracticable method of trying to cut out the pattern with a needle or sharp tool."

Instead of Evans having been the first to tell the public to rip the pattern off, in distinction from lifting, cutting, or otherwise removing it, the word "rip" does not appear in the patent or in Evans' testimony, where he was asked to explain the method of removal. The words used in the specification are "remove" and "raise," and in the claims "lift" and "remove." He was not the first to tell the public to rip, lift, or remove the pattern "with the glue thereover." In that he was distinctly anticipated by Thompson, and also, but perhaps not so clearly, by Stremme. He was not only not the first to tell, he did not himself tell, the public "at what stage of the jelling of the glue" to remove the pattern. The claims of the patent say, "While such chipping compound is in a liquid condition." The specification says, "Such raising of the pattern must be effected while the chipping compound thereover is in a semiliquid condition," while according to counsel it is utterly immaterial "whether the pattern is to be ripped off five minutes or twenty-five minutes after it is coated with glue," the necessity being simply "a convenient period,—longer or shorter, according to circumstances of temperature or convenience." Nothing more than this could be necessary to justify this court in saying, as it did, that "dry," "set," and "liquid," as used in the patents of Shaw, Frederici, and Evans, are relative terms, meaning in each case that condition which should be found by experience to contribute most effectively to the desired result. That result is the same in each patent, namely, "smooth and sharply-defined outlines," or, as it is expressed in the brief, "strict and precise lines of ornamentation." In that particular it is manifestly impossible that Evans should have been an inventor. He could not have been first to tell "how to do this ripping, and leave sharp, fine, strict, and precise lines of ornamentation," unless the force of the proposition is in the word "ripping," because, confessedly, Thompson did the same thing by cutting through the glue, and "by simply lifting" the pattern from the part of the glass which was not to be chipped. His testimony shows that sometimes the cutting of the glue was imperfect, and when that was so, or when the glue was in such condition as to flow together behind the knife, as must often have occurred, the lifting of the pattern, it is evident, had the same effect in his process as in that of Evans. There is conceded to be a suggestion of the same thing in Stremme's patent, and, as explained in our first opinion, it is distinctly shown by Frederici and Shaw. Those patents cannot be excluded from consideration because they belong to the art of sand-blasting. That is not only a kindred art; it is embodied in the Evans process, and necessarily was known to him. His testimony shows that he not

only knew about it, but had for years been engaged in sand-blasting, and was familiar with its processes. In the practice of that art he had used patterns made of oiled paper, and for this reason, if no other, counsel could not but concede that "no contention is made as to the material of patterns." Knowing just how patterns covered with wax, set or semiset, or with paint, dry or semidry, could be lifted from the glass so as to limit the effect of the sand-blast to smooth and sharply-defined outlines, Evans cannot be credited with invention because his pattern is covered with glue, and when lifted leaves a like outline and limitation to the chipping effect of the glue, which remains upon the parts of the glass not covered by the pattern. The lifting of the pattern, and thereby cutting a film of glue, is not different from the lifting of a pattern, and thereby cutting a film of beeswax, paint, paste, mucilage, white of egg, or other semifluid or viscous substance. It is plainly a mistake to attribute to Evans, as a new idea, that the edges of the pattern could be used to cut or sever a semiliquid chipping compound, so that the portion thereof left on the figure would dry within the lines of the figure, and in drying pull or chip interiorly from such lines. The drying and pulling are completely shown by Stremme and Thompson,—by Thompson from lines as sharp and precise as by Evans, and the cutting of the liquid by lifting the pattern is shown by Thompson, and also by Frederici and Shaw. The petition is therefore denied.

SHOWALTER, Circuit Judge (dissenting). Upon further consideration of this case on the application for a rehearing, I am unable to concur in the opinion heretofore pronounced. In the Stremme patent, dated March 26, 1867, the lines of the figure to be produced by the chipping compound are traced with a pencil on the ground surface of a pane of glass. Then the entire surface, other than the figure, is covered with a coating of varnish which is allowed to dry. Then the glue or chipping compound is applied freely on the figure overlapping the lines formed by the varnish. The glue or chipping compound then dries; the theory being that the glass will be chipped inside the figure, but that the chipping compound will merely pull off the varnish exterior to the figure.

But two patents which concern the chipping of glass by a chipping compound were shown in the prior art; the patent to Stremme being one, and that to Thompson in June, 1889, being the other. In the Thompson patent a covering of asphaltum "or analogous adhesive matter" is put over that portion of the glass which is not to be chipped. This covering is then itself covered with a layer of tin foil or paper. The patentee says, "A mere covering of paint will answer the purpose;" meaning, apparently, that the paint may be used instead of the asphaltum and its outer coating of tin foil or paper. The glue is then spread over the figure overlapping the lines of paint, or asphaltum covered with paper or tin foil. "If the chipping process were now to be carried out in the usual manner," says the patentee,—and he seems to be confirmed by the testimony in the case,—"the glue would chip pieces of glass off beneath the covering, a, b,"

meaning that the chipping would cross the lines of the figure and extend under the covering of paint or asphaltum. "To avoid this," says the patentee, "I cut through the glue with a sharp knife along the margin of the space to be chipped and roll or strip off the glue while in a jellied state from the parts not to be chipped, but I do not cut any crease into the glass itself. The outline of the design or pattern being thus cut through the glue, the chipping may be proceeded with by subjecting the glass and its sharply-defined glue cover to heat in the usual manner." Again he says: "By my improved process I am enabled to produce chipped glass in a simple and effective manner, and without the glass at the sides of the design to be chipped being affected by the chipping process."

In the process of the patent in suit the following is the treatment: First, a thin film of soap or similar substance is applied over the surface of the glass; second, a pattern, capable of resisting the action of a sand-blast, is placed on the glass and held there by means of the soap; third, the film of soap, or other adhesive substance, is removed from the figure cut in the pattern; fourth, the sand-blast process is applied; fifth, the chipping compound in a liquid condition is then placed over the surface of the glass and the pattern; sixth, the pattern is lifted from the glass while the chipping compound is in a semiliquid condition; seventh, the chipping compound thus cut away at the edges of the figure is made to harden and contract by the action of heat, thus chipping the glass within the lines of the figure. If the adhesive substance of the first step be of a kind which will not interfere with the action of the sand-blast, then the third step may be omitted as needless. In this process the lifting of the pattern cuts the semiliquid chipping compound so as to leave the lower exterior edge of the chipping compound which remains on the glass in line with the exterior of the figure to be chipped. The chipping compound commences to dry from such exterior edge, and the chipping is effected so that the figure is clear and exact. The idea that the edges of the pattern—when the glass surface immediately under and coincident with said pattern remained smooth and that within the figure had been roughened as by sand-blasting—could be used to cut or sever a semiliquid chipping compound, so that the portion thereof left on the figure or sand-blasted surface would dry within the lines of the figure, and in drying pull or chip interiorly from such lines, seems to be new with the patentee of the patent in suit.

The patent to Frederici was for an improvement in preparing glass for the sand-blast process. By means of an adhesive coating he attached to a pane of glass a pattern with a design cut in it. Over this he placed a thin layer of beeswax, or some such material, and then stripped the pattern off, thus cutting the beeswax at the edges of the design. He then applied the sand-blast process to the portions of the glass not covered by the beeswax. If the pattern itself had been in this patent, what is called in the record "a sand-blast resist," and if instead of covering the design with beeswax the sand-blasting had been applied to the design,—that is, to the portions of the glass not covered by the pattern,—and thereafter a chipping compound had been applied over the pattern, and then the pattern had been lifted, leaving the liquid or semiliquid chipping compound on the design, and the

chipping compound so left had been suffered to dry, this would have been the process of the patent in suit. But in the Frederici patent the beeswax, or whatever material is used, seems to be set or dry when the pattern is lifted off. The idea of putting such a substance as a liquid glass-chipping compound over a pattern and over the portion of the glass surface exposed thereby, which portion had been previously sand-blasted so that it might hold the chipping compound, and of then pulling the pattern from the glass, leaving the semi-liquid chipping compound exactly within the lines of the figure, and adhering to the roughened glass in such a way that in drying it would pull or chip the glass from its own exterior lines, the same being coincident with the lines of the figure, seems to me not suggested by the Frederici patent. In the patent to Shaw the paint is brushed over the pattern and the glass, and after it dries the pattern is removed. The point in that patent seems to be the use of metal foil for the purpose of making patterns so that the same can be successfully removed from the glass.

The successive steps of treatment, as set forth in the patent in suit, constitute a process which is not in the prior art; nor am I able to say that the *prima facie* validity of this patent upon the matter of invention is satisfactorily disposed of by anything in the record. The patent to Thompson seems to show that the cutting of the chipping compound by lifting the pattern was not an obvious expedient. He used a knife or sharp implement to sever the still jellied, or as yet unhardened, glue at the outer edges of the figure to be chipped, for the very purpose of preserving exactness of contour. It did not occur to him that this could be easily and rapidly done—provided the figure or design were roughened while the margin thereof under the pattern remained smooth—by simply lifting the pattern at a prior stage of the glue-hardening process, and before the glue became solid enough to afford the necessary resistance to the action of the knife. Stremme operated on ground glass. He sought to produce models for casting. Chipping to or from an exact line was a problem with which he was apparently not concerned. The following sentence occurs in his specification: "The mode here described may be simplified to a great extent by using patterns in applying the varnish, either in the manner of brushing through or printing on the glass the protecting varnish, which latter method would also be applicable in certain cases, even in transferring the glue, when the varnish would be dispensed with altogether." Precisely what he meant by the words "transferring the glue" is not any more definitely disclosed than by the sentence quoted. Did he mean to use a flexible or a rigid pattern? Was the pattern to adhere to the glass? The suggestion seems to be of a pattern as a substitute for the varnish. Was the pattern to remain on the glass while the glue dried and while the chipping went on during the subsequent application of heat? The process of the patent in suit concerns the treatment of smooth glass. The sand-blasting is a necessary condition to the action of the chipping compound, and the pattern for the preliminary sand-blasting serves in the application—and accurate adjustment within the lines of the figure—of the chipping compound. In the Stremme process the design on which the glue is to be applied is not bounded by clear glass. The rough-

ened surface to hold the glue is not a distinct inclosure on a surface of glass otherwise clear. There is not surrounding the design a margin of clear glass which of itself would resist, or tend to resist, any chipping exterior to the ground surface of the design. Nor in the Thompson patent is the exact definition of a sand-blasted design within a margin of clear glass in any way proposed or suggested in aid of the chipping process. In the process in suit the sand blasting is applied within the exact lines of the design. When the pattern is lifted there are no surface breaks or irregularities to carry the chipping compound across the exterior lines; moreover, the cutting of the semiliquid coating is from the underside. The chipping compound is thus left on, and within the exterior lines of, the roughened surface, so that the drying process may commence at, and the pull in the chipping process be from, the exterior lines. My conviction is that the decree here ought to be reversed.

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THE C. VANDERBILT.

THE NIAGARA.

THE AMERICA.

THE SYRACUSE.

THE BELLE.

ROBINSON et al. v. THE C. VANDERBILT.

(District Court, E. D. New York. April 12, 1898.)

**MARITIME LIENS—WHARFAGE—VESSEL USED FOR STORAGE.**

Although a maritime lien may attach to a domestic vessel for wharfage furnished in the ordinary course of navigation, yet no such lien arises where the vessel has been withdrawn from navigation, and is kept at the wharf for the mere purpose of storage.

Asa F. Smith (Frank D. Sturges, of counsel), for libelants.

George M. Van Hoesen (R. D. Benedict, of counsel), for claimants.

THOMAS, District Judge. The boats of the Schuyler Steam Tow-boat Company, operating between New York and Albany, since 1880, during the closed season of navigation, had laid up at the docks of Jeremiah P. Robinson, at the foot of Court street, in Brooklyn. Mr. Robinson died in August, 1886, and Jeremiah P. Robinson, his son, and others, his executors, appear as libelants, to enforce alleged liens for wharfage, as hereafter stated. The claimant, the Holland Trust Company, is the trustee of a mortgage dated December 24, 1890, and duly recorded December 26, 1890, covering the boats in question, and given to secure certain bonds held by the trust company and others.

The liens for wharfage are claimed against the following specified boats, for the following specified times:

Vanderbilt,	from 23th Nov., 1890, to June 9, 1891,	191 days.
"	" 27th July, 1891, to July 29, 1891,	3 "
Syracuse,	" 1st Dec., 1890, to March 28, 1891,	118 "
"	" 29th July, 1891, to July 31, 1891,	3 "
Belle.	March 31, April 1-9, and July 31, 1891,	11 "
America,	from 3d Dec., 1890, to May 20, 1891,	169 "
Niagara,	" 27th March, 1891, to 31st July, 1891,	127 "

The boats occupied berths as follows:

Vanderbilt,	No. 1,	inside,	Nov. 28th to June 9th.
"	"	"	July 27th to July 29th.
America,	No. 2,	"	Dec. 3d to May 20th.
Syracuse,	No. 3,	"	Dec. 1st to March 28th.
"	No. 1,	"	July 29th, 30th, and 31st.
Niagara,	No. 3,	"	March 27th to 30th.
"	No. 1,	outside,	March 30th, to June 9th.
"	No. 2,	"	June 9th to July 31st.
Belle,	No. 3,	inside,	March 31st to April 9th.
"	No. 1,	"	July 31st.

Although the boats had for several years laid up at these docks, and the libelants presumptively had the books and records of the owners thereof relating thereto, they produced no evidence, verbal or written, of the transactions between the parties previous to the season of 1890-91, nor any evidence, save as hereinafter mentioned, of the arrangement for the season of 1890-91. The libelants, however, did prove the following: That on November 28, 1890, the Schuyler Towboat Company, being unable to pay wharfage for the boats America, Syracuse, Vanderbilt, Niagara, and Belle, for a time previous to such date, but when does not clearly appear, gave notes for such indebtedness, and that at least one of such notes was renewed in whole or part on or about May 20, 1891, and that coincident with such renewal the following paper was executed:

"This note is given in renewal of a previous note for \$1,409.00, dated Nov. 28th, 1890, which was given for wharfage of the steamboats America, Syracuse, Vanderbilt, Niagara, and Belle, said wharfage constituting a lien upon said steamboats.

"Albany, May 20th, 1891.

Schuyler Steam Towboat Company,

"Samuel Schuyler, President."

The libelant Jeremiah P. Robinson testifies that Mr. Vosburgh, representing the Schuyler Company, when the note of November 28, 1890, was given, agreed that he would give the libelants a writing stipulating that they should not lose the lien for legal wharfage after having taken the note, or from taking the notes; that such agreement was reduced to writing, and was similar to that of May 20, 1891. On rebuttal, the same witness testified that, in connection with the giving of the notes for previous wharfage, one of which is mentioned above—

"Mr. Vosburgh asked us to take notes for the wharfage due. I declined to do it. He urged that we should take notes, as they were unable to pay cash, and he said we had our legal lien for wharfage on the boats, double wharfage for that matter, if the notes were not paid; and I told him that I would take the notes on that condition, that we should not lose our lien for wharfage according to law, which would be double wharfage, if it was not paid on demand."

The witness also stated that Mr. Vosburgh wrote a letter to that effect. These notes so given and the collateral agreements or statements have no direct relation to the wharfage in question, and are useful, if at all, to give some glimpse of the understanding of the parties as to a lien for previous wharfage. Certain evidence, however, was given, which has a direct relation to the wharfage in suit. In May, 1891, the Schuyler Company gave the following note and accompanying paper: "

"\$2,264.35

Albany, May 15th, 1891.

"Four months after date, we promise to pay to the order of Mr. Samuel Schuyler twenty-two hundred and sixty <sup>85</sup>/<sub>100</sub> dollars at the First National Bank, New York City. Value received.

"Due Sept. 18th.

Schuyler Steam Towboat Company,

"Samuel Schuyler, Treasurer."

"The accompanying note is given for wharfage of the steamers America, Niagara, Syracuse, and Vanderbilt, for the months of December, 1890, January, February, March, and April, 1891, and interest as per annexed memorandum, said wharfage constituting a lien upon said boats.

"Albany, May 20th, 1891.

Schuyler Steam Towboat Company,

"Samuel Schuyler, President."

The further evidence proffered by the libelants, bearing on the arrangement, is that of Egan, libelants' clerk, who stated that he kept a record of the wharfage of the boats, and rendered bills therefor. He stated that he understood that the Schuyler Company were to pay \$5 for each berth occupied. His book containing the account of the wharfage of these boats shows that, contrary to his custom in respect to other boats, he made no entry of tonnage, no entry of the charge for the wharfage (save for the first month, which he erased under direction), and that he apparently rendered one bill for each berth, however many boats were stored in it.

The evidence of the claimants relating to the arrangement for this wharfage is given by one witness, Mr. Vosburgh, agent of the Schuyler Company, who testified:

"Q. State under what arrangement those boats went to that wharf in 1890. A. They went there. They paid \$5 a day for each boat lying next to the wharf; nothing for any outside boats lying outside of the boats lying next to the wharf."

Vosburgh states that no charge was ever made for any boat save the one lying abreast the wharf; that this arrangement was made with Jeremiah P. Robinson after the death of his father, and was renewed every year. The only negative that Mr. Robinson gives to this evidence is this:

"Q. At that time (November, 1890) was any agreement made between you and Mr. Vosburgh with regard to the wharfage being five dollars a day for the future wharfage of the inside boats? A. There was not."

Such is the evidence of the parties as to a lien and to compensation. The disposition intended to be made of the suits does not require more precise finding of the facts than is indicated in the foregoing summary. Under the facts above presented, the libelants claim for the wharfage furnished liens upon the boats, purely maritime, unaided by the local statute. This involves the inquiry (1) whether wharfage furnished to domestic vessels is a maritime service; (2) whether it entails a lien upon domestic vessels; (3) whether wharfage for the purpose of storing vessels in the winter time, or when out of commission, is maritime in its nature, and whether a lien therefor results.

The following authority holds that wharfage furnished to a domestic vessel is not maritime in its nature: Delaware River Storage Co. v. The Thomas (Cir. Ct. E. D. Pa.) 7 Fed. Cas. 413. The following authorities hold, directly or by implication, that wharfage furnished



to a domestic vessel is maritime in its nature: *Ex parte Easton*, 95 U. S. 68; *The Virginia Rulon*, 13 Blatchf. 519, 520, Fed. Cas. No. 16, 974; *The Shrewsbury*, 69 Fed. 1017 (hence the lien authorized by local statute attached); *The Atlantic Dock Co. v. Wenberg*, 9 Ben. 464, Fed. Cas. No. 622; *Town of Pelham v. The B. F. Woolsey*, 16 Fed. 418; *The Mary K. Campbell*, 24 Blatchf. 475, 476, 31 Fed. 840; *The Geo. E. Berry*, 25 Fed. 780. The following cases hold that a maritime lien upon a domestic vessel attaches on account of wharfage furnished it: *The Advance* (Dist. Ct. S. D. N. Y., 1894) 60 Fed. 766; *Woodruff v. One Covered Scow*, 30 Fed. 269; *The Kate Tremaine*, 5 Ben. 60, Fed. Cas. No. 7,622; *The Allianca*, 56 Fed. 609. The following cases hold that a maritime lien upon a domestic vessel does not attach on account of wharfage furnished it: *Russell v. Swift*, 1 Newberry, 553, Fed. Cas. No. 12,144; *Ex parte Lewis*, 2 Gall. 483, Fed. Cas. No. 8,310. The supreme court of the United States has held that wharfage furnished a foreign vessel entails a lien (*Ex parte Easton*, 95 U. S. 68); but in that case the court did not decide that a lien for wharfage exists, by the maritime law, against a domestic vessel. *The John M. Welch*, 18 Blatchf. 54, 62, 63, 2 Fed. 364. The opinion of the supreme court in *Ex parte Easton* carefully confines the right of lien to the case of wharfage furnished to a foreign ship, although the discussion in the opinion of the maritime nature of the service is general.

It will be observed that while it may be accepted safely that wharfage furnished to a domestic vessel, in the ordinary course of navigation, is maritime in its nature, and while the authorities allow a maritime lien therefor, yet that there are two reasons for hesitating respecting the attitude of the appellate court when the question shall come before them: (1) The careful exclusion of domestic vessels from the benefit of a lien, in the opinion in *Ex parte Easton*, *supra*; (2) the analogy of the question to that involved in *The Lottowanna*, 21 Wall. 558, where supplies to a domestic vessel were held to be maritime in nature, but not entitled to lien therefor. However, the decisions of Judge Brown in *The Allianca*, 56 Fed. 609, and *The Advance*, 60 Fed. 766, and of Judge Benedict in *The Kate Tremaine*, 5 Ben. 60, Fed. Cas. No. 7,622, and *Woodruff v. One Covered Scow*, 30 Fed. 269, while their authority remains unimpaired, should determine the holding of the district courts of the Southern and Eastern districts of New York. But the rule thus established is not applicable to the wharfage furnished the boats here libeled, while withdrawn from navigation. A service furnished under such conditions is not within the fundamental reasons that have prompted the courts to award liens for wharfage, or for any other purpose. At the outstart, it should be noticed that, although wharfage afforded for storage to domestic ships removed from navigation be maritime in its nature, it does not follow that a maritime lien results. The implied contract for supplies and materials furnished to domestic vessels is maritime in nature, and yet entitled to no lien. *The Lottowanna*, 21 Wall. 558. Nor is the question primarily determined by the fact that the service is, or is not, afforded on the credit of the ship. It is necessary to the existence of all maritime liens that the credit should be given to the ship, but the mere presence of such

fact would not of itself characterize the service as maritime. Much less would it establish the existence of a lien. In *The Lottowanna*, 20 Wall. 201, 21 Wall. 558, supplies were furnished to a domestic vessel on the credit of the vessel, but a lien therefor was not recognized. There is beyond this a necessary element to the existence of a lien, and that element pervades all contracts for which liens are given.

Whatever is done to operate a ship, to aid her physically in the performance of her mission, viz. to take freight or passengers, to carry freight or passengers, to unload freight or passengers, and to preserve her while so doing, is a maritime service; and if the service be rendered to the ship, and on the faith of the ship, a lien therefor usually arises. The case of supplies and materials furnished a domestic vessel, on the credit thereof, is an exception, and, as has been claimed, an illogical exception. See opinion of Clifford, J., in *The Lottawanna*, 20 Wall. 201, and dissenting opinion of the same judge in *The Lottawanna*, 21 Wall. 558, and *The Kate Tremaine*, 5 Ben. 60, Fed. Cas. No. 7,622. But it may be safely stated that no service, although maritime in its nature, entails a lien unless it be done in course of the preparation of the ship for her voyage, or the operation of the ship on the voyage, and to the conclusion of the voyage, which includes the unloading of the ship. If now wharfage be considered, it may be said to be essentially maritime, and to be entitled to a maritime lien, so long as it is connected with the fitting of the ship for, or the operation of the ship to the completion of, the voyage. The wharf is a necessary instrumentality to the fulfillment of the ship's duty, viz. the reception and discharge of cargo and freight, the making ready of the ship for the voyage, and the restoration of the ship after one voyage preparatory to another. But if an empty ship be tied to a wharf, because her field of operation is closed by ice, or because she is taken away from navigation, the case is widely different. She is at the wharf for no purpose of navigation, but for the precise purpose of nonnavigation, and because navigation is not contemplated. She is not at the dock for passengers, for freight, for repairs, or any purpose preceding or succeeding the actual voyage. She is not there for rest, even in the sense of lying up for some preparation for another voyage, or reparation from a voyage ended; but the sole reason of her presence at the wharf is that she has gone out of commission, withdrawn temporarily from navigation, abandoned for the time the purpose of her construction, because the locality of her journeying positively prohibits the continuance of such occupation, or because there is no occasion or opportunity for her use. The mariners are discharged, the boat is shut up, like a closed house, and is left in idleness to a caretaker or watchman, and so remains until the owner sees fit to withdraw her from this state of suspension for her appropriate use. Such an abandonment, such a complete isolation and disconnection with navigation, as this, bears no analogy to any condition of a ship when a lien is allowed for a service rendered her. Would a watchman or caretaker be entitled to a lien for his services on a boat in such a situation? How would such watchman's services be equivalent to the services of a mariner? The services of a mariner could not be required in the

nature of the case, for the mariner is an operative, and the boat in winter quarters is a dead thing, to whom a mariner would be useless. It is difficult to conceive of any act of man in connection with a ship, or any condition of a ship, unless it be one of permanent abandonment, so divorced from navigation as this laying up of a boat at the end of a season, and at the close of navigation, until it should be wanted again, or the taking of a boat out of commission at any time for the mere purpose of storage.

Liens for wharfage have been allowed in cases where the service was rendered in connection with actual navigation, when passengers or freight were to be transported to or from the vessel, or the wharf was used for some purpose convenient or necessary to the resumption or completion of the ship's voyaging. But it will be found, upon investigation, that the principle of commercial activity on the part of a ship is always present when a lien is recognized for a service rendered her. Truly, she may be lying in apparent idleness at the dock; but she is indolent only in the sense that, in the matter of cargo or repairs or victualing or manning, she is making ready for her journey.

In *The Kate Tremaine*, 5 Ben. 60, Fed. Cas. No. 7,622, the lien was allowed against a boat employed in transporting freight between the cities of New York and Albany; and, in the course of such employment, she was moved to the libellant's wharf, and there discharged her cargo. Judge Benedict, in his opinion, states:

"A wharf is a necessity of modern navigation, and of navigation alone. The sole object of its erection is to facilitate the transportation of passengers and freight upon navigable waters."

In *Ex parte Easton*, 95 U. S. 68, it is said of a wharf:

"Erections of the kind are constructed to enable ships, vessels, and all sorts of water craft to lie in port in safety, and to facilitate their operation in loading and unloading cargo and in receiving and landing passengers. \* \* \* Conveniences of the kind are wanted both at the port of departure and at the place of destination, and the expense paid at both are everywhere regarded as properly chargeable as expenses of the voyage. \* \* \* Instances may doubtless be referred to where wharves are erected as sites for stores and storehouses; but the great and usual object of such erections is to advance commerce and navigation, by furnishing resting places for ships, vessels, and all kinds of water craft, and to facilitate the operation in loading and unloading cargo, and in receiving and landing passengers. \* \* \* Repairs to a limited extent are sometimes made at the wharf; but contracts of the kind usually have respect to the voyage, and are made to secure a resting place for the vessel during the time she is being loaded or unloaded. Such contracts, beyond all doubt, are maritime, as they have respect to commerce and navigation, and are for the benefit of the ship or vessel when afloat."

In *The Brooklyn*, 46 Fed. 132, 133, Judge Brown does, indeed, remark that wharfage "may accrue for the use of the dock in mooring for the purpose of protection and safety only"; but after citing for this *The George E. Berry*, 25 Fed. 780, the learned judge adds:

"But in this port such a charge is ordinarily for the purposes of loading or unloading cargo on the dock, and that includes, necessarily, a berth for the vessel, and a place of deposit for the cargo."

In *The George E. Berry*, the learned judge states: "Wharfage, in its most general legal sense, doubtless includes the mooring of vessels

for the purpose of protection and safety, as well as for loading and unloading the cargo,"—and holds that, under the enabling statute of the state, a town could impose a charge for wharfage for mooring only by a designated private individual, even in connection with his shipyard and business, but adds: "The general ordinance passed by the town, however, must be construed to refer to vessels engaged in navigation, or in loading or unloading some parts of their contents." There is no suggestion that a maritime lien, unaided by the statute, could arise. See, also, remarks in the opinion in *Town of Pelham v. The B. F. Woolsey*, 16 Fed. 418, 423.

In *The Allianca*, 56 Fed. 609, 613, Judge Brown states that there is no true analogy between repairs or supplies and wharfage furnished to a domestic vessel. He enforces the suggestion by pointing out that contracts for repairs or supplies are usually matters of deliberate compact, made while the vessel is in port, while, on the other hand, wharfage is often a matter of immediate or pressing necessity, "either for safety, or for the completion of the ship's voyage, and for the full performance of her maritime duty," and that it is usually not a matter of bargaining or of direct order. Such a statement, obviously, could not be applicable to the conditions attending the wharfage in the case at bar.

In *The Advance*, 60 Fed. 766, the same learned judge states:

"Ever since the decision of Benedict, J., in the case of *The Kate Tremaine* (1871) 5 Ben. 60, Fed. Cas. No. 7,622, it has been the law and practice in this district to recognize a maritime lien for wharfage furnished to domestic vessels when the wharfage is obtained in the ordinary course of navigation, on the engagement of the master or officers of the ship. See, also, *The Allianca*, 56 Fed. 609, 613. In all cases, however, to sustain a maritime lien, there must be either in fact, or by presumption of law, a credit of the ship; and, whenever such credit is negatived by the evidence, no such lien, whether maritime or statutory, will be recognized. *The Samuel Marshall*, 4 C. C. A. 385, 54 Fed. 396, 403."

In a few sentences is here embodied the spirit of the law on the question of maritime liens for wharfage.

In *The Shrewsbury*, 69 Fed. 1017, 1020, the opinion suggests the principle:

"A lien for wharfage is made, under the general maritime law, a lien next in rank to wages. It is a necessary privilege for the steamer to have in order to carry on its business."

In *Woodruff v. One Covered Scow*, 30 Fed. 269, it appeared that a scow had been for a long time moored at the libellant's dock, and a lien for wharfage thereon was allowed. As the holding, unexplained, might seem to diminish the uniformity of the judicial utterances on this subject, a portion of the opinion may be given:

"The case in this aspect would be easily disposed of if the structure in question could be held to be a ship or vessel; the supreme court having, in *Ex parte Easton*, 95 U. S. 68, held a contract for the wharfage of a ship or vessel to be maritime. But this structure, being stationary, and never employed in the transportation of freight or passengers, from place to place upon the water, cannot be held to be a ship or vessel. The case, therefore, is not covered by *Ex parte Easton*. Neither in *Ex parte Easton*, nor in any other case to which

I have been referred, has the precise question here involved been determined. Nevertheless, the grounds upon which the decision in *Ex parte Easton* proceeds afford reason, in my opinion, to hold the present contract to be maritime in character; for it will be observed that the subject-matter is the same in the one case as in the other, save only in this: that the structure accommodated is not engaged in the transportation of passengers or freight from place to place upon the water. What the wharfinger furnishes, under contract with a ship or vessel, the libellant furnished to this structure, namely, a resting place, safe from the influence of currents and of tides, and this he did by means of a wharf, which is an incident to navigation. Moreover, the object of this resting place was to facilitate the landing of sails, oars, and persons from the small boats accustomed to use this structure, and engaged in navigation. The object sought to be secured by the contract with the libellant for the use of his wharf for this float was similar in character to the object sought to be secured by a contract for the wharfage of a ship. Furthermore, the structure itself, although not a ship or vessel in the legal sense, and perhaps not one of the other 'kind of water craft' to which the supreme court, in *Ex parte Easton*, alludes as distinct from a ship or vessel, is used in connection with navigation on the water and the transportation on the water of passengers and freight, and in no other occupation. If no boats had frequented this slip for the purpose of landing persons or goods, this float would not have been there. It was there because the boats coming there required it, in connection with the navigation in which they were engaged. The use to which the float was put seems clearly maritime in character. The necessities which made a wharf necessary for the float were necessities of the sea, while the benefit derived from the use of the wharf by this structure inured to persons and things transported on the sea. These considerations appear to me to be sufficient to authorize a determination that a contract for the wharfage of such a structure is a maritime contract, by reason of the subject-matter. The contract sued on being maritime, the jurisdiction of the admiralty to enforce it follows of course. There remains the question whether the maritime law attaches to such a contract a lien for the wharfage. Upon this question there is little room to doubt. By the maritime law a lien for wharfage always attaches to a ship or vessel, and the reasons for the lien in the case of a structure like this are as forcible as in the case of a ship."

It may be judged, from the reasons given for the decision, to what extent it should be influential in the disposition of the question at bar. Whatever dissent may exist to the conclusion, it will be observed that the decision is based upon the connection of the scow with active maritime commerce.

The foregoing characterizations of the nature of wharfage and its relation to maritime enterprises sufficiently indicate that ships retired from service are not subject to maritime lien. Happily the question is not without direct authority. The mere fact that an empty, unmanned ship is tied to a wharf does not of itself create a lien against it for wharfage. In *The Mary K. Campbell*, 24 Blatchf. 475, 31 Fed. 840, Judge Wallace decided that a wharfinger acquired no privileged lien against a vessel seized by a sheriff under an attachment, and taken to and kept at the wharf at the instance of that officer. And yet the sheriff had a special property in the vessel, which authorized him to take possession of her, to move her to such place as he saw fit, to engage wharfage for storing her pending sale; but the essential feature of her condition was that she was withdrawn from maritime service, and her changed relation modified the rights of the persons affording her wharfage.

In *The Murphy Tugs*, 28 Fed. 432, the question was directly decided

by the district and circuit courts. The following extract from the opinion embodies the decision:

"The claim of William Miller for wharfage during the winter of 1884 and 1885 must also be rejected. It has been our practice to limit the application of the state statute giving a lien for wharfage to the season of navigation, when the use of a wharf is necessary to the employment of the vessel, but not to allow a lien for services rendered the vessel while she is laid up during the winter; such as the use of a slip, the storage of sails and rigging, or the hiring of a watchman. These are in no sense maritime in their nature. *The E. A. Barnard*, 2 Fed. 712; *The Island City*, 1 Low. 375, Fed. Cas. No. 7,109. *The Thomas Scattergood*, 1 Gilp. 1, Fed. Cas. No. 11,106. In cases of this kind the wharfinger would probably have a common-law lien dependent upon possession, and he should not relinquish such lien until his claim is satisfied."

This holding has been cited frequently with approval in cases where contracts for the storage of grain in vessels during the winter, either at the point of shipment or delivery, have been held not to be of a maritime nature. Such contracts have been likened to the winter storage of vessels. *The Pulaski*, 33 Fed. 383, 384, where it is said:

"To be the subject of an admiralty lien for a breach of contract, the vessel must be, at the time, engaged in commerce and navigation, or in preparation therefor (*The Hendrick Hudson*, 3 Ben. 419, Fed. Cas. No. 6,355); and the service must be maritime in its nature (*A Raft of Cypress Logs*, 1 Flip. 543, Fed. Cas. No. 11,527; *Gurney v. Crockett*, Abb. Adm. 490, Fed. Cas. No. 5,874; *The John T. Moore*, 3 Woods, 68, Fed. Cas. No. 7,430). This case is really of the same nature as a claim for winter wharfage, passed upon in this court, and affirmed by the circuit court, in *The Murphy Tugs*, 28 Fed. 429."

To the same effect are *The Richard Winslow*, 67 Fed. 259, affirmed by the circuit court (7th Cir.) 18 C. C. A. 344, 71 Fed. 426, wherein it was said:

"A maritime contract must therefore concern transportation by sea. It must relate to navigation and to maritime employment. It must be one of navigation and commerce on navigable waters. Unquestionably, there was here a contract for carriage by sea, and that contract was maritime in its nature. But there was joined with it a contract with respect to the cargo after the completion of the voyage that was in no respect maritime in its nature. If, as Judge (now Mr. Justice) Brown observes in *The Pulaski*, 33 Fed. 383, the storage were a mere incident to the transportation, the entire contract would be held to be maritime, and within the admiralty jurisdiction. But here the contract for holding the corn in storage did not concern navigation. It could not take effect until after completion of the voyage, and had no relation to further transportation of the cargo of the vessel. It was to be performed at a time when the vessel was not engaged in commerce or navigation, or in preparation therefor. It was merely a contract for winter storage, and was no more maritime in its nature than the nonmaritime contracts for winter wharfage (*The Murphy Tugs*, 28 Fed. 429); for the employment of a dismantled hull (*The Hendrick Hudson*, 3 Ben. 419, Fed. Cas. No. 6,355); for the storage of a vessel's outfit during winter (*Hubbard v. Roach*, 2 Fed. 393); or for the service of a shipkeeper during winter (*The Sirius*, 65 Fed. 226). The reason is that such service does not pertain to the navigation of a ship, nor assist a vessel in the discharge of a maritime obligation."

See *The Pulaski* and *The Murphy Tugs*, cited for authority in *Steamship Co. v. Ferguson*, 22 C. C. A. 671, 76 Fed. 993.

**Liens for personal services:** If the examination of the general principle here presented be extended, it will be found to be the vital test of the existence of liens for personal services. The service must be connected with a ship voyaging, or making ready to voyage, or com-

pleting a voyage. The nearer the service is to the very act of voyaging, the higher ranks the lien. Hence the preference for mariners' wages. In just the degree that the service recedes from the activities of the going and coming of the ship, or the immediate preparation for such going or coming, the right of lien for such service becomes doubtful, or the lien, if existing, diminishes in rank. Hence the long doubt as to the standing of the services of stevedores, and the final settlement of the question favorably to their lien. In such cases the arguments have been directed to assimilating their service to that of mariners, or to uniting them to the vessel, while yet in the course of transportation, actual or constructive. The same principle pervades the discussion of the rights of watchmen as lienors, and it will be sufficient to direct attention to two late and instructive decisions, *The Hattie Thomas*, 59 Fed. 297, and *The Sirius*, 65 Fed. 226. The strong temptation to quote from them at length must be limited to two brief extracts from the opinions. In the latter case Judge Morrow said:

"It is a cardinal principle of admiralty jurisprudence that, to give a court of admiralty jurisdiction over contracts, the subject-matter thereof must be maritime. It is not enough that the service which sprang from the contractual relation be performed on water, or even that it be done on board, and for the benefit, of a vessel which is afloat. These are not the exclusive tests: The service arising from the contract must be of a maritime character, and I might add not nominally, but substantially, so. The expression 'maritime character' or 'nature' is held to mean any act which contributes to the navigation of the vessel, presently or prospectively. This is, rather a broad and indefinite statement, but the needs of vessels in navigation are so complex and diverse that it is difficult to give an exhaustive, and at the same time accurate and intelligible, definition. However, Judge Betts, in *Cox v. Murray*, Abb. Adm. 340, Fed. Cas. No. 3,804, gives one an excellent idea of the scope of the expression as applied to contracts. He says: 'The subject-matter of the contract—the substantial object and end—must pertain to navigation, or be connected with transactions performed by vessels on the sea, to become maritime in its nature, and be clothed with the privilege of a remedy in admiralty courts; and it appears to me that an agreement acquires this maritime quality only when the matters performed or entered upon under it pertain to the fitting of a vessel for navigation, aid, and relief supplied her in preparing for and conducting a voyage, or the freighting or employment of her as an instrument of a voyage. Collateral contracts with or assistance by services, or advances to an owner or master, incidentally benefiting a voyage, acquire no special property thereby which renders them maritime.'"

In the former case Judge Townsend said:

"It seems to me that the principle deducible from the cases establishes that, where services are rendered in the home port of the vessel, the question whether there is an admiralty lien, irrespective of statute, depends largely upon whether the services are in the nature of repairs or supplies or other necessities for the vessel, such as are furnished by material men, or are such in kind as would be rendered by a mariner. If they are of the latter character, it seems that they are of equal rank with those of other seamen, and constitute a lien against the vessel. It is further important to inquire whether the services concern the cargo or freight or the vessel itself or her maritime duties, and, if the latter, whether they are connected with her navigation, present or prospective."

These cases illustrate the ultimate considerations that justify maritime liens, and furnish tests for determining their existence.

The views above expressed lead to the conclusion that no maritime lien attached to the boats during the time that they were withdrawn

from commerce and navigation. It is therefore unnecessary to consider, as a distinct proposition, whether the wharfage was furnished on the credit of the boats. It results that the libels must be dismissed, with costs, in the cases of the *America* and the *Niagara*; but in the case of the *Syracuse* there was wharfage furnished for July 29th, 30th, and 31st, and in the case of the *Vanderbilt* from July 27 to July 29, 1891, and in the case of the *Belle* for March 31st, April 1st to 9th, inclusive, and July 31st. This wharfage has no connection with storage, and the usual rule obtaining in this district is applicable. Decrees therefore should be entered against the *Syracuse* for three days' wharfage, against the *Vanderbilt* for three days' wharfage, and against the *Belle* for eleven days' wharfage, all at the rate of \$5 per day, with costs.

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THE F. W. VOSBURGH.

THE J. T. WHITBECK.

VASSAR v. THE F. W. VOSBURGH et al.

(District Court, E. D. New York. April 20, 1893.)

**COLLISION—UNLAWFUL NAVIGATION.**

The tug V., with a dumper on each side, in proceeding down the East river kept about 200 feet from the Brooklyn shore, in order to escape the flood tide,—a usual custom. The W., a tug with a barge on a hawser, was going up the river, about 450 feet from the Brooklyn shore. In rounding the bend at Fulton Ferry, neither gave a signal; and the V. headed well into the stream, and collided with the barge, the W. making no effort to avoid her. *Held*, that the V. was at fault, in navigating too near the shore, and the W. in not attempting to go to port, so as to avoid her.

This was a libel in rem by Robert G. Vassar against the tugs F. W. Vosburgh and J. T. Whitbeck to recover damages resulting from a collision between libellant's barge, while in tow of the Whitbeck, and, a dumper towed by the Vosburgh.

Macklin, Cushman & Adams, for libellant.

Carpenter & Park, for the Vosburgh.

Henry W. Goodrich, for the J. T. Whitbeck.

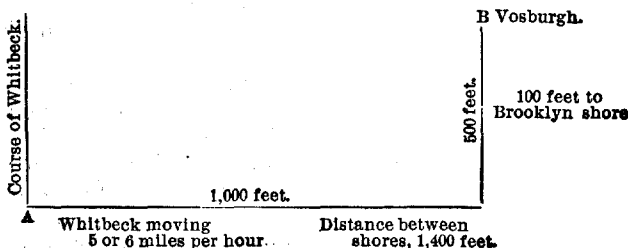
THOMAS, District Judge. The brief on behalf of the Vosburgh gathers and seasonably presents some judicial comments upon the uncertainties and mendacities that attend cases of this nature. The true issue is whether the tugs, Whitbeck and Vosburgh, were severally navigating in that part of the East river where the law required them to be, and whether they met the demands of good navigation. To aid the solution of the material issues, not a single witness is produced from either tug or its tow whose truthfulness or accuracy of observation is beyond very grave suspicion. It results that any judicial view of the causes of the accident, and of the culpability of the parties therefore, must itself be imperfect. On the 19th day of December, 1892, the Whitbeck, a tug 55 feet in length, towing the *Volunteer*, a square-boxed, rudderless scow (dimensions 80 feet in length by 25 feet in width), loaded with stone, came from Buttermilk channel, keeping



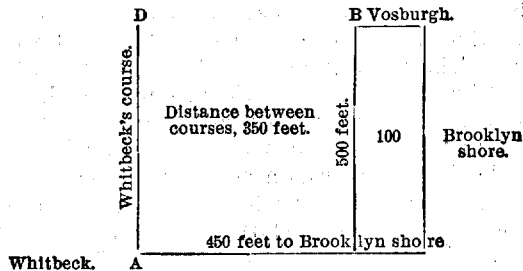
nearer to the Brooklyn shore. She was carrying the requisite lights, although it was not sufficiently dark to require them to apprise other vessels of her locality. The Whitbeck was bound for the foot of Division avenue, Williamsburg. The captain of the Whitbeck testified that when just south of the Brooklyn Bridge, or opposite Fulton Ferry, on the Brooklyn side, he saw the tug Vosburgh, carrying proper lights, with a dumper on each side, swing away from the dock at Rutgers street, New York; that the Vosburgh crossed the river some 1,500 or 2,000 feet above him, and came directly and close to the Brooklyn shore; that the Vosburgh, when about 100 feet from the Brooklyn shore, and about 500 feet north of the Whitbeck, and with about 1,000 feet between their courses, straightened upon a down course; that the Whitbeck was headed up the river; that then the Vosburgh "went straightened down the river, and she took a cant off too far, and sheered over towards me again," changing her course two points, with the result that the starboard dumper struck the starboard side of the scow, doing injury; that the Whitbeck was going about 5 or 6, and the Vosburgh about 3, miles an hour; that he gave the Vosburgh two whistles at the time when the latter swung towards him (that is, when the latter was about 500 feet away); that the Vosburgh did not respond until the Whitbeck had repeated the signals, when the Vosburgh was about abreast of her, shaping her course directly for the Volunteer, which was following directly in the course of the Whitbeck; and that when the Vosburgh was between the Whitbeck and the Volunteer the Whitbeck blew an alarm whistle, whereupon it appears that both tugs stopped, and the Vosburgh claims to have reversed, although the captain of the Whitbeck says that the Vosburgh did not reduce her speed. The collision happened right off Empire Stores, Brooklyn. The captain of the Whitbeck claims that he was during these events about one-third of the way across, and heading up, the river. Every witness connected with the Whitbeck or her tow states that the hawser running to the barge was about 20 or 25 fathoms long, connected to the barge with a bridle. This seems to be the probability, although the witnesses for the Vosburgh make the hawser 45 to 50 fathoms, and without a bridle, or at least with a single fastening to the bitt of the Volunteer. The statement of the captain of the Whitbeck is palpably untrue in a certain particular. His circumstantial description of seeing the Vosburgh swing off from Rutgers street, New York, and go straight across the river from that point, is so at variance with other testimony as to make the court quite conservative in accepting the observation of this witness in any particular. The Vosburgh took on her second dumper at Thirty-Eighth street, and claims to have crossed the river at Jackson street, and thence to have come down close to the Brooklyn shore. Her captain states that he did this to get the slack water, and escape the flood tide at that time prevailing. This appears to be in accordance with the usual custom of navigation, although absolutely contrary to law. The Vosburgh's captain also states that when he first saw the Whitbeck the Vosburgh was about 200 feet from the Brooklyn shore, heading directly down stream; that the Whitbeck was about 800 feet distant, and 200 feet from the Brooklyn shore, pointed towards Rutgers street; that he saw both the port and starboard

lights of the Whitbeck; that, upon receiving the Whitbeck's signal, the Vosburgh starboarded; that the Whitbeck did not starboard. He says, however, that, after the signals were given, the Whitbeck's port lights were shut out. The confusion of the witness as to whether it was the green or red light that was shut out raises a doubt as to the value of his observation. He states that he was heading straight with the docks at the time of the collision, or a little in, and had his helm hard a-starboard. This witness accounts for the accident upon the theory that the Volunteer headed off on her starboard quarter, so that she was parallel with the Brooklyn shore. His diagram, however, shows that the Volunteer was headed for the New York shore. The evidence of those on the dumpers of the Vosburgh is that the Vosburgh was about 200 or 250 feet off the Brooklyn shore. The engineer of the Whitbeck states that the Whitbeck was one-third over from the Brooklyn shore, with 150 yards between her course and that of the Vosburgh, which should have caused them to pass at an interval of 100 yards, and that the Vosburgh was 300 or 400 yards from the Brooklyn piers. The river is about 1,400 feet wide at the point of the collision. The value of this evidence will be illustrated later. However perplexing this evidence, there is one sure starting point, viz. the unlawful navigation of the river by the Vosburgh. It may be that some fault of the Whitbeck was a contributing cause of the injury. That will be considered. But, as to the Volunteer, the fault of the Vosburgh is not excused; and the latter, at least, is liable for the libellant's injury. Is the Whitbeck also liable? The probabilities are, as between the conflicting statements of those on the Whitbeck and those upon the Vosburgh, that the former are correct as to the fastening of the hawser, and, on the whole, culpable fault in this regard against the Whitbeck may not be concluded.

The next question is, was the Whitbeck herself unlawfully near the Brooklyn shore? The captain of the Whitbeck, whose observation should be accepted sparingly, states that when the Vosburgh was straightened down the river she was 500 feet up the river from the Whitbeck, with 1,000 feet between their courses, and that the Vosburgh came over towards him, and hit his tow. The distance across the river was about 1,400 feet. This would have put five-sevenths of the river between the two boats, and, indeed, the Whitbeck very near to the New York shore. The engineer's exaggeration in the same regard has been pointed out. The following would be a diagram of the location of the boats:



The captain of the Whitbeck states that his tug was pointing up the river, and that he was going 5 or 6 miles per hour, while the Vosburgh was going 3 or  $3\frac{1}{2}$  knots per hour. Then the Whitbeck was going nearly twice the rate of the Vosburgh. Now, the Whitbeck's captain claims that from the Empire Stores, B, the Vosburgh canted off, and got so far upon his course as to hit his barge on her bow, which, as he claims, was following straight behind him. Therefore the Vosburgh must have gone over much more than 1,000 feet while the Whitbeck was traveling, at 5 or 6 miles per hour, 500 feet, plus about 150 feet, the length of the hawser line, plus some portion of the length of the scow. This could not be true. But, again, in a more indefinite way, the captain and engineer of the Whitbeck say that the Whitbeck was one-third over from the Brooklyn shore (that is, about 450 feet), and the Vosburgh was about 100 feet from the shore. The following would be the position of the boats:



It is evident that if the Vosburgh had turned at right angles, and sailed for the point D, she would have made the shortest distance between her and the course of the Whitbeck, and it was possible thus to hit the Volunteer. But this is on the theory that the Vosburgh changed her course directly towards the Whitbeck's course. The evidence of the captain of the Whitbeck is that the Vosburgh changed her course, when she canted, about two points, and he illustrates his recollection of her course by the map following page 25 of the evidence. It is perfectly evident that on such a course, and with such distance and relative speed, the Vosburgh would not have collided with the scow. This leads to the conclusion that the captain of the Whitbeck was mistaken in his distances, and he was much nearer the Brooklyn shore than he stated. It seems to be the idea of those connected with the Vosburgh that she was 200 feet off shore. This would put 250 feet between the courses of the Whitbeck and the Vosburgh; assuming that the Whitbeck was 450 feet off, or one-third of the way over. With such distances, the Vosburgh might have taken a course that would bring her in collision with the Volunteer. In the uncertainty of the matter, it is preferable to hold that, while the Whitbeck was probably within the alleged distance of one-third out, yet she was not so far in as to make her negligent from that fact alone. Although the Whitbeck may not be found culpably negligent on account of her position in the river, yet she was so far towards the

Brooklyn shore that it becomes important to consider whether she did all that good navigation required to avoid the accident. Should she have attempted to go further to port? The Whitbeck's captain states that he was headed up the river, and did not change his wheel when he saw the Vosburgh coming towards him. His alleged reason for not doing so is that he did not have time to get off. During the same time the Vosburgh, as he claims, made the distance towards the Whitbeck's course, so as to hit her tow. It is true that the Vosburgh's captain states that the Whitbeck was heading about for Rutgers street, but that he saw the Whitbeck's green and port light when the Vosburgh was headed down the river. In such relative positions, the Vosburgh's captain could not have seen the Whitbeck's port light. Moreover, the Vosburgh's captain says that the boats were about head on; and then, in contradiction, he states that, after seeing both of the Whitbeck's side lights, the port light shut in. This seemingly indicates a movement of the Whitbeck to port, which is strengthened by the further statement of the Vosburgh's captain that the Whitbeck hauled off. All this would lead to the conclusion that the Whitbeck starboarded, but it is opposed by the positive evidence of the Whitbeck's captain that he was headed up the river, several times repeated, and did not change his wheel. Upon the argument, counsel for both parties, in reply to an inquiry of the court, stated that there was no evidence that the Whitbeck starboarded. In the position in the river necessarily occupied by the Whitbeck, as heretofore discussed, and in view of the fact that her captain saw the Vosburgh directing her course for the Volunteer, it was a duty that the Whitbeck owed the Volunteer, if not the Vosburgh, to use some effort to get out of the Vosburgh's way. But the Whitbeck kept on her way. This, as to the Volunteer, was negligent. The probable fact is that the Vosburgh was some 200 feet out from the shore, that the Whitbeck was nearer to the Brooklyn shore than her captain has testified, and that in rounding the bend in the river, extending from Fulton Ferry to the Empire Stores, neither boat gave a signal; that the Vosburgh, intending to go around this bend, was heading well into the stream, and, maybe, was caught and carried out by the tide; and that the Whitbeck, headed up the river, did not attempt to go to port. The specific fault of each vessel has been pointed out. It is impossible to measure the relative culpability of these boats, or the degree to which each contributed to the injury. They should, as between themselves, bear the damages equally; but, as to the libellant, each should be liable for the whole. It results from the above that a decree must be entered for the libellant, for such damages suffered by the Volunteer as may be found, against both the Whitbeck and the Vosburgh; the damages to be paid equally by said respondents, with the right of the libellant, in case of inability to collect a moiety or any part thereof from one respondent, to resort to the other respondent for the same.

## In re SAVILLE.

(District Court, E. D. New York. March 28, 1898.)

## 1. SHIPPING—NEGLIGENCE—STARTING STEAMER.

Where a steam lighter lying in the Atlantic basin in the city of Brooklyn, with its stem two to six feet from the South Central pier, in going slightly forward caught a boy, who was playing on some spiles projecting from under the pier, and crushed him, the owner is not liable, as he was not bound to examine the water between the vessel and the pier before starting.

## 2. SAME—INSPECTORS' RULES—WHISTLE.

Inspectors' rules 5 and 8, and the instructions following rule 8, requiring steamers navigating in crowded channels or in the vicinity of wharves to sound their whistles, have reference to the meeting and movement of vessels, and not to a vessel lying close to a pier, and a little boy playing on some logs in the water between the vessel and the pier, and hidden from view.

This was a petition by Leah M. Saville, owner of the steam lighter Ellen, for limitation of liability.

James J. Macklin, for petitioner.

Chas. J. Patterson, for respondent.

THOMAS, District Judge. The steam lighter Ellen, on the 16th day of September, 1893, was lying alongside the wharf opposite the Clinton stores in the Atlantic basin in the city of Brooklyn. The bow was at right angles to the South Central pier, the stem being from 2 to 6 feet from the easterly face thereof. She was fastened by a stern rope, a bow rope, and a spring line. She was unloaded, so that her deck was some 10 feet from the water, and about 5 or 6 feet above the string piece of the dock, which approximated the same distance above the water. What is described as a raft, consisting of some old spiles, about 25 feet long, and collectively about 5 feet wide, lay under the South Central pier, but could, and on the day of the accident did, protrude between two upright spiles, about 3 feet beyond the edge of the same. Between it and the stem of the lighter were some 3 feet of clear water. Upon this, for a short time previous to the accident, two boys had been playing, and at the moment of the accident one of the boys, Peter MacCallister, 9 years and 5 months old, was either playing or washing his foot in the water. The floor of the pilot house is some 7 feet above the deck, and the pilot house itself is about 50 feet from the highest point of the bow, and in front of the pilot house was a mast and boom. The lighter is some 100 feet long and 17 feet wide. A person in the pilot house could not have seen the boy in the position in which he was placed. On the day of the accident, and about the middle of the day, the captain of the lighter wished to throw the stern out from the wharf for the purpose of getting sternway. For this purpose he directed a deckhand to cast off the stern rope, which was done. Meanwhile the captain had given one bell, the signal to go ahead, whereupon the deckhand somewhat loosened the bow rope. The lighter then moved

slowly forward, pushed the raft backwards or downwards, and caught the boy between the stem of the lighter and one of the spiles of the pier, causing his death. No person connected with the lighter could have seen the boy without standing near and looking over the bow, and no one connected with the lighter did in fact put himself in a position from which the boy could be seen. The respondent claims: (1) That other persons on the wharf or pier saw the boy, and that shortly before starting the lighter the captain was walking on the wharf towards his boat, and could have seen the boy had he looked, as it is alleged that the boy was in plain sight, and was in fact seen by others on the wharf or pier. (2) That no lookout was kept at such a place on the bow as would have enabled the boy to be seen, and that such lookout should have been so placed. (3) That, if the captain could not have seen the boy from the pilot house, he should have placed a lookout in a position advantageous for seeing him. (4) That no whistle was sounded upon starting the lighter, as required by the rules of the board of supervising inspectors, under the heading of "The Pilot Rules for Atlantic and Pacific Coast Inland Waters," reference being had especially to rules 5 and 8. (5) That the Atlantic basin comprises public waters, and is permitted for the use of small boats; and that the boy presumptively was rightfully upon the raft, at least as regards the lighter. (6) That the boy had a right to assume that the barge would not move ahead without giving notice or warning of some kind. (7) That, if the boy was negligent in going upon the raft, still that he was, and for some time had been, in plain sight, and that those in charge of the lighter were bound to use due care for his protection. The above propositions cover both the question of the petitioner's negligence and the contributory negligence of the boy. The question of the petitioner's negligence, when considered, disposes of the claim. The respondent's position regarding the petitioner's negligence results in three propositions: (1) That the captain, while on the wharf, should have seen, and hence must be presumed to have seen, the boy. (2) That the captain should have placed a lookout on the boat, where he could have seen the boy. (3) That the regulation signals should have been given, to warn any person who might be within the few feet between the stem of the lighter and the pier.

The first proposition assumes (a) that the captain, when walking to the lighter on the wharf, did see the boy, or (b) that he should have seen him. There is not the slightest evidence that the captain did see the boy. If he had seen him, the principle would be properly invoked that the captain should have used care, whether the boy was or was not wrongfully or negligently on the raft. But the necessary condition for the application of this doctrine is absent, viz. knowledge by the captain of the boy's presence on the raft. Nor does the fact that two persons are produced who were in situations where they could see the boy, indicate that the captain also saw him. A person is presumed to see what it is his duty to see, if that may be accomplished in the course

of performing the required duty. It cannot be said that the captain, while off the lighter, was under any legal duty to use any care to discover whether any person was in the position occupied by the boy. The contention that a person in charge of a boat, while approaching it, is obliged to examine the water beneath the bow of his boat, to discover whether some person is there present, has no justification, either in legal principle or authority.

As to the second proposition, it seems obvious that it was not the duty of the captain to place or send a lookout to the very bow of the boat to look over and down to the water to discover whether a person was concealed within the five or six feet of the interval between the stem of the boat and the pier. Such an event is so improbable that the demands of prudent navigation do not comprehend it. A lookout is required under certain conditions, and it might be that observation from the pilot house would not be sufficient if from that position the detection of objects could not be effected. But such a rule would not require a lookout to be placed in such a position that he could look over and down from the bow of the boat, and see a boy sitting on some spiles protruding some three feet from beneath a pier, to which the boat was in the proximity disclosed in the present instance. That is not an element of danger of navigation, which a navigator is required to anticipate, or against which he is called upon to guard, unless, perchance, the fact be actually called to his attention, or other facts known to him actually or constructively require such caution in his procedure. The same is true in respect to signals. In this regard the respondent's proposition is this: A ship, with her side against a wharf, and her stem within five or six feet of a pier, desires to go slightly forward, to throw out her stern and get sternway. A small boy is on some spiles projecting from, and some five feet below, the pier, which itself is about the same distance below the deck of the boat. The respondent's contention is that rule 5, and the instructions following rule 8 (but applicable to rules 1 to 8), so apply that a failure to observe them raises a legal presumption of negligence; that is, the pilot should have given one long blast of the steam whistle. Rule 5 requires a steamer nearing a short bend or curve in the channel, when the view is obstructed for half a mile, to give one long blast, which must be answered by any steamer, within hearing, going in an opposite direction. This rule is also made applicable when boats are moved from their docks or berths, and other boats "are liable to pass from any direction towards them." A boy playing on some spiles under a steamer's bow, and tucked in between the bow and a pier, is not within the purpose or protection of this rule. The note following rule 8 provides for an exception to rules 1 to 8 "when steamers are navigating in a crowded channel, or in the vicinity of wharves. Under such circumstances, steamers must be run and managed with great caution, sounding the whistle, as may be necessary, to guard against collision or other accidents." The exception was to deprive a steamer running under such circumstances of immunity

from a mere observance of rules that could not be deemed sufficient to meet the exigencies of navigation in "a crowded channel, or in the vicinity of wharves," and to impose a caution that the nature of the situation would require of a prudent man to avoid accidents. The very purpose of the exception is to make the duty of observing care depend upon no mere technical signals, but to impose a general obligation of care in the movement of the steamer in localities where other craft were, or might be expected to be. Its general intention would not cover the present case, as nothing in the way of shipping could be expected to be crowded between the bow of the lighter and the pier; and, indeed, such a thing, if not impossible, is too improbable, and foreign to any state of facts contemplated by the rule, to permit a serious contention that its direction has any application. These rules have reference to the meeting and movement of ships, vessels, and steamers, and not to a vessel lying with her bow close to a pier, and a little boy, who has climbed down the spiles, and placed himself on some logs right under the vessel's bow, hidden from the view of any person other than one looking over and down from the extreme forward part of the boat. Whatever sympathy such an accident as that here involved may provoke, there does not seem to be a single legal justification for allowing the claim. Therefore the claim is disallowed, and the relief prayed for by the petitioner is granted. The decree may be settled in accordance with this decision.

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In re DEMAREST et al.

In re PENNSYLVANIA R. CO.

(District Court, E. D. New York. March 9, 1898.)

1. NEGLIGENCE—PERSONAL INJURIES—MOVING BARGES.

Where a barge was being removed from one wharf to another, by a rope, in a careful and customary manner, and a passing tug, not knowing that a rope was being used, caught it in its wheel, and carried it away with such suddenness that a boy on the barge became entangled in the coil, and his leg broken, neither party is at fault.

2. SAME—DANGEROUS PREMISES—CHILDREN.

The rule that the owner of dangerous premises or machinery is guilty of negligence in allowing young and inexperienced persons to come and remain within the influences of such danger applies only where the injury complained of resulted from a danger commonly incident to the premises, and the owner is not required to use affirmative care in guarding the child from a danger arising entirely from extraneous causes.

Wing, Shoudy & Putnam, for Augustus Demarest.

Robinson, Biddle & Ward, for Pennsylvania R. Co.

William S. Lewis, for respondent.

THOMAS, District Judge. The barge Wetherel, chartered by the Pennsylvania Railroad Company, was lying at the Commercial Wharf, in Atlantic Basin, Brooklyn, May 24, 1893. Otto Nilsen, then of the



age of ten years and about four months, and his brother, of the age of seven years, Norwegians, resided with their parents in Brooklyn. They had been in this country for about four months, and neither read nor spoke the English language. On the morning of the above date, the boys were sent to school; but finding, as they claimed, the school gates closed, they, while returning home, were attracted to the wharf where the barge was lying, and asked the mate, one Nansen, also a Norwegian, dead before the trial, if they could go aboard the same. Pursuant to his consent, they did go aboard, and remained until lunch hour, when they went home, returned after lunch, again went on the barge, and remained there until after the accident in controversy. Erickson, captain of the barge, a Norwegian, states that in the forenoon he directed the mate to send the boys ashore, and that in the afternoon he in person gave a similar order, which was obeyed, and that thereafter he did not know that the boys were on the barge until the immediate time of the accident. The boys deny that they were ordered from the barge by any one, but rather that they were encouraged by the mate, and suffered by the captain, to remain, and their statement in this particular, in connection with other circumstances, is preferable. About 3 o'clock the barge was removed from the Commercial Wharf to a parallel wharf some 200 feet distant, and known as "South Central Pier," about opposite the end of which the barge was lying. The barge, while at the Commercial Wharf, was headed in a northerly direction, while at some 10 feet from its stern was a coal boat. The manner of changing the position of the boat was as follows: One end of a rope, coiled at a spot towards the bow of the barge, was passed over the railing on the starboard side thereof, and carried to the stern of the coal boat, and fastened. Thereupon Erickson, with a boat hook, pushed the stern of the barge from the wharf, and, then seizing the rope, began pulling upon the fastening on the coal boat, at the same time backing towards the bow of the barge. This drew the bow of the barge to a position approximately at right angles to the Commercial Wharf, and gave her sternway in the direction of the South Central Pier. This impetus having been attained, Erickson ordered the mate, then on the coal boat, to cast off the line fastened thereon, which he did; and Erickson dropped his hold on the line, went towards the stern to grapple his boat hook upon the South Central Pier, which by this time the barge had approached to within some 10 feet. The line thus released trailed over the starboard side of the barge near the bow, falling into the water at an angle of some 45°, while the end detached from the coal boat fell into the water, by which it was covered. At this moment, the tug *Defiance*, coming into the Basin from the East river to take a boat lying southerly of the barge, for which purpose it was necessary to pass the same, was rounding South Central Pier, from the end of which the barge was not far distant.

Erickson testified that he called out to the captain of the tug, who was in the pilot house, as follows: "I have got a line out. Look out for it;" or, "Captain of the tug, I have got a line across there;" but did not call at that instant upon the captain to stop. It appears that Erickson called out in this manner, not in expectation of any danger

to the boy, but to save his line from being cut or picked up by the tug. The captain of the tug testifies that he did not see the line, and that it was not in view; and the conclusion is warranted that, as the line passed from the barge to the water on the starboard side, it was not fairly in the sight of the captain of the tug. The captain of the barge states that the line was floating in the water, but whether it was on the water or in such a condition as to be seen he is not able to state. The injured boy and his brother state that the line was just above the water, but it is apparent that their judgment upon the matter, even if they have any memory, is not reliable, and that their recollection of the details of the movement of the barge and of the position of the line is inaccurate, however much they may have intended to speak truly concerning them. The captain of the tug also states that he did not hear the warning given by Erickson, nor any warning whatsoever, until he had passed the lighter, when he heard somebody say, "Look at the boy!" When Erickson saw that there was danger of the tug taking up the line, he went hurriedly forward of the mast, where the boys were standing, which was near the winch, and two or three feet from the coil of rope according to his statement. It was his intention to pull the line in. He states as follows: "I told him [the injured boy] to get out of the way, and, as soon as I made a grab for the rope, it went out all of a sudden. This was caused by the tugboat picking it up in her wheel." He states that he then looked behind, and saw the boy tangled up in the rope and tried to clear him, but he could not; and that he got hold of the brake on the winch, and held on until the last turn around his leg broke the boy's leg behind the bitt, which is forward of the winch. The evidence of the boys was that, when the tugboat was near the rope, Erickson called out for the tugboat to stop, and that then Erickson came over, and said to "look out," and then he let the line out quicker, and the injured boy stepped aside, and into the circle of the rope, which was at his left, and that the coil of rope pulled the boy around a couple of times, and caught him up, and brought him against the side of the boat, and caused the injury, and that thereafter Erickson caught him in his arms, and tried to cut the rope with an ax. Their evidence is that the bow of the tugboat had just touched the rope as Erickson called out.

It is obvious from these facts that no fault attaches to the *Defiance* whereupon liability for the accident may be based. The case does not fall within the facts present in *Clark v. Koehler*, 46 Hun, 536. See *Banks v. Railway Co.*, 136 Mass. 485.

The only question remains as to the liability of the barge. It is claimed by counsel for the respondent that the barge is guilty of negligence in two particulars: First, in allowing the boys to come and remain upon the barge; and, second, in obstructing the waterway with the rope. As to the last claim, it appears that the Basin was not a public water, except for such boats as were privileged to use the same, and that the means employed to send the barge from the wharf to the pier were quite customary, and there is nothing to indicate a negligent exercise of this usual right. The more serious question arises as to the neglect of the captain of the barge

and the mate in allowing the boys to spend the day upon it, concerning which the rule is invoked that the owner or person in charge of dangerous premises or machinery is guilty of negligence in allowing young and inexperienced persons to come and remain within the influences of such danger. It is urged also, in the present case, that those in charge of the barge expressly or impliedly invited the children to remain on the barge, and that the owner is liable to the same extent as if the invitation had been directly extended by itself. The authorities respecting these contentions are familiar, and need not be cited nor reviewed. But was the place one of danger? Did those in charge do or omit any act constituting negligence? Erickson testifies that he sent the boys away because it was dangerous for them to remain, and that one of them had, in the earlier part of the day, been struck on the shoulder by the handle of the winch, which was the immediate cause of his ordering them off, and that he regarded it as a pretty dangerous place for the boys to be. If the injury had occurred from any danger commonly incident to the boat or the navigation thereof, or from the misbehavior of those in charge, this opinion of the captain might have weight in connection with other circumstances in determining the liability of the barge. But the injury arose from a circumstance quite removed from any danger ordinarily or reasonably to be expected from the presence of the boys upon the barge, or the changing of the position thereof; nor did it arise from the active misconduct of the captain or mate. The only possible ground for charging culpable negligence relates to the nonfeasance of Erickson when actual peril arose from which the accident resulted. The subject may be discussed from such standpoint.

The boys were on the barge by the consent of those in charge of her. If it must be held that those in charge were not so related to the cause of the accident as to make the petitioner liable, yet when there appeared a sudden, unexpected, and unusual condition, and one dangerous to the children if brought within its influence, did Erickson then do or omit to do any act that resulted in creating such liability? In other words, if it must be held that the fact that the lads were near the coil of rope, amusing themselves perhaps by handling the line, while the boat was being shifted, did not show negligence on the part of Erickson, yet when the latter discovered that the rope was, or was likely to be made, fast to the tug, whereby it would be rapidly uncoiled and carried out, did the relation that he had allowed to exist between the boys and the boat require him to do any affirmative act looking to their safety? The proposition is this: Two children, one ten and one seven years of age, have been allowed to come upon a barge lying at a wharf near a public street, and play thereon for several hours, and finally to stand near and handle a coil of rope used in slowly moving the barge. Suddenly a passing tug takes up the rope, and carries it rapidly out. The captain in charge of the barge, having come hurriedly up, tells the boys to get out of the

way, takes the rope, and gives them no other attention. In yielding their position to him, one of them steps into the coil, is caught by it, and injured. A place not dangerous, by an unexpected event, and one for which those in charge of the barge were not responsible, becomes dangerous; because it cannot be doubted that, when this rope began to go out rapidly, the situation was one of peril to children of tender years. If Erickson thought the barge in itself was a dangerous place, there was every reason for his appreciating that the danger was greatly increased. He then knew, or should have known, that these children, in proximity to this coil, were in a position where injury might come. No threatened injury to the barge or the line appeared, which demanded Erickson's immediate and undivided attention, or necessarily diverted it from the children, or at least forbade the exercise of some protection or care in their behalf. There is no evidence that he paid the slightest attention to the removal of the children from their perilous position, or that he gave them any instructions, or did any act even remotely directed towards their security. On the other hand, he came rapidly forward, told them to get out of the way, took hold and began to handle the line. He wished to occupy the position in which the children were, and, while the respondent was taking another position, he stepped into the coil. Through Erickson's sufferance, the boys were in a position which unexpectedly became dangerous for the children. He desired them to stand aside from that position, that he might occupy it. How they did it does not seem to have been a matter of care to him. Let us make an illustration: Some machinery is not in motion, and some curious children are standing near it, by the sufferance of the owner's servants. From a cause for which the owner was not responsible, the machinery is set in motion, and the children thereby are placed in a dangerous situation, and the person in charge comes hurriedly to the spot, and orders the children to get out of the way, occupies their place, and one of them, in getting out, is injured. Has the person done his duty to the children? The question is new in this feature: That, while the petitioner is not responsible for the cause of danger, he permits children of a tender age to be on his premises; and, when the danger appears, he orders them hurriedly aside, without the exercise of any affirmative care for their safety in obeying the command. The fact that he does not create the danger does not, from a moral standpoint at least, excuse care, when it does appear, towards a child within the action of the perilous agency. Erickson should not have contented himself with ordering him away, but should have given some heed at least to the manner of the child's escape from the perilous surroundings. And yet the fault of Erickson was simply that of nonfeasance in the face of a danger for which he was in no wise a responsible agent. His mere omission to take charge of the child does not seem to have such causal connection with the injury as would make the petitioner liable. Erickson personally did not do what a careful and considerate man should have done; but such omission seems to bear

rather upon his exercise of a personal humanity than upon a legal duty which the petitioner owed to the respondent, and which was to be fulfilled by its agent in charge of the barge.

The owners of premises and machinery have been declared responsible for the exposure of the same under such circumstances as to attract children, as well as for the misconduct of their servants in the treatment of children, and even adults, who were by the invitation of such servants, or without any sanction whatsoever, in places over which such servants had control. There seems, however, to be no authority or principle that sanctions a holding that the owners of premises or appliances, whether acting through themselves or others, are legally required to use affirmative care to guard a child from a danger not incident to the locus in quo, arising without culpable fault of their own, but entirely from extraneous causes. Were such authority or principle present, there would be no hesitation in awarding damages to the respondent; but, in the absence of such legal justification, the conclusion necessarily results that there must be a decree for the petitioners, relieving them from liability, and granting the relief prayed for in the petition.

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### THE BRONX.

SMITH et al. v. THE BRONX.

(District Court, D. Massachusetts. March 23, 1898.)

**1. BURDEN OF PROOF—PRESUMPTION OF FACT.**

The burden of proving that the damages to be recovered were caused by the wrongdoing of the offending vessel remains on the libelant, and does not shift during the trial; but the introduction of evidence may give rise to a presumption of fact, and thus put upon a party the burden of explaining a situation from which, in the absence of explanation, his liability would be presumed.

**2. MEASURE OF DAMAGES—REFUSAL OF MASTER OF STRANDED VESSEL TO ACCEPT ASSISTANCE.**

Where those in charge of a stranded vessel refuse the services of tugs belonging to the owner of the vessel responsible for the accident, tendered promptly, while the tide was high and conditions favorable, and it appears that the stranded vessel could have been saved at that time with less cost than that afterwards incurred by libelant, he will be limited to such damages as the schooner and cargo would have sustained if hauled off the beach at time of claimant's offer.

This was a libel in admiralty by John L. Smith and others against the steam tug Bronx to recover damages for the stranding of libelants' schooner Hooper, while in tow of the Bronx. The cause was heard on exceptions to the assessor's report in respect to the damages.

The schooner Hooper went ashore on Plum Island a little after high water, on the evening of July 4th. The accident happened through the fault of the tug Bronx, which had undertaken to tow her into Newburyport. On the following morning, the master of the schooner, Joseph E. James, who, with his crew, had

spent the night at the life saving station, went on board the schooner before breakfast, and made some examination of her condition, after which he went up to Newburyport, and there noted a protest. He left the vessel meanwhile in charge of the mate, William E. Corson. During his absence, at about 8 a. m., two tug boats belonging to the Merrimac River Towing Company, owner and claimant of the Bronx in this case, arrived at the beach. They were the Uhler, a tug boat of 165-horse power, and the Hazel Dell, of 140 horse power. The Bronx (140 horse power) was also in readiness if wanted. The two boats first mentioned had come from Newburyport, under the command of the manager of the company, Capt. Davis, to see what could be done about pulling the schooner off. He had with him two pilots, duly qualified to pilot vessels into the harbor, and a proper complement of men. After arriving at the schooner and examining her situation, he went ashore, and made arrangements with members of the life saving crew and others on the beach to take the life boat, which was there and ready for use, and run a line from the schooner to the tugs for the purpose of pulling on her. This was about to be done when a conversation occurred between the mate, Corson, then in charge of the schooner, and Capt. Davis, regarding the terms on which the proposed effort should be made. Capt. Davis' proposition was that the whole matter of compensation should be left for settlement afterwards. The mate insisted that there should be a written agreement in advance, either that nothing whatever should be charged unless the schooner was taken off, or that the amount to be charged should in no event exceed a certain sum; and, failing to induce Capt. Davis to make any such agreement, he forbade the line to be run from the schooner to the tugs. They thereupon returned to Newburyport, Capt. Davis leaving word for the captain with the mate that he had been there with two boats ready to pull the schooner off, that he should be at the office in Newburyport all day, and could be found there if wanted. Before the tugs started from the beach, however, and about 10 o'clock, Capt. James arrived back from Newburyport. He saw the tugs there, and heard from the mate an account of what had passed, but took no steps whatever then or afterwards to communicate with Capt. Davis or get him to continue his effort to relieve the schooner; and that same afternoon he began to strip her. On the morning in question, the tide was high a few minutes after 10 o'clock, the weather was fine, the wind off shore, and the sea smooth. Capt. Davis and his tugs were at the schooner early enough to take advantage of the high tide in their proposed attempt to get the schooner off. The tides on the next and subsequent days were less favorable for the attempt, as the tides were "medium" between July 1st and 12th, and "low" July 13th-17th.

Carver & Blodgett, for libelants.

Russell & Russell, for respondents.

LOWELL, District Judge. The interlocutory decree of Judge NELSON must be taken to establish that the Hooper went ashore on Plum Island by the fault of the Bronx. The owners of the Hooper expended certain sums of money in floating the schooner with its cargo, and the schooner, after she had been floated, was found to have sustained damage, the cost of repairing which has been found by the assessor. The amount of these items, and of certain others which need not be here mentioned, the owners of the Hooper seek to recover from the Bronx in this action. The owners of the Bronx, admitting that the interlocutory decree makes the tug liable for the damage caused by the stranding of the Hooper, yet object to pay the expenses of getting her off, on the ground that they themselves could and would have floated her and towed her into the harbor of Newburyport for nothing if they had not been hindered by those who had charge of her.

The principles of law applicable to this branch of the case are simple, and the only difficulty lies in their application. The libel alleges, as it must, that the damages which the libelant seeks to recover were caused by the fault of the vessel libeled. The burden of proving this, to wit, that the injuries and expenditure for which he seeks to recover were the result of the tug's wrongdoing, or, what is the same thing in this case, the result of the stranding of the schooner, is on the libelant. This burden of proof, in its technical sense, here remains on the libelant throughout the case, and never shifts. But where a vessel has come into an exposed and dangerous position by the fault of another, and is rescued from that position at a certain cost, then, in the absence of other evidence, it may often be reasonably presumed that the cost of relief is the true measure of damages. In the case at bar, if there were no evidence of what occurred after the stranding, except evidence of the cost of hauling off the schooner by the Right Arm, I might fairly presume that this cost should be reimbursed by the Bronx. This would be a "prima facie presumption" (3 W. Rob. 13); a presumption of fact, which is sometimes said to shift the burden of evidence, though not the technical burden of proof, by putting upon the party against whom the presumption is made the burden of explaining a situation from which, in the absence of explanation, his responsibility would naturally be inferred. These presumptions and this burden of evidence may shift frequently, as the facts are developed by the evidence in the course of a trial. As was said in *The Gladiator*, 25 C. C. A. 32, 79 Fed. 445, 447, the expressions of admiralty courts upon this matter seem in some respects inconsistent; but these varying expressions arise in the application of the law to peculiar states of fact. The opinion of the court in that case goes on to illustrate how, under some circumstances, as evidence is introduced, a presumption of fact, and with it the burden of introducing further evidence to qualify facts already proved, may shift from side to side. Another illustration of the difference between the burden of proof, properly so called, and a presumption of the sort just mentioned, is found in the case of *Grill v. Collier Co.*, L. R. 1 C. P. 600, 612, 614; s. c., on appeal, L. R. 3 C. P. 476, 482. In that case, as in this, the question to be determined was this: Was the damage to the plaintiff's property (in that case the cargo of a vessel which had been in collision) occasioned by the defendant's negligence? The judge left it to the jury to say whether the collision was caused by the defendant's negligence. Defendant contended that the judge should have asked the jury if the damage to the plaintiff's property was caused by the defendant's negligence, and urged that the damage might have been lessened by proper precautions taken after the collision. The court said that this objection might prevail if there were any facts to support it, but that it was a mere speculation of counsel, and that there was no evidence that the damage could have been lessened. Under these circumstances, it was held that the ruling of the judge at the trial was substantially correct, although he had not stated the question to the jury with logical exactness. It was a fail-

ure to appreciate this difference between the burden of proof, properly so called, and a presumption of fact, which, as I conceive, led Sir Robert Phillimore, in *The Thuringia*, 1 Asp. 283, 291, 292, to say:

"It appears to me that the decisions of common law incline to the position that the burden of proving that ordinary skill and courage could not have averted the loss lies upon the party complaining." "The decisions in this court, however, seem to throw the burden of proof upon the original wrongdoer, who alleges that the injured vessel was unnecessarily abandoned."

In order to rebut the presumption that the cost of floating the schooner was an expense reasonably incurred by the libelant in extricating his property from the plight into which it had fallen by the fault of the Bronx, the claimants show that, on the morning after the stranding, they sought to carry a hawser from the Hooper to two or more of their tugs, intending to haul the schooner off the beach at high water. This intention of the claimants was frustrated by those in charge of the Hooper. In refusing to allow the claimants to attempt the rescue of the Hooper, I think the mate of the schooner, and the captain, so far as he was responsible for the refusal, acted very unwisely. It was at least possible that the attempt would succeed. If it failed, no harm would have been done. The first high tide after a vessel has gone ashore is certainly the natural time for an attempt to get her off, and, if those in charge of the schooner neglected to avail themselves of an opportunity which offered at the least a reasonable chance of success, they cannot be heard to say that their neglect occurred in the exercise of a reasonable discretion.

It is urged by the libelant that the court does not scrutinize carefully what is done in good faith and in a time of perplexity by those in charge of a vessel, but often treats conduct as reasonable and proper even though it has resulted in damage to the property concerned. That this will be done in some cases there can be no doubt; but I consider that the mate's action in refusing the aid of the tugs was so unreasonable as to put it outside the scope of the rule. As was observed by the privy council in the case of *The Flying Fish*, Brown. & L. 436, 443, the test is "what a reasonable man would do under similar circumstances where he had no other judgment but his own to resort to." "It is to be observed," the court there remarked, "that this was not the case of a sudden emergency, leaving no time for deliberation, when great allowances should be made for any error in judgment which may occur. In this case there was no danger to life, nor any immediate apprehension of the loss of the vessel; and the captain had some hours to decide what course was best to be adopted. The learned judge was of opinion that 'as against a wrongdoer, which,' he says, 'in legal estimation, the Flying Fish must be taken to have been, it cannot be maintained that there was no reasonable doubt as to the course to be pursued.' But treating the Flying Fish as a wrongdoer is really begging the whole question. For the collision, and for all the consequences of that collision, the appellant is responsible. But if the subsequent



damage resulted from the acts or omissions of the captain of the Willem Eduard, for that portion of the damage the appellant is not only not a wrongdoer, but he is not even to be regarded as the doer of the act which occasioned it." "It is impossible for their lordships to arrive at the conclusion that the master exercised any judgment at all upon the possibility of saving his vessel. It appears that he attempted nothing, because he had persuaded himself that nothing could be done; and that he rejected all offers of assistance, not after weighing the measures proposed, but because he had hastily determined that the state of his vessel would make every effort to save her unavailable." See, also, *The Baltimore*, 8 Wall. 377, 387; *The Linda*, Swab. 306; *The Thuringia*, 1 Asp. 283; *The Eolides*, 3 Hagg. Adm. 367; *The Hansa*, 6 Asp. 268.

It is further urged by the libelants that the action of the mate, who had limited authority, may not bind the libelants so completely as the action of the master would have done; but the evidence shows pretty clearly that, when the master arrived on the beach, he did not, as he might have done, recall in any way the refusal given by the mate, nor did he express any willingness that the claimants should make the attempt they proposed. I think, moreover, that, unless the master was able to rely altogether upon his mate's discretion, he did a very unwise thing in absenting himself from the beach at that time. He knew that the tide would be high about 10 o'clock. The weather was most favorable, and he should certainly have been on hand at some time before high water to avail himself of all the opportunities that might offer. He had already notified his owners, and, if his protest could not have been made at an earlier hour, it might well have waited until the tide had fallen.

It is further urged by the respondents that, in order to make it the duty of the mate and the captain to accept the claimants' offer, the latter should have offered the services of their tugs without compensation. The argument seems to me to overlook the situation of the parties at the time. The schooner had gone upon the beach. There was little doubt that its owners would seek to hold the Bronx responsible for the damage. The interlocutory decree of Judge NELSON had not then been rendered. Had the owners of the tug offered their gratuitous services to the schooner, their action would naturally have been construed as an acknowledgment that the Bronx was to blame for the original accident, and this acknowledgment the claimants could not afford to make. They offered no bargain, but, as I read the evidence, said in substance this: "We will try to float the schooner without prejudice, without a previous agreement, and with the compensation, if any, left to the discretion of the court." This court can hardly be expected to admit that its own discretion is exercised so unreasonably as to make it a terror to reasonable men. I am of opinion, therefore, that those in charge of the schooner should have permitted the claimants to attempt to get her off the beach at high water on the morning

of July 5th, and that, in refusing to permit the attempt, they acted unreasonably, even after allowance has been made for the difficulties of their situation.

Unreasonable as the conduct of those in charge of the schooner may have been, it cannot, however, defeat the right of the libelants to recover, unless the refusal caused additional delay and expense. Though it may have been the duty of the mate to permit the claimants to make their attempt, his refusal caused them no injury, unless their attempt would have succeeded. I consider the principal question involved in this case to be: Could the claimants, with the force at their disposal, have hauled the schooner off the beach at high water on the morning of July 5th? It is not important to determine whether, after proof of the claimants' unreasonable refusal, there was, in the absence of other evidence, a presumption of fact that the schooner could or could not have been pulled off. Had neither party introduced evidence, I might have had to decide in whose favor the presumption existed. But as all available evidence was introduced, I have only to determine to which side the weight of evidence inclines.

As no attempt was made to float the vessel, the possibility of floating her is a matter of opinion, and the opinions of the witnesses differ widely. I have come to the conclusion that the attempt would probably have been successful. Most of the witnesses were prejudiced. Many of them had no particular capacity for forming a valuable opinion. Davis, Kenney, and Pettingill, who knew something about wrecking, were undoubtedly prejudiced in favor of the claimants' case. Lattime and McBurnie were without considerable experience. In reaching my opinion, I am chiefly moved by the evidence of Capt. Davis, of the Right Arm, who finally pulled off the Hooper, and who, so far as appears, was an unprejudiced observer, as well as an expert wrecker. His testimony seems to me to show that he believed that the claimants would have succeeded. Some of the reasons he gives for his belief may not be weighty, but his conclusions are more important than his reasons. The opinion of an expert who is competent and impartial is not to be discredited by his scant training in logical expression. I am moved also by the fact that the experienced assessor, who had the great advantage of hearing all or nearly all the witnesses, reached the conclusion to which I also have come. While I have thus come to the conclusion that the Hazel Dell and the Uhler could have pulled off the schooner on the morning of July 5th, I think, if it be necessary to their case, that the claimants are entitled to add the power of the Bronx to that of the two other tugs. She was in Newburyport at the time, and was available. It is true that this fact was unknown to those in charge of the schooner, and, in determining if their action in refusing assistance was wise or unwise, only the two tugs can be taken into consideration. If I am right, however, in holding that those in charge of the schooner should have accepted the offer, though made by only two tugs, I think that, in determining the question of ultimate success,

I am not prevented from considering the facts as they actually existed. I agree with the assessor, therefore, that the Bronx was responsible only for the damage which the schooner would have sustained if she had been hauled off the beach on the morning of July 5th; and I overrule the libelant's exceptions to that part of the assessor's findings.

The libelant's exception E relates to the liability of the tug for damages sustained by the schooner's cargo. Had the schooner been floated on the morning of July 5th, the cargo would not have been injured.

Exception M relates to the disallowance of the expenses of Mr. Champion's first trip. Exception N relates to the amount of demurrage. I am not disposed to differ from the findings and rulings of the assessor upon these points.

Regarding exception T, I agree with the assessor that, if the claimants had performed salvage service, they would so far have satisfied their own liability by services instead of money; and I see no reason why the libelants should recover an amount which, under the circumstances, they would not have been called upon to pay. It is said that while the owners of the tug might have been prevented from recovering for the salvage services rendered by their vessels, because they were liable for the original disaster, yet that the officers and crew of the tug might have recovered from the schooner the value of their own individual salvage services. Had they done so, the owners of the schooner could doubtless have claimed reimbursement from the owners of the tugs, but I think a hypothetical expense of that sort cannot be recovered in this action.

Holding the above opinion, I need not consider the respondents' exceptions. Decree in accordance with the assessor's report.

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#### THE NEW YORK.

UNION S. S. CO. v. ERIE & W. TRANSP. CO. et al.

(Circuit Court of Appeals, Sixth Circuit. February 8, 1898.)

No. 461.

#### COLLISION—RIGHT OF WAY—SIGNALS.

When a vessel is pursuing a course which the law gives her a right to take without the assent of another vessel, the whistle consistent with that course is to be regarded as a positive indication of her intention to pursue it. But, where a vessel has no right to pursue a particular course without the assent of the vessel she is meeting, the whistles she uses to obtain that assent are merely invitations to an agreement contrary to the usual mode of passing, and are not to be taken as a distinct indication that, on failure to obtain such assent, she will violate the rules of navigation, at least until there is something additional in her conduct to justify such an inference.

This was a libel by the Erie & Western Transportation Company, owner of the steamer Conemaugh, against the steamer City of New York, owned by the claimant, the Union Steamship Company, to recover damages for a collision between the two vessels, whereby the Conemaugh was sunk in the Detroit river. The claimant filed a cross libel for damage occasioned to the New York. The district court, by its final decree, found that the New York was solely in fault, and assessed the entire damages against her. The claimant of the New York thereupon appealed to this court, which, on October 5, 1897, filed an opinion reversing the decree below, finding that the Conemaugh was alone in fault, dismissing the libel against the New York, and ordering a decree in personam against the owner of the Conemaugh for the damages received by the New York, and also dismissing the intervening petition of certain insurance companies. 27 C. C. A. 154, 82 Fed. 819. The cause is now heard upon a petition for a rehearing.

Before TAFT and LURTON, Circuit Judges, and SEVERENS, District Judge.

TAFT, Circuit Judge. In this case a petition for rehearing has been filed, asking that the court reconsider its decision already announced in so far as it was adjudged thereby that the New York was not guilty of fault contributing to the collision. We deem it necessary to consider only two points made in the petition. One is that the finding of fact by the court made the relative situation of the vessels such that, under the case of *The Manitoba*, 122 U. S. 97, 7 Sup. Ct. 1158, the New York should have whistled. The other is that the two blast whistles of the Conemaugh were a distinct indication to the New York that the Conemaugh was about to fail in her duty to keep out of the way of the New York, and was on a course across the bows of the New York, and that, by reason of this indication, it became the duty of the New York to stop and reverse. We think the rule laid down in the *Manitoba* has no application to the case at bar. In that case two vessels were approaching each other for a considerable time on slightly converging and nearly parallel courses, and, as the courses did not change, it was held the duty of each vessel to be cautious, to indicate by whistle its course, and to reduce speed and stop. In the case at bar, if we assume that the lookout of the New York saw all that he ought to have seen, he would have discovered that the Conemaugh was changing her course from one crossing that of the New York, and was swinging round into the wake of the tow, presumably for the purpose of keeping out of the New York's way by going to the starboard. For a time it is true that their courses might have been parallel, but only in the execution of this proper maneuver. We have no doubt that a lookout on the New York could have had the same view of the red light of the Conemaugh which the captains of the last two tows of the *Burlington* had as

the Conemaugh swung round into their wake, and might well have inferred therefrom that the Conemaugh was complying with her obligation to swing to starboard out of the way of the New York.

This conclusion of fact is important in considering the next point made in the petition for rehearing,—that the Conemaugh's two blast whistles were distinct indications of her intention to do what she did. In situations where a vessel is pursuing a course which the law gives her the right to take without the assent of another vessel, the whistle consistent with that course is to be regarded as a positive indication of her intention to pursue it. But we apprehend that, where a vessel has no right to pursue a particular course without receiving the assent of the vessel she is meeting, the whistles she uses to obtain that assent are merely invitations to an agreement contrary to the usual mode of passing, and are not to be taken as a distinct indication that, on failure to obtain the assent she seeks, she will violate the rules of navigation, at least until there is something additional in her conduct to justify such an inference. This distinction is a necessary corollary to the ratio decidendi of *The John King*, 1 U. S. App. 64, 1 C. C. A. 319, and 49 Fed. 469, and *The B. B. Saunders*, 23 Blatchf. 383, 19 Fed. 118. The captain and lookout of the New York, if they had seen and heard the Conemaugh, would have observed her swinging slowly to starboard in the wake of the last barges in the tow, although blowing signals of her intention, if assented to by the New York, of changing her course across the bows of that vessel. This was not a distinct indication of her intention to cross the bows of the New York as she did.

Other questions are made in the petition to rehear, but as they are mere repetitions of the arguments on the facts considered in the original opinion, and as they do not change our views, it is needless to state or discuss them. The petition is denied.

REED et al. v. NORTHERN PAC. RY. CO. et al.

(Circuit Court, D. Minnesota. May 7, 1898.)

REMOVAL OF CAUSES—FEDERAL QUESTION—LIABILITY ASSUMED BY DEFENDANT FROM NATIONAL CORPORATION.

A corporation purchasing a railroad at foreclosure sale in a federal court, and assuming as part of the consideration all liabilities incurred by the receivers of that court in their management, is not entitled to remove a suit to enforce such a liability, on the ground that it involves a federal question, because the receivers, if sued, could have removed the suit on that ground.

This is an action brought in a state court by Lathrop E. Reed and others, partners as Reed & Sherwood, against the Northern Pacific Railway Company and others. Defendant Reed removed the cause to this court, and it is now heard on a motion to remand.

D. F. Morgan, for plaintiffs.

C. W. Bunn, for defendants.

LOCHREN, District Judge. This action was commenced in the state district court, Anoka county, to recover of the defendant railway companies the value of a large quantity of lumber alleged to have been burned in plaintiffs' lumber yards in July, 1894, by fire negligently dropped or scattered from the locomotives of the Northern Pacific Railroad Company and the Great Northern Railway Company while passing the said yards. The Great Northern Railway Company is a Minnesota corporation, and the Northern Pacific Railroad Company was a federal corporation, organized under acts of congress, and at the time of the said fire its railroad and property was in the possession of and operated by receivers appointed by this court, and under decree in the same action in which said receivers were appointed the said railroad and property were sold to the defendant the Northern Pacific Railway Company, which is a Wisconsin corporation, and which by the terms of the sale became obligated to pay, as part of the consideration for its purchase, any liabilities contracted or incurred by the receivers before the delivery of the possession to it of the railroad property. The action was removed to this court upon the petition of the two railroad companies, defendants, upon the alleged ground that it is a suit "arising under the constitution or laws of the United States." The plaintiffs now move for an order remanding the cause to the state court, claiming that it is not such a suit.

Had the suit been brought against the receivers while they remained in the discharge of their functions, it would have been such a suit; as the corporation represented by them existed and derived its rights and powers from the laws of the United States, and the right to sue the receivers so appointed rested on the same laws. *Railway Co. v. Cox*, 145 U. S. 593, 12 Sup. Ct. 905; *Landers v. Felton*, 73 Fed. 311; *Cableman v. Railway Co.*, 82 Fed. 790. But the defendant the Northern Pacific Railway Company does not represent the Northern Pacific Railroad Company nor the receivers. It is liable, if at all, by virtue of the terms of its contract of purchase, by which it assumed the then pending indebtedness and liabilities of the receivers. If the Northern

Pacific Railroad Company had taken possession of a tract of land as owner, and one claiming better title had brought ejectment against that corporation in the state court, it might (if the value was sufficient) have removed the action to the federal court on the ground stated. But if the present Northern Pacific Railway Company, having received possession of the said land under its purchase aforesaid, were sued in ejectment for the recovery of the land, it could not remove the case on the ground stated into this court, merely because its title came from the other corporation. Neither do I think this cause can be so removed by the present Wisconsin corporation merely because it has assumed, as is claimed by the plaintiffs, a liability which once rested on said receivers.

The motion is granted, and it is directed that the cause be remanded to the state court from which it was removed.

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**TUG RIVER COAL & SALT CO. v. BRIGEL et al.**  
(Circuit Court of Appeals, Sixth Circuit. April 11, 1898.)

No. 557.

**1. FEDERAL COURTS—JURISDICTION—DIVERSE CITIZENSHIP.**

The citizenship which determines the jurisdiction of a federal court is that which existed at the time of commencement of the suit, and subsequent changes can neither divest nor confer jurisdiction.

**2. SAME—PARTIES.**

When jurisdiction vests at the commencement of suit over the indispensable parties, but its exercise is prevented by the presence of other proper parties over which the court cannot take jurisdiction, the names of such other parties may be stricken out, and the objection to the exercise of jurisdiction thereby obviated.

**3. SAME—AMENDMENT OF PLEADINGS.**

Where a federal court has jurisdiction over the parties and cause of action at the time suit is brought, the jurisdiction is not affected by subsequent amendments of pleadings relating to the cause of action.

**4. MORTGAGE—FORECLOSURE—PARTIES.**

The mortgagor and mortgagee are the only indispensable parties in a suit to foreclose a mortgage.

**5. CHANCERY PRACTICE—MASTER—FINDINGS OF FACT—EFFECT.**

In the absence of clear evidence of mistake of fact or error of law, a finding of fact by a master, concurred in by the court below, is binding upon an appellate court.

**6. SAME—COSTS.**

Where the final decree in an equity suit has been reversed by the court of appeals for want of the diverse citizenship necessary to the jurisdiction of federal courts, and the bill is subsequently amended so as to obviate that difficulty, and make a case proper for the court to proceed with, the general costs of the cause in the court below should be adjudged by the court on final hearing just as in the ordinary case. 73 Fed. 13, affirmed.

**7. EVIDENCE—PAROL TO WRITTEN CONTRACT.**

Evidence that a written contract, absolute on its face, was not intended to take effect except upon a certain condition, does not tend to contradict, add to, or vary the contract, but only to explain it, and is admissible.

Appeal from the Circuit Court of the United States for the District of Kentucky.

Bill was filed in the circuit court to foreclose a mortgage and trust deed, executed by appellant in favor of appellees, as trustees, to secure payment

of certain bonds issued and sold by appellant company, a corporation organized under the laws of Kentucky, and a citizen of that state. Complainant Brigel was a citizen of Ohio, and Murray a citizen of New York. The bill sought a sale of the property covered by the mortgage in bar of the equity of redemption. At the time of filing the original bill, there were creditors of the defendant, some holding claims for taxes paid, and others being judgment creditors with executions levied, and claiming junior liens thereby under the laws of Kentucky. A number of these creditors were made parties to the original bill, and it appeared from the record that the citizenship of one or more of them was of the same state with that of one of the complainants, and the citizenship of others was alleged to be unknown. The case having been brought before this court on appeal, the final decree was reversed for lack of necessary diverse citizenship to support the jurisdiction of the court, as the record then was. 31 U. S. App. 665, 14 C. C. A. 577, and 67 Fed. 625. When the case went back, the circuit court permitted an amendment of the bill, so as to dismiss the bill as to all parties except the appellees and appellant, so as to make the suit one of foreclosure only between the trustees as complainants, and the mortgagor company as defendant. A sale in bar of the equity of redemption was specially prayed for in both original and amended bills. Between the date of filing the original bill and the amendment thus allowed, Murray, one of the trustees, changed his citizenship from New York to Kentucky, and this fact was set up in a plea to the amended bill, raising objection thereby to the jurisdiction of the court. This plea, having been set down for hearing, was overruled by the court, and the defendant answered the amended bill. The case was then heard again upon a master's report as to debts, liens, and priorities, various creditors having intervened by petition. Sale was made under orders of the court, and from the final decree confirming the sale the case is again brought to this court by appeal. The opinion of the court disposing of the plea is published in 73 Fed. 13.

W. G. Hutcheson and Thomas F. Hargis, for appellant.

Walter A. De Camp and Thomas W. Bullitt, for appellees.

Before LURTON, Circuit Judge, and SEVERENS and CLARK, District Judges.

CLARK, District Judge, after stating the case, delivered the opinion of the court.

The question of jurisdiction raised must first be considered and determined. It is well settled that, if the necessary diverse citizenship exists at the time of commencement of the suit, no subsequent change of citizenship, although voluntary, will defeat the jurisdiction which once vested. *Morgan's Heirs v. Morgan*, 2 Wheat. 290; *Mollan v. Torrance*, 9 Wheat. 537; *Clarke v. Mathewson*, 12 Pet. 164; *Anderson v. Watt*, 138 U. S. 694, 11 Sup. Ct. 449. And where the jurisdiction of the circuit court has fully attached against the tenant in possession in an action of ejectment, substitution of the landlord as defendant will not affect the jurisdiction, although he may be a citizen of the same state with plaintiff. *Hardenbergh v. Ray*, 151 U. S. 112, 14 Sup. Ct. 305. The primarily interested and indispensable parties to the original bill were the appellees and appellant. There can be no doubt that there was jurisdiction over the bill so far as the trustees as complainants and the mortgagor company as defendant were concerned; and, if all other parties had been omitted, the jurisdiction would have been too clear to admit of question. The presence of the other parties, and the relief sought against them, constituted an impediment to the exer-



cise of the jurisdiction otherwise rightfully attaching. It is well settled now that these subsequent lienholders were not indispensably necessary parties to the original bill. The dismissal as to them enabled the court to retain the jurisdiction which rightly belonged to it, and merely removed an impediment to the exercise of that jurisdiction.

In *Conolly v. Taylor*, 2 Pet. 556, bill was filed in the circuit court of the United States for the district of Kentucky by aliens and a citizen of Pennsylvania against citizens of Kentucky and a citizen of Ohio, on whom process was served in Ohio. As between the citizen of Pennsylvania and of Ohio, neither of them being a citizen of the state in which the suit was brought, the court could exercise no jurisdiction, though its jurisdiction as between the alien plaintiffs and the defendants could not be questioned. Before the cause was heard, the name of the citizen plaintiff was struck out of the bill, and the question was whether the original defect was cured by this change, and whether the court could proceed to a final decree with the parties then left in the case. The defendant contended by way of argument that, if an alien becomes a citizen pending the suit, jurisdiction is not divested by this circumstance, and so, if one citizen sued another citizen of the same state, jurisdiction could not be given to the court by the citizen who brought the suit removing and becoming a citizen of a different state; and in reply to this contention Mr. Chief Justice Marshall, delivering the judgment of the court, said:

"This is true, but the court does not understand the principle to be applicable to the case at bar." "Where there is no change of party, a jurisdiction depending on the condition of the party is governed by that condition as it was at the commencement of the suit. The court, in the first case, had complete original jurisdiction; in the last it had no jurisdiction, either in form or substance. But, if an alien should sue a citizen, and should omit to state the character of the parties in the bill, though the court could not exercise its jurisdiction while this defect in the bill remained, yet it might, as is every day's practice, be corrected at any time before the hearing, and the court would not hesitate to decree in the cause. So in this case. The substantial parties plaintiffs—those for whose benefit the decree is sought—are aliens, and the court has original jurisdiction between them and all the defendants. But they prevented the exercise of this jurisdiction by uniting with themselves a person between whom and one of the defendants the court cannot take jurisdiction. Strike out his name as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the court possessed between the alien plaintiffs and all the citizen defendants. We can perceive no objection, founded in convenience or in law, to this course."

The principle declared in this case was reaffirmed and applied in *Vattier v. Hinde*, 7 Pet. 252, in which the bill had been dismissed as to a defendant and the jurisdictional defect cured. In this case Mr. Chief Justice Marshall said:

"It is impossible to draw a distinction, so far as respects jurisdiction, between striking out the name of a plaintiff and of a defendant. The citizen of Ohio may have been a more necessary party in the cause than the citizen of Pennsylvania. Had it been otherwise, the same principle which sustained the one alteration would have sustained the other."

See, also, *Carneal v. Banks*, 10 Wheat. 181.

Bill was filed in the circuit court for the Southern district of Alabama by citizens of Texas against defendants, all of whom were citizens of Alabama, except two of the defendants, who were also citizens of Texas. Objection was taken in the circuit court to its jurisdiction on account of the residence of these two defendants in the same state with the complainants, and the court, in its final decree, directed the bill to be dismissed as to these two defendants, as not being essential parties to the suit by the complainants. The supreme court of the United States, in disposing of this objection, said:

"The objection to the jurisdiction of the court that two of the defendants were residents of Texas, the same state with the complainants, was met and obviated by the dismissal of the suit as to them. They were not indispensable parties; that is, their interests were not so interwoven and bound up with those of the complainants or other parties that no decree could be made without necessarily affecting them. And it was only the presence of parties thus situated which was essential to the jurisdiction of the court. The rights of the parties, other than the defendants who were citizens of Texas, could be, and were, adequately and fully determined without prejudice to the interests of those defendants. And the question always is, or should be, when objection is taken to the jurisdiction of the court by reason of the citizenship of some of the parties, whether to a decree authorized by the case presented they are indispensable parties, for, if their interests are severable, and a decree without prejudice to their rights can be made, the jurisdiction of the court should be retained, and the suit dismissed as to them." *Horn v. Lockhart*, 17 Wall. 570.

It is very clear, therefore, that the circuit court properly allowed the amendment, and that the amendment, when made, related to the commencement of the suit, for otherwise the amendment would be ineffectual to remove the impediment, and would, as was justly observed by the learned circuit judge, be without meaning. This must be so, for it is well settled in these and other cases that jurisdiction depends upon the state of things at the time the suit is brought.

In *Anderson v. Watt*, 138 U. S. 707, 11 Sup. Ct. 449, the supreme court, referring to the previous case of *Conolly v. Taylor*, said:

"This court held that jurisdiction depended upon the state of the parties at the commencement of the suit, which no subsequent change could give or take away; that, if an alien became a citizen pending the suit, the jurisdiction which was once vested would not be divested; and, so, if a citizen sued a citizen of the same state, he could not give jurisdiction by removing and becoming a citizen of a different state; but that, just as the omission to state the character of parties might be corrected at any time before hearing, so by an amendment made by striking out the person whose presence as a complainant prevented the exercise of the jurisdiction, the impediment could be properly removed."

The principle on which the decisions proceed is that, when jurisdiction vests at the commencement of the suit over the indispensable parties to a decree, but the exercise of jurisdiction is prevented by the presence of other proper and material parties, the names of such other parties may be stricken out, and the objection to the exercise of jurisdiction thereby obviated. See *Sioux City Terminal R. & W. Co. v. Trust Co. of North America*, 27 C. C. A. 73, 82 Fed. 124.

We have said that the mortgagee and mortgagor were the only indispensable parties to a bill simply to foreclose. The proposition was stated in the late case of *Davis v. Trust Co.*, 152 U. S. 594, 14 Sup. Ct. 693, in this language:

"In a decree for the foreclosure of a mortgage the two parties principally and primarily interested are the mortgagee and the mortgagor."

And, as has been observed, neither prior nor subsequent lienholders are necessary parties to such a bill where the relief sought does not go beyond foreclosure against the mortgagor. *Wabash, St. L. & P. Ry. Co. v. Central Trust Co. of New York*, 23 Fed. 513; *Jerome v. McCarter*, 94 U. S. 734; *Howard v. Railway Co.*, 101 U. S. 837; 1 *Fost. Fed. Prac.* § 52; 1 *Beach, Mod. Eq. Prac.* § 74. And where the court, at the commencement of the suit, has jurisdiction by reason of the citizenship of the parties, this jurisdiction is not, as a rule, affected by amendments relating to the cause of action.

In *Green v. Custard*, 23 How. 484, suit had been instituted in the state court by Custard, a citizen of Texas, against Green, a citizen of Massachusetts, to recover a balance due on a judgment. The suit was by attachment. The case was, on Green's application, removed into the district court of the United States. After removal, Custard, by amendment, as the court said, "set forth an entirely new cause of action," basing the right to recover on a note. The court thereupon remanded the case upon the ground that the amendment made a case within the proviso to the eleventh section of the original judiciary act, restricting the jurisdiction of the United States courts. On writ of error the judgment was reversed. The principle deducible from this case is that, where the circuit court of the United States has jurisdiction over the parties and cause of action when the suit is brought, the jurisdiction is not affected or defeated by any amendment of the pleadings changing the cause of action. But the contention by the defendant that the amended bill was the commencement of a new suit is entirely untenable. This is already sufficiently apparent from what we have said of this amendment and the character of the suit as left by the amendment. All the features of the suit as an ordinary foreclosure bill remained just the same as when the suit was first instituted, and with the mortgagees and mortgagor as the only parties. The amendment only eliminated from the case parties not necessary to the foreclosure suit with the relief sought against them. And what has been thus said in regard to the amended bill is applicable to the second amendment, by which the defendant Gordon was brought in for the purpose of having his rights settled in this suit. It is clear that Gordon might have been joined with the mortgagor company as a defendant to the original bill, and jurisdiction over the suit as between the trustees as complainants and the appellant and Gordon as defendants would have been entirely clear. The purpose and effect of the amendment bringing in Gordon were to enable the court to give to the purchaser a perfect title, and this amendment was strictly in aid of the proper purpose of the original bill, and to obtain full relief thereunder.

The objection to jurisdiction on account of this amendment cannot be sustained.

We are thus brought to the merits of the case, which do not seem to require extended discussion. A question presented by the assignments of error is whether or not the real ownership of bonds held by Charles E. Brigel was in him or his father, Leo Brigel, one of the trustees in the mortgage. The contention of the appellant in the court below and here was and is that these bonds were bought by, and in fact belonged to, Leo Brigel, the trustee, and that they were purchased in the name of the son fraudulently, and for the purpose of covering up the real ownership thereof. Leo and Charles E. Brigel testify that the bonds belonged to the son, and not to the father, and in this they are supported by other circumstances not necessary to be detailed. The defendant relied mainly on circumstantial evidence to show that in fact the bonds were the property of the father, and not the son. The relationship, lack of sufficient means in the son with which to make the purchase, the part taken by the father in bringing about the purchases and in going the son's security for payment, and other circumstances, are relied on. The case was referred to a special master for the purpose of a full report as to all debts against the company, and also with direction to report the outstanding bonds secured by the mortgage, the amounts of these bonds, and by whom held and owned. The special master reported these bonds as belonging to Charles Brigel, and on exception duly taken the circuit judge concurred with the special master in this finding of fact. Under such circumstances, in the absence of very cogent evidence of a mistake of fact, or of some error of law, this finding of fact by the master, concurred in by the circuit court, must be accepted by this court as final. *Belknap v. Trust Co.*, 47 U. S. App. 663, 26 C. C. A. 30, and 80 Fed. 624; *Emil Kiewert Co. v. Juneau*, 47 U. S. App. 395, 24 C. C. A. 294, and 78 Fed. 708; *Turley v. Turley*, 85 Tenn. 251, 1 S. W. 891; *Davis v. Schwartz*, 155 U. S. 631, 15 Sup. Ct. 237; *Crawford v. Neal*, 144 U. S. 585, 12 Sup. Ct. 759. It is only necessary to say that an examination of this record fails to disclose any such state of proof as would warrant us in disagreeing with the conclusion thus reached by the master and the circuit court. This conclusion that Charles E. Brigel, and not Leo, is the real owner of the bonds, renders it unnecessary for us to consider or determine to what extent and with what rights as between himself and the mortgagor company Leo Brigel might purchase bonds secured by the mortgage because of his trust relation to the mortgagor company.

Another contention by the defendant is that by a certain contract dated September 21, 1891, signed by the appellant company, Leo A. Brigel, and Thomas F. Hargis, the right to foreclose the present mortgage was suspended. The position is that Leo Brigel agreed that out of the proceeds to be collected under suits contemplated by that contract the bonds were to be first satisfied, and that Brigel, having failed and refused to carry out the contract, cannot insist on foreclosure for the satisfaction of the bonds. A complete

answer to this contention is found in the conclusion that Charles E. and not Leo A. Brigel is the owner of the bonds, for, this being so, it was not within the power of Leo Brigel to affect the rights of Charles E. Brigel in respect to these bonds. But, aside from this, we fully agree with the conclusion of the circuit court that the weight of evidence establishes that Leo Brigel signed this contract on the express condition that it was not to take effect, or become binding on him, until submitted to and approved by his attorney, who was not at the time present; and that, when advised by his attorney that the contract was void as against public policy, he promptly gave notice that he would not execute the contract on his part, and that the same was abandoned by the appellant through its president, Barrett. It is insisted that the evidence offered to show that the contract was signed upon this condition was not admissible under the rule, which does not permit a written contract to be contradicted, varied, or added to by parol testimony. One difficulty with this position is the lack of proper objection to the testimony when offered in the court below. *The Cayuga*, 16 U. S. App. 577, 8 C. C. A. 188, and 59 Fed. 483. But, passing by this, the objection is clearly not good. The testimony did not tend to contradict, add to, or vary the written contract, but only to show that the contract precisely as made was to take effect and become binding only upon a condition which was never satisfied. *Ware v. Allen*, 128 U. S. 590, 9 Sup. Ct. 174, is directly in point. The question arose in that case in relation to a promissory note. Testimony was offered to show that, before the paper was signed or agreed upon, it was understood that it was to be of no effect unless, upon consultation with their attorney, the defendants were assured that the proceeding was a lawful one, and that an attachment could be enforced. The court said, in effect, that the case was clearly one of that class well recognized in law by which an instrument, whether delivered to a third person as an escrow or to the obligee in the instrument, is made to depend as to its going into operation upon events to occur thereafter, and that parol evidence was admissible to show that the execution or delivery of the written instrument was conditional, and not to take effect until such subsequent event should take place, although the written instrument was absolute on its face. So, in *Burke v. Dulaney*, 153 U. S. 228, 14 Sup. Ct. 816, it was held that in an action by the payee of a negotiable promissory note against the maker, evidence was admissible to show a parol agreement between the parties, made at the time of the making of the note, that it should not become operative as a note until the maker could examine the property for which the note was given, and determine whether he would purchase it. This is a well-settled general rule of evidence in relation to all contracts under which it may be shown that there was a condition precedent which has not been fulfilled in order to avoid the effect of a contract. 2 Tayl. Ev. § 1135; 2 Jones, Ev. §§ 478, 507. We are not required, in dealing with this case, to consider what difference there may be in the application of the rule to negotiable and nonnegotiable paper, nor how far the rule which permits such

evidence is limited to the original parties to the contract, as the question here arises between the original parties to this contract.

Another objection made is to the judgment recovered in the Martin circuit court by Leo Brigel against appellant for \$5,057. This objection was properly overruled by the special master and the circuit judge. The defendant company suffered the judgment to be taken in the name of Leo A. Brigel, and the legal title to the judgment and the right to recover are clearly in Brigel; and whether or not, as between Brigel and any third party, the beneficial interest in the judgment belongs in equity to such party, is a question with which we are not concerned here. This view renders it immaterial to inquire how far this objection was waived by the finding of the court as to what judgments there were, and the owners of such judgments, which finding is recited as having been made "with the consent of all parties." This review of the case disposes of all of the objections chiefly relied on by the defendant for a reversal of the decree. The circuit court properly construed the mandate of this court in relation to the disposition to be made of the costs of the cause in the court below. When complainants so amended their bill as to remove the jurisdictional objection, and make a case proper for the court to proceed with, the general costs of the cause in the court below were left to be adjudged by the court on final hearing, just as costs in the ordinary case. We find no error in the action of the court below, and the decree is accordingly affirmed.

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DENNEHY et al. v. McNULTA et al.

(Circuit Court of Appeals, Seventh Circuit. May 2, 1898.)

No. 424.

**1. CONTRACTS — ILLEGAL CONDITION AS CONSIDERATION — EFFECT OF NONPERFORMANCE.**

Rebate vouchers issued by a distilling company to customers, by which it promised to refund a certain sum per gallon on their purchases at the end of six months, on condition of their purchasing exclusively from the company during that time, cannot be enforced, either at law or in equity, where the condition has not been performed, though such condition be illegal, as in restraint of trade; there being no other consideration for the promise. 23 C. C. A. 415, 77 Fed. 700, affirmed.

**2. MONOPOLIES — ILLEGAL COMBINATION TO CONTROL BUSINESS — LEGALITY OF CONTRACTS.**

One purchasing liquors from an illegal combination of distillers, which controls the market and prices, though impelled thereto by business needs and policy, enters into the contract voluntarily, and cannot retain the goods, and recover the price paid, or any part of it, either on the ground that the combination was illegal, or the price excessive. 23 C. C. A. 415, 77 Fed. 700, affirmed.

Appeal from the Circuit Court of the United States for the Northern District of Illinois.

The appellants filed claims for allowance against the funds in court in the consolidated causes against the Distilling & Cattle-Feeding Company, of which sufficient description appears in the case of Distilling Co. v. McNulta (decided by this court Jan. 4, 1897) 46 U. S. App. 578, 23 C. C. A. 415, and 77 Fed. 700.

(1) The claims of Dennehy & Co. were presented by petition in their name, and consisted of 91 written instruments, called rebate certificates or vouchers, issued by the Distilling & Cattle-Feeding Company to Charles Dennehy & Co., aggregating the sum of \$5,238.23. The instruments are of various dates, numbers, and amounts, and in form as follows, with appropriate insertions in the blank spaces, respectively:

"Peoria, Ill., —, 189-. No. —

"Subject to the conditions named herein, and for the purpose of securing the continuous patronage of the within-named purchaser, the successors and assigns of the same, for its products, the — Distilling & Cattle-Feeding Co., six months from the date of this purchase voucher, will pay to Charles Dennehy & Co., of Chicago, purchaser, — dollars (\$—), being a rebate of seven cents per proof gallon on — proof gallons of the Distilling and Cattle-Feeding Company's product purchased this day. This voucher will be valid and payable only upon condition that the above-named purchaser, the successors and assigns of the same, from the date of this voucher to the time of its payment, shall have bought their supply of such kinds of goods as are produced by the Distilling and Cattle-Feeding Company, and all compounds thereof, exclusively of one or more of the dealers named on the back thereof, until further notified, and shall also have subscribed to the certificate on the back hereof.

"Distilling and Cattle-Feeding Co.,

"By J. B. Greenhut, President.

"Not transferable nor negotiable.

"When due, forward to the German-American National Bank of Peoria, Ill., where this voucher is payable without exchange or other charge."

Printed upon the back is the following indorsement: "It is hereby certified that from the date of this voucher to the maturity thereof the within-named purchaser, and the successors and assigns of the same, have purchased all of their supply of such kind of goods, and their compounds, as are produced by the Distilling and Cattle-Feeding Co., exclusively from one or more of the dealers named hereon." Appended thereto is a list of 61 dealers or distillers referred to, variously located throughout the United States.

(2) The petition of Moses Salomon sets up that he is the assignee of sundry judgments rendered in justices' courts against the Distilling & Cattle-Feeding Company, and also the holder of vouchers on which said judgments were rendered; but it appeared, and was undisputed, that appeals from the judgments were perfected and pending, whereby the judgments became ineffective; and thereupon the petitioner introduced 47 certificates or vouchers issued to Stein Bros., of various dates, numbers, and amounts, aggregating the sum of \$3,604.64, and similar in form and tenor to the instrument above described, except that in a portion thereof the rebate was named at "five cents per proof gallon," instead of seven cents, as recited in the sample form, and the words, "Not transferable nor negotiable," do not appear, from the record, to have been printed or stamped thereon.

It is not claimed that the payees or holders in either case complied in any respect with the conditions named in the voucher. On the contrary, it appears, and is conceded, that there was neither compliance nor attempt to perform the condition. It further appears that no interest is in fact asserted by either of the payees named in the vouchers; but that (1) the Dennehy & Co. vouchers were indorsed in blank, without recourse, by that corporation, delivered to the United States Distilling Company, and were subsequently delivered to one G. E. Jones, for whose benefit, as finally divulged, the claim was filed in the name of the original payees; and (2) that the vouchers issued to Stein Bros. were by them indorsed payable to the order of one Joseph Wolf, without recourse, and by the latter indorsed in blank, and delivered to the petitioner, Salomon, an attorney at law, under an arrangement that Salomon should bear all expenses, and receive one-half of any amount realized.

The hearing upon the claims was before a special master, who reported to the circuit court "the testimony and evidence, with his conclusions thereon." Aside from the matters above recited, voluminous testimony was introduced on behalf of the claimants, directed to showing that the Distilling & Cattle-Feeding Company, as organized and conducted, was a combination of a large percentage

of the distillers of the country,—asserted to be 85 per cent. thereof,—constituting an illegal trust, monopolizing and controlling the product of the country in that line to the extent of nearly 90 per cent.; that the system of rebate vouchers in evidence was entered into and designed to carry out and secure the purposes of the monopoly; that, through this control of the major share of distillery products, it was deemed a business necessity on the part of Dennehy & Co., Stein Bros., and other dealers throughout the country, to make all their purchases in that line from the distributors of the combination; or, as stated in the argument of their counsel, it became “impracticable and detrimental to their trade to buy liquors elsewhere,” in the face of the monopoly; but it also appears that an independent and accessible supply existed in fact. The conclusions of the special master were against the allowance of the claims in both cases. Exceptions filed by each claimant were subsequently heard and overruled in the circuit court, the report of the special master in each case was confirmed, and final decree entered accordingly. The opinion thereon, by Showalter, Circuit Judge, is reported in 77 Fed. 265.

Moses Salomon, for appellants.

Levy Mayer, for appellees.

Before WOODS and JENKINS, Circuit Judges, and SEAMAN, District Judge.

SEAMAN, District Judge, after stating the case as above, delivered the opinion of the court.

Passing technical objections to consider this controversy upon the merits, it is manifest that no liability is chargeable against the Distilling & Cattle-Feeding Company, except upon one or the other of the following propositions: (1) That the conditions contained in the vouchers may either be ignored or set aside for illegality, and the promise thus segregated may be enforced without performance of the conditions; or (2) that in the original transactions money was paid to this corporation under circumstances from which the law raises an implied promise of repayment, within the doctrine of money had and received, which, *ex æquo et bono*, belongs to the party by whom it was so paid. Under either head, the mere fact that the corporation, as one of the contracting parties, may constitute an unjust monopoly, and that its general business is illegal,—a status apparently held in *Distilling & Cattle-Feeding Co. v. People*, 156 Ill. 448, 41 N. E. 188,—cannot serve, *ipso facto*, to create default or liability on its contracts generally; nor can such fact be invoked collaterally to affect in any manner its independent contract obligations or rights. *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352, 355, 56 N. W. 864.

1. Can a cause of action be predicated upon the written agreement? In substance, the instrument promises that, “subject to the conditions named,” and “for the purpose of securing the continuous patronage” of the purchaser as payee thereof, the Distilling & Cattle-Feeding Company will, in six months after date, pay to the purchaser the amount named, “being a rebate of seven [or five] cents per proof gallon” on a purchase that day made, and to be “valid and payable only on condition” that the purchaser named, his successors and assigns, from date of the voucher to the time of payment, “shall have bought their supply of such goods as are produced” by the promisor corporation “exclusively from one or more of the dealers named on the back,” and “shall also have subscribed to the certificate on the back.” The terms are une-



quivocal that the promise was not to bind the corporation unless the promisee performed the acts stated. In other words, the obligations of the contract are dependent upon a condition precedent; and there can be no default by the promisor without performance of the condition, unless waived or excused by acts or conduct on the part of the promisor. Under the contract in question, compliance with the conditions was neither obstructed on the one side, nor attempted on the other, and it is manifest that no right of action at law has accrued in favor of the promisees. In view of this status, the appellants contend that the claims are entitled to equitable consideration, because (1) they are presented in the course of a proceeding in equity; and (2) this condition is affixed to the contract as a means by which to carry out the illegal purposes of a monopoly operating in restraint of trade, and for that reason a court of equity should either disregard the condition, or strike it out. But assuming, for the argument, that both premises are well taken, no relief can then be granted for enforcement of the contract, as no consideration is left to support the promise. The condition is the sole consideration for the promise, and, if that is illegal, the promise falls with it. Even if the consideration were invalid only in part, the same result would follow, the promise being indivisible. *Bish. Cont.* §§ 74, 487; 3 *Am. & Eng. Enc. Law*, 886; *Greenh. Pub. Pol.* rule 24. No element of the contract as actually made between the parties remains to be enforced. A court of equity cannot make a new contract for them, nor can it destroy the substance of the one which they have entered into, and at the same time preserve the contract obligation. Recovery upon the vouchers in question, with the conditions unfulfilled, would have that effect, and must be denied in equity as well as in law. *Klein v. Insurance Co.*, 104 U. S. 88, 91.

2. The second and final proposition calls for the application of the equitable doctrine on which *assumpsit* may be maintained as for money had and received, and the right to this remedy must be found in the original transactions and circumstances under which the payments were made to the Distilling & Cattle-Feeding Company. These were, on their face, simple contracts of bargain and sale, and the only payments referred to were made upon distinct purchases of supplies at stipulated prices. The goods were legitimate subjects of trade, and there was no illegality in the nature of the contract of purchase. There is no pretense that the purchaser was either deceived or mistaken. On the contrary, his purchase, so far as appears, was in exact compliance both with his expectations and his bargain. It is not asserted that fraud entered directly into any of these transactions; nor is there impeachment for any cause, except upon the hypothesis for which the appellants contend, by way of collateral attack namely: (1) That an unlawful combination enabled the seller to control and arbitrarily fix prices upon nine-tenths of the distillery products of the country; (2) that the exigencies of business on the part of the purchasers constrained them to deal with this combination; (3) that the amount named in the vouchers as rebate was beyond the fair price, and a distinct addition to the price which was imposed and withheld to secure continuance of the trade. And upon the line of testimony introduced as tending in some measure to show this state

of facts the appellants rest their right to recover the alleged excess in the prices paid, as money paid under constraint or duress. Without considering whether the testimony referred to was either admissible under the issues, or of the effect alleged, and conceding, for the purposes of the case, the truth of each of the above propositions of fact, there can be no recovery of the money so paid, for the reason that no actual duress is shown, and no element exists to make the payment involuntary or compulsory. *Radich v. Hutchins*, 95 U. S. 210, 213; *Lonergan v. Buford*, 148 U. S. 581, 590, 13 Sup. Ct. 684; 6 Am. & Eng. Enc. Law, 57, tit. "Duress," and cases cited. In *Radich v. Hutchins*, supra, it is said:

"To constitute the coercion or duress which will be regarded as sufficient to make a payment involuntary, \* \* \* there must be some actual or threatened exercise of power possessed, or believed to be possessed, by the party exacting or receiving payment, over the person or property of another, from which the latter has no other means of immediate relief than by making the payment. As stated by the court of appeals of Maryland, the doctrine established by the authorities is that 'a payment is not to be regarded as compulsory, unless made to emancipate the person or property from an actual and existing duress imposed upon it by the party to whom the money is paid.' *Mayor, etc., v. Lefferman*, 4 Gill, 425; *Brumagim v. Tillinghast*, 18 Cal. 265; *Mays v. Cincinnati*, 1 Ohio St. 268."

In the case at bar neither the persons nor the property of the purchasers were within the physical control of the sellers when the contracts of purchase were entered into, or when the payments were made thereupon, and in the eye of the law the transactions were voluntary. At the utmost, the circumstances here assumed show an urgent need for the goods to keep up their stock and continue in trade, and to that end a business necessity to make their purchases from the illegal combination, because it so far controlled the market that they had reason to fear disastrous results if supplies were sought elsewhere. However urgent this need may have seemed for preservation of business interests, it cannot operate to change the payment made upon such purchases from the voluntary character impressed by the contract into the involuntary payment which may be reclaimed. *Emery v. City of Lowell*, 127 Mass. 138, 140; *Custin v. City of Viroqua*, 67 Wis. 314, 320, 30 N. W. 515, and cases cited; 6 Am. & Eng. Enc. Law, 71. As the purchaser elected to take the goods upon the terms fixed, and with all the circumstances in mind, his rights must be measured by the contract, and not by the motives which influenced either party to enter into it. If the seller took advantage of his necessities, and made the price excessive, it would be subversive of the well-established rules which govern contract rights to receive testimony of such circumstances, to so modify the terms agreed upon, and allow recovery of the excess in price. In the case of an injurious combination of the nature asserted here, the remedy is by well-recognized and direct proceedings; but one who voluntarily and knowingly deals with the parties so combined cannot, on the one hand, take the benefit of his bargain, and, on the other, have a right of action against the seller for the money paid, or any part of it, either upon the ground that the combination was illegal, or that its prices were unreasonable. We are of opinion that no foundation is established for either set of claims, and the decree thereupon is affirmed.

## UNITED STATES v. TAFFE.

(Circuit Court, D. Oregon. April 29, 1898.)

No. 2309.

## CONDEMNATION—REMOTE AND SPECULATIVE DAMAGES.

In a proceeding to condemn a right of way for a boat railway over defendant's land, the injuries likely to result to his fishing grounds are too conjectural to be the basis of an award; and the possibility of its construction being followed by a change in the track of a railroad company, so as to injure defendant's shipping facilities, is too remote to be considered as a consequence of the proposed use of the land.

John H. Hall, for the United States.

Dolph, Mallory & Simon and Nixon & Dolph, for defendant.

BELLINGER, District Judge. This is a proceeding to condemn a right of way for a boat railway over defendant's lands. There have been two trials, resulting in verdicts which were set aside as excessive. 78 Fed. 524, 86 Fed. 113. The matter is now submitted, upon a stipulation of the parties, to the judge of this court, the parties stipulating to abide by his decision "as a sole arbiter and judicial tribunal" in the premises. The land condemned is of nominal value, unless its use as a right of way is to be considered. Aside from this, the claim for compensation is based upon injuries that will result to defendant's fishing rights and interests, by the work of constructing the boat railway, by changes in the high water channel of the river caused by an embankment for the roadbed, by interference with the prospective working of a gold mine on the premises, and by the proposed change in the railway track of the Oregon Railway & Navigation Company at that point.

There is no testimony legitimately tending to show a prospective demand for further rights of way, and I am of the opinion that the defendant is not entitled to anything on such account. As to the injuries likely to result from the work of building the boat railway, and from the effect of the proposed embankment upon the run of fish to defendant's fish wheels, these are purely conjectural. It cannot be known that the work of construction at that point will be carried on during the fishing season, and, if so, for what length of time, nor the effect of such work if prosecuted during the fishing season, nor the effect of the proposed roadbed upon the run of fish going to defendant's fish wheels. Nothing could be more uncertain or speculative than the damages that may result from these causes. Such damages are to be classed as possible or imaginary damages, for which no award can be made.

In the last trial the claim to compensation on account of defendant's gold mine was given small consideration by defendant, and was, in effect, abandoned by him in his testimony; nor is there anything in the case to warrant an award of damages on that account. He testified that the prospecting done by him resulted in obtaining several colors; "but it was very light colors,—very small. You would have to take a double magnifying glass to detect it."

"Q. It was not enough to justify you to go to any expense for the

purpose of placer mining it? A. No; nor I have never had time since, nor I would not go to any expense either until I found out that there was more gold in it than I have ever discovered; but I have never tried since."

The proposed change in the track of the Oregon Railway & Navigation Company, if made, will cause great inconvenience and damage to defendant in the loss of existing facilities for the shipment of his product, unless the company operates a spur track at that point for defendant's accommodation; and the question arises whether such damage is to be assessed as a result of the proposed condemnation. Whether or not there will be a change in the railroad at this point depends upon the voluntary action of the company. The government does not assume to have authority to make such change. It appears that the proposed change would straighten the road at that point, and would be to the interest of the company, and in keeping with a policy of improvement adopted by it; and it is upon such an inducement that the company is expected to permit its line to be changed. If, upon such an inducement, the company should change its line, or permit a change to be made, this could not be held to be a consequence of the use which is to be made of the land sought to be condemned in this proceeding. Damages to be recovered must be such "consequential damages, direct in their nature, as will naturally arise from the use to which the property condemned is to be put." A change in the railroad does not follow as a consequence of the proposed use of the land condemned; and, furthermore, the withdrawal of the railroad shipping facilities now enjoyed by defendant does not follow as a consequence of a change of the railroad, if made. The proposed boat railway will leave the present railroad track intact for use as a switch or spur, connecting defendant's cannery with the main railway track as changed. If defendant has a vested right to these facilities, as argued on the trial, the railroad company will not be prevented, by the construction and operation of the boat railway, from continuing them. If he has such right, he will not be damaged by what is proposed, unless the railroad company fails in its obligation to him, in which case he has his remedy by an action at law. On the other hand, if he is without such vested right, his damages are, in my opinion, within the category of those damages for which there is no redress,—*damnum absque injuria*; and in any event, as already shown, they are not a consequence, direct in their nature or otherwise, of the use for which the proposed condemnation is intended.

Upon these conclusions, the defendant is not entitled to compensation in respect to any of the matters referred to. In my judgment, the damages to defendant consequent upon the taking and use to be made of the land in question will not exceed \$1,000; and I find in his favor for that sum.

**HANSEN v. BALTIMORE PACKING & COLD-STORAGE CO. et al.**

(Circuit Court, D. Minnesota. April 30, 1898.)

**1. SALE—RESCISSION BY PURCHASER—FAILURE TO DELIVER.**

Failure of a seller to deliver one of several separate articles covered by a contract of sale will not entitle the purchaser to a rescission.

**2. SAME—FALSE REPRESENTATIONS—EXPRESSION OF OPINION.**

A statement of a seller of an interest in property to be transferred to a fishing company, which it was agreed as a part of the contract of sale should be formed by the parties, of the number of pounds of fish that could be taken by the new company in a season, was not a representation, but merely an expression of opinion, upon which the purchaser had no right to rely.

**3. CAVEAT EMPTOR.**

A purchaser of property which was open to his inspection cannot rescind because of defects which he might have seen.

**4. SAME—ESTOPPEL TO CLAIM RESCISSION.**

A purchaser of property to be used in a business, who, after learning its true condition, retains and uses it until he ascertains that the business will result in loss, cannot then obtain a rescission on the ground of misrepresentation by the seller.

This is a suit in equity by Ferdinand Hansen against the Baltimore Packing & Cold-Storage Company, Edward T. Le Clair, and John F. Locke. Heard on the pleadings and proofs.

Koon, Whelan & Bennett, for complainant.

C. S. Jelley and Harrison & Noyes, for defendants.

LOCHREN, District Judge. Complainant seeks the rescission of a contract expressed in two writings made and dated on the 11th day of September, 1895, whereby he purchased, nominally, of the defendants Edward T. Le Clair and John F. Locke, using the firm name and style of the "Reid Fish Company," one-half interest in the business, plant, and property of the said Reid Fish Company, of all kinds, at Rat Portage, and other places in the district of Rainy river, for the sum of \$15,000, payable as stated in said writings; and whereby, further, the parties to said writings agreed that they would form a Canadian corporation, to be called the "Rat Portage Fish Company, Limited," for the purpose of carrying on general fish business in said district of Rainy river, and would transfer to such new corporation the whole of their stock in trade, plant, outfit, and real and personal property, at Rat Portage, and elsewhere in said district, used in the fish business; and that one-half of the stock of such Canadian corporation, when formed, should be allotted to said Ferdinand Hansen, or such person as he might designate, and the other half to the other parties to said contract; and that the Rat Portage Fish Company, when incorporated, should carry on the fish business in said district; and that said Ferdinand Hansen should purchase all caviar manufactured by it, at the price of \$35 per standard keg, paying also the cost of the kegs and of making the caviar, and that the other parties to said writings should purchase all fish which the same company should have for sale at the price of three cents per pound; and that agreements

for such purchase of caviar and fish should be made with the Rat Portage Fish Company, when incorporated.

At the time of said transaction the defendant Locke was, and has since been, the president of the defendant the Baltimore Packing & Cold-Storage Company, a Minnesota corporation, doing business at Minneapolis, in the state of Minnesota, and elsewhere, and the defendant Le Clair then was, and since has been, the manager of the same corporation, and the same corporation was the real owner of the business, plant, and property of all kinds of the Reid Fish Company aforesaid, the title to which was held for its use by said Locke and Le Clair, and the said sale to Ferdinand Hansen, and the agreements with him connected with said sale, were, on behalf of the same corporation, negotiated and made by said Le Clair as its manager, although in his own name and that of said Locke, and in the name of the Reid Fish Company; and all the consideration paid therefor by said Ferdinand Hansen was received by the said Baltimore Packing & Cold-Storage Company, to its own use. Ferdinand Hansen, the complainant, was the son of the senior member of the firm of Hansen & Dieckmann, dealers in fish and caviar at Hamburg, and nephew of the senior member of the firm of Dieckmann & Hansen, engaged in the same business at New York. He was a German, and in 1895 was 26 years of age, and had never been engaged in business for himself, but for some two years had been buying, for the said New York and Hamburg firms, caviar and some fish, upon the Delaware river, Lake of the Woods, and upon the Pacific coast, and at other places in the United States and dominion of Canada. In the spring of 1895 the complainant, then engaged in the purchase of caviar for said Hamburg and New York firms, called upon said Baltimore Packing & Cold-Storage Company, at Minneapolis, and conferred with said Le Clair, its manager, about the purchase of its caviar made at the Lake of the Woods; and was informed that the caviar for that year had been contracted to Neilson Bros., of Sandusky, Ohio, who were connected with said Baltimore Packing & Cold-Storage Company in fishing plants on the American side of said lake; and, upon the statement by said Hansen of his desire to arrange for the purchase of caviar to be made in the following year, he was informed by said Le Clair that he had a plan in view for a company to operate a fishing plant on the Canadian side of that lake, but was not then prepared to state the details, as licenses to fish, which would only be granted to Canadian subjects, must be obtained from the Canadian government, and that any connection of other persons with the enterprise must be kept secret, but that Hansen could obtain the caviar that would be made by that company by becoming an owner of its stock. Hansen arranged with said Le Clair to be kept informed of the progress of the enterprise, and while he was at the Lake of the Woods, and in Manitoba and in Oregon, up to the beginning of September, 1895, letters and telegrams passed between Le Clair and Hansen relative to said project; and on September 6, 1895, by appointment, Le Clair and Hansen met at Winnipeg, and Hansen was informed by Le Clair that a Canadian corpora-

tion could be formed to carry on the business of fishing at the Lake of the Woods, in the Rainy Lake district, and licenses for such fishing obtained from the Canadian government, and Le Clair offered and proposed to sell to said Hansen, to be by him put into such new corporation, the business, plant, real and personal property, and outfit of every kind of said Reid Fish Company at Rat Portage, and elsewhere in said district, for the sum of \$30,000, and represented that he had paid one Reid, for the same plant, property, business, and outfit, the sum of \$22,500, and had added to the property, so that it was worth \$30,000, and, at the request of said Hansen, gave him a rough statement, or inventory, of the articles of property to be included in the proposed sale. And said parties discussed the proposed enterprise at length, and the number of licenses and nets that might be used, and said Le Clair expressed a confident belief that the proposed company would obtain in a season 1,000,000 pounds of fish, and 400 kegs of caviar, and desired to have a contract connection with the new company in respect to the fish. Hansen was then given an option of four days to consider the offer of Le Clair, during which time he proposed to go again to Rat Portage, where the real estate and most of the property of the Reid Fish Company was situated; and it was discussed and understood between the parties that Hansen should not, by speech or act, give rise to suspicion that he intended to obtain any interest in the property, as that might defeat the entire enterprise, by making it impossible to obtain the fishing licenses, which would be granted only to Canadian subjects. Hansen and Le Clair then went to Rat Portage together, and remained there, much of the time together, until the night of September 11, 1895. They saw the real estate and buildings upon the same, though no careful examination of the interior of the buildings was made, and also saw or could see the steamboat and barge; and together went over the Lake of the Woods, in a steamboat, from which they saw the buildings of the Reid Fish Company at Stevens Point, and also saw and discussed that portion of the lake in which Le Clair proposed to obtain fishing rights for the next year's fishing. After this examination, the contract of September 11, 1895, was made, as first above stated, and the complainant paid the full consideration for the purchase, at the times and in the manner stated in the bill of complaint.

The Canadian corporation, the Rat Portage Fish Company, Limited, was formed, and licenses to fish in the Lake of the Woods were obtained from the Canadian government before the commencement of the fishing season of 1896; and, by agreement between said Hansen and said Le Clair, one Mallory, a Canadian subject, and friend of Hansen, was employed as manager of the Rat Portage Fish Company, it being intended that Hansen's share of the stock of that company should be held by said Mallory for Hansen. Hansen as well as Mallory went to Rat Portage early in the spring of 1896, to prepare for the season's fishing, when it was found that the nets on hand were neither as many nor as good as Hansen had expected from Le Clair's representation; and in preparing supplies

and outfit Hansen advanced to the new company moneys to the amount of \$3,200, and the Baltimore Packing & Cold-Storage Company a still larger amount. But by reason of high water in the Lake of the Woods, or from some other cause, the catch of fish by that company was small, and did not meet the operating expenses, up to October, 1896, by which time the advances of the Baltimore Packing Company to the Rat Portage Fish Company exceeded the sum of \$14,000, and Hansen was unable or refused to make further advances, and had during the summer, while stating his own inability to make further advances, requested the Baltimore Packing & Cold-Storage Company to continue to make advances to enable said Rat Portage Fish Company to carry on its business of fishing in said Lake of the Woods. On the 5th of October, 1896, Hansen charged Le Clair with having deceived him in the sale of said fishing property, and with having misrepresented to him the amount and value of said property; and, failing to induce the Baltimore Packing & Cold-Storage Company to repurchase his interest in said property, at an offered very large reduction in its price, thereafter brought this suit.

1. Perhaps the most serious claim of misrepresentation by Le Clair is in respect to the price \$22,500, which he stated to Hansen had been paid to Reid for his property, outfit, and business. While Le Clair testifies that this sum was paid Reid on such purchase, his testimony, as well as that of Mr. Reid, is unsatisfactory, in failing to give any details of the bargain or of the payments, and the character and condition of the property, and testimony as to its value, tends to the conclusion that so large a price on that purchase is improbable, if paid in cash, or in property at strictly cash values.

2. The preponderance of the evidence is to the effect that the condition of the title to lot 20, on which the buildings at Rat Portage are situated, was explained to Hansen when the written contracts were made; and there is no evidence that such title may not be obtained for \$175, as then stated, and no request has been made of defendants to secure that title.

3. The claim by complainant that defendants agreed to include the engine and boiler then in a steamer at Duluth need not be considered. That property does not appear to be included in the written contracts of September 11, 1895, which writings would supersede prior verbal negotiations, and, if included, the failure to deliver would not be ground for rescission.

4. The alleged representations as to the amount of fish that would be caught, and the amount of caviar that would be made, were merely statements of expectation, opinion, or hope, on which a purchaser has no right to rely. Le Clair refused to guaranty any amount, and there is no charge or proof that he misrepresented the amount of fish caught or caviar made in the past in the Lake of the Woods fisheries.

5. Hansen went to Rat Portage pending the negotiations, and had an opportunity to examine the property he was buying. That he was cautioned not by word or act to disclose his intended purchase cannot be assumed to have been made to prevent him from



making examination, as there was a sufficient and bona fide reason for that caution, which he understood and assented to. But the lots and the buildings at Rat Portage, and the craft on the water, and buildings elsewhere on the lake, were, in the condition in which they were, open to his view, and he had perhaps seen them when there before. He cannot claim deception as to what he must or might have seen.

6. But whatever examination he then made, or failed to make, he certainly learned the condition of all this property early in the spring of 1896, when he went there, and when the Rat Portage Fish Company, under the management of his friend Mallory, was buying nets and adding to the outfit, and getting ready for the season's fishing. Knowing, then, the condition of the property, if he had grounds for rescinding the contract because of misrepresentations, prompt disaffirmance on his part was necessary. Instead of that, he affirmed the contract, and put more of his own money in the business, and called on Le Clair, repeatedly and successfully, to advance moneys on behalf of the Baltimore Packing & Cold-Storage Company, to keep the business running, in the hope that the season's business would still turn out profitable, getting that company to make much more than its share of such advances. And it was not until Le Clair refused further advances unless Hansen would put in his share, and until it had become apparent that the business of the season would result in loss instead of profit, that Hansen sought to rescind the sale, because of alleged misrepresentations. He cannot be permitted, after learning the facts, to speculate, as owner, on the chances of profit in the business, and rescind after it has proven unprofitable. It is quite evident from complainant's testimony that his venture in the fishing business was to place him where he could control and purchase, at a low rate, the output of caviar, which he hoped would reach or exceed 400 kegs per season, and that he gave perhaps less thought or care to the values of the properties of the plant he was buying an interest in than is usual with purchasers. The value of the hoped-for production of caviar was, in his mind, more than that of the real estate, building, and outfit for fishing. His letter to Le Clair, the day after his purchase, shows that he regarded the venture as a speculation in which there was much hazard, and that he considered he was paying a large price for the half interest in the property. That Le Clair, acting for the Baltimore Packing & Cold-Storage Company, did not consider the plant and business as worthless, but was as hopeful of profits as was Hansen, is shown by the fact that he advanced for his company, towards the season's expenses of the Rat Portage Fish Company, nearly as much money as Hansen had paid for the half interest. Decree will be entered dismissing the bill of complaint, with costs.

## GREEN et al. v. TURNER et al.

(Circuit Court of Appeals, Seventh Circuit. May 2, 1898.)

No. 463.

## 1. MORTGAGE—LIABILITY OF MORTGAGOR'S GRANTEE.

A mortgagee of lands may maintain a suit in equity against the mortgagor's grantee, who has agreed with the mortgagor to pay the indebtedness.

## 2. SAME—SUBROGATION—DEFENSES BY GRANTEE.

Complainants sold mining lands to M. & H., retaining a vendor's lien for part of the purchase money, and they subsequently sold the land to defendants, who agreed with them to pay the unpaid purchase money. Subsequently the complainants commenced a suit in equity against the defendants to recover the amount of the deficiency on a sale of the property under the vendor's lien. *Held*, that the defendants were entitled, without rescinding the sale, to set up as a defense a claim that the sale of the land to them was brought about by false representations, and were not restricted to presenting the same by a cross bill.

## 3. SALE OF MINING LANDS—FALSE REPRESENTATIONS—EXAMINATION BY PURCHASER.

Prospective purchasers of mining property have a right to rely on statements made to them by the owners as to the presence of extensive beds of ore at the bottom of certain pits and trenches, and are not called upon to go into them and determine the truth by dipping out the water or digging out the earth with which they are partially filled. 80 Fed. 41, affirmed.

## Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

This suit was brought by the appellants, Joel C. Green, John G. Brown, and T. F. Main, against the appellees, William J. Turner, William H. Timlin, and Howard Morris, to enforce performance of a promise in writing made by the appellees to Moore & Hibbert, a firm composed of L. A. Moore and Nathaniel Hibbert, to pay an indebtedness of the latter to the appellants. On August 23, 1890, the appellants, by written contract, sold to Moore & Hibbert "all the ores, minerals, mineral substances, mineral waters, and limestone, together with all necessary mining rights and privileges, upon several tracts or parcels of land lying in the north flank of Glade Mountain, in Smyth county, Virginia," known as the "Glade Mountain Iron Property," in consideration of which Moore & Hibbert agreed to pay them \$35,000,—that is to say, \$1,000 cash, \$10,666.66 by November 15, 1890, and the residue in three equal installments, evidenced by notes dated August 23, 1890, and payable, respectively, in 6, 12, and 18 months from date, with interest,—a deed to be made with the reservation of a vendor's lien, and possession of the premises to be delivered upon the payment of the sum made due November 15, 1890. On November 12, 1890, by an agreement in writing, Moore & Hibbert assigned the contract of August 23d to appellees, who on their part agreed to cause to be paid the sums for which Moore & Hibbert were responsible to the appellants. Other terms of the agreement and the provisions of a supplemental agreement made November 22, 1890, have no relevancy to any present question. On December 12, 1890, the appellees paid to the appellants the sum of \$10,666.66, which Moore & Hibbert had agreed to pay on or before November 15th, and thereupon appellants executed a deed, as agreed, to Moore & Hibbert, and delivered it to the appellees; and, Moore & Hibbert having also executed a deed to them for the property, they took possession, but, after some weeks spent in exploring for beds of ore upon the land and finding none of value, they offered to reconvey to Moore & Hibbert, and demanded of them a rescission, to which they refused to accede. The appellees then abandoned the property, which later the appellants purchased for the sum of \$150 at decretal sale on a decree of foreclosure of the vendor's lien reserved in their deed to Moore & Hibbert. Copies of the contracts mentioned were made exhibits in the bill, the theory of which is dis-

closed by the averment "that they have no sufficient remedy at law against the defendants, and can only have adequate relief in a court of equity, in which court your orators are entitled to have and maintain their equitable action against the defendants upon the promises and agreements made by said defendants to their grantors, L. A. Moore and Nathaniel Hibbert, to pay to your orators the amount of the unpaid purchase money for the payment of which your orator reserved a lien upon the property," etc. The appellees answered, alleging, in addition to the facts stated, various false representations by Moore & Hibbert in respect to the existence, and of facts tending to show the existence, of beds of valuable ore on the land; that by explorations conducted at large expense they had found that there were no ores of value there, and that for mining purposes the land was worthless.

James G. Flanders, for appellants.

Geo. D. Van Dyke, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

While there can be no doubt of the right of the appellants, upon the facts alleged, to sue in equity upon a promise made, not directly to them, but to third parties (*Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494; *Willard v. Wood*, 135 U. S. 309, 10 Sup. Ct. 831; *Id.*, 164 U. S. 502, 17 Sup. Ct. 176; *Carnahan v. Tousey*, 93 Ind. 562), yet if it be true, as contended by the appellants, "that, by a subsequent, independent, collateral contract, made and entered into between appellants and Timlin, Turner, and Morris, the latter assumed to pay them for Moore & Hibbert the balance of purchase money due them on the land," the appellants had on that contract a right of action at law, and there was neither necessity nor justification for a suit in equity. No such promise, however, is alleged in the bill; the evidence does not show that it was made, and whether the appellees represented or stated to the appellants, at the time the deed was delivered, that they had assumed the payment of the notes of Moore & Hibbert, is wholly immaterial. To say to the appellants that they had bound themselves to Moore & Hibbert in a contract of assumption is not equivalent to a new promise to the appellants. The case alleged in the bill is essentially just what the judge below is charged with having misconceived it to be, namely: "That appellants were mortgagees of Moore & Hibbert; that Moore & Hibbert, by fraudulent statements, had sold the same mortgaged land to appellees; and that appellants, being unable to make all of the debt out of Moore & Hibbert, were simply pursuing appellees on a contract Moore & Hibbert had made with appellees, which contract was procured by such fraudulent statements."

It is, of course, true that affirmative relief to a defendant in equity is to be sought only on a cross bill, but the objection urged, that the defense set up in the answer of the appellees is of that character, and not available without a cross bill, is not sound. Affirmative relief was not asked nor granted. If an action at law had been brought by Moore & Hibbert upon the promise of the appellees, the fraud alleged in this answer, showing a failure of the consideration

for the promise, would have been a good defense, and it is equally good against the appellants, who, lacking privity of contract, are permitted to sue in equity on the theory of equitable substitution to the rights of the original promisees. They do not thereby acquire superior rights, or cut off defenses, which were good against Moore & Hibbert. It was only against Moore & Hibbert that the appellees could have been entitled to affirmative relief, and, they not being parties to the suit nor within the jurisdiction of the court, if the appellees were to have relief at all it was upon an answer, and not by cross bill. If the answer contains the suggestion of a prayer for affirmative relief, it is a harmless surplusage; and, if there is wanting a distinct allegation that the appellees "ever tendered any reconveyance of the land to Moore & Hibbert or to complainants," the defense was nevertheless sufficient. An offer to reconvey was made to and refused by Moore & Hibbert. No offer to convey to the appellants was necessary, or would have been proper. *Town of Springport v. Teutonia Sav. Bank*, 84 N. Y. 403; *Shoe Co. v. Trentman*, 34 Fed. 620. Besides, it appears that the appellants had by the foreclosure of their vendors' lien become repossessed of the title with which they had parted. But the sufficiency of this answer does not depend upon a rescission of the contracts between Moore & Hibbert and the appellees. It is alleged in the answer that for mining purposes the property was worthless. The conveyance to the appellees was only of mining rights, except that of one tract the fee was conveyed. The appellees had paid upon the purchase directly to Moore & Hibbert \$1,000, and to the appellants \$10,666, and, if the fraud alleged in the answer is established by the evidence, the damage suffered by the appellees far exceeded the amount of the unpaid notes held by the appellants.

That Moore & Hibbert made false representations as charged, and that the appellees had a right, under the circumstances, to rely, and did rely, upon the representations made to them, the proof is sufficiently clear and convincing. The contention that the appellees were consciously making a speculative purchase, and having been shown the property, and having examined it for themselves, did not and could not rightfully rely upon the representations made as being more than expressions of opinion, is plausible, but does not impress us as the right view of the case. Timlin at one time, and Turner at another, went over the property, and at various places saw pits and trenches, some old and some new, at the bottoms of which they were told that extensive beds of ore in place had been found. Those statements they had the right to believe, without going into the pits to determine the truth by dipping out the water or digging through the earth with which they were partly filled. The mere presence of the pits and trenches, besides demonstrating the scope of the exploration which seemed and was represented to have been made, was calculated to add credibility to the representations made of what had been discovered, and the inference is not unfair that that was the intended result.

There is conflict of evidence in respect to the representations made by Moore & Hibbert, but the preponderance, as it seems to

us, is distinctly in support of the conclusions declared in the opinion of the court below. *Green v. Turner*, 80 Fed. 41.

It is urged that, by reason of their long delay to disaffirm the contract, the appellees should be deemed to have waived all right to relief on account of misrepresentations (Pom. Eq. Jur. § 897); and it is also contended that it has not yet been demonstrated that there are no valuable beds of ore on the land. If these propositions are consistent, and one of them may not be regarded as a sufficient answer to the other, they are nevertheless untenable. As already stated, the defense to the suit does not depend upon rescission, and there is no sufficient ground for saying that by delay in repudiating the contract the appellees had waived the right to relief on account of the deceit practiced upon them. On the other proposition, that it had not been sufficiently shown that there are no valuable beds of ore on the land, the evidence leaves no doubt. The decree below is affirmed.

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LAKE ERIE & W. R. CO. v. MICHIGAN CENT. R. CO.

(Circuit Court, D. Indiana. April 30, 1898.)

No. 8,698.

1. SPECIFIC PERFORMANCE—UNCERTAINTY.

The witnesses for the complainant testified to a verbal agreement by which the defendant granted it the use of a certain bridge, passenger station, and tracks. The complainant was unable to show the terms on which it was to use the station, or the amount of the track that was granted, except the right to use all necessary terminals. The general superintendent of the defendant, with whom the agreement was alleged to have been made, contradicted the testimony, while the documentary evidence pointed to the absence of any definite arrangement between the parties. *Held*, that no definite agreement capable of being enforced was entered into.

2. STATUTE OF FRAUDS—FRAUD OF REAL ESTATE—POSSESSION.

Possession sufficient to take a verbal grant of the use of lands out of the statute of frauds must be open, notorious, and exclusive, taken under the contract, and referable to it; and where one is already in possession a continuance under the contract is not sufficient, nor is possession in common with the grantor.

W. E. Hackedorn, John B. Cockrum, and Miller & Elam, for complainant.

Winston & Meagher, for defendant.

BAKER, District Judge. This is a suit founded on a verbal agreement, whereby, for an executed consideration of valuable property rights moving from the complainant to the defendant, the latter agreed that the complainant "should have the right to forever use the bridge and tracks of the defendant west of Trail creek to its freight and passenger depots in Michigan City, and to use said depots, and the right to store its passenger cars upon said tracks west of Trail creek, without paying any rental or other charge therefor to the defendant." The prayer of the bill is that the court on the final hearing will quiet and set at rest forever the title of the complainant in and to the bridge and the approaches thereto, and the tracks and depots lying west of Trail

creek, except in so far as the defendant may be entitled to use the same jointly with the complainant. The defendant denies the making or existence of any such agreement, and also claims the benefit of the statute of frauds. The verbal agreement concerns and purports to grant such an interest in real estate as to bring the case within the terms of the statute, unless the complainant has proved such part performance as to take it out of the statute. The Lake Erie & Western Railroad Company, and each of the companies through or from which it derives its rights, will be hereinafter designated as the complainant. The agreement is alleged to have been made in the summer of 1878, and it involves such important and lasting rights that we should naturally expect that it would have been reduced to writing. Mr. Malott, who was the vice president and general manager of the complainant, and who negotiated the agreement with Mr. Ledyard, the general superintendent of the defendant, says that the understanding was that the verbal negotiations were to be reduced to writing. No agreement embodying the terms of the verbal negotiations was ever reduced to writing or executed by the parties. Lord Chancellor Cranworth, in *Ridgway v. Wharton*, 6 H. L. Cas. 268, says:

"The circumstance that the parties do intend a subsequent agreement to be made is strong evidence to show that they did not intend the previous negotiations to amount to an agreement."

And Lord Wensleydale, in the same case (page 304), says:

"An agreement, to be finally settled, must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms afterwards to be settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled. Until its terms are settled, he is perfectly at liberty to retire from the bargain."

The same doctrine is affirmed and applied in the case of *Lyman v. Robinson*, 14 Allen, 242, 254. The pertinence of this principle is at once apparent from the admission of Mr. Malott, who, on his cross-examination, says that at the time the agreement was entered into between Mr. Ledyard and himself he did not think there was any discussion of the terms upon which the complainant should have the right to use the station for freight or passenger business, or what it should pay for switching; and yet it is alleged in the bill as a term of the agreement that the complainant should have the right to use the freight and passenger depots without rental or other charge therefor. It does not appear that the complainant ever reduced the verbal agreement or negotiations to writing, or requested the defendant to execute the same. But, conceding that these considerations would not preclude the maintenance of the bill, the court is still of the opinion that the agreement set out has not been proved by such clear and satisfactory evidence as would justify it in finding that the agreement set up in the bill had been entered into as alleged, and in enforcing it as prayed for. On his direct examination Mr. Malott testified that the complainant had a right of way on the side of Trail creek, and that it was necessary to remove the tracks, and to make quite a change in the tracks of the defendant's road as well as the complainant's, to enable the

bridge to be put in, and in consideration of that a proposition was made that, if the complainant would surrender its rights there, and use the defendant's bridge, the complainant should have free use of the structure. The complainant was to surrender the use of its tracks and right of way, and to remove the tracks and surrender the right of way to the defendant, from a point east of Franklin street to the west line of Trail creek. The agreement also covered a portion of the complainant's tracks east of Trail creek. The complainant was guaranteed the use of the defendant's tracks to its depot. It was to be done without charge to the complainant. The understanding was that the arrangement was to continue for all time. On his cross-examination he testified that at the time this agreement was entered into between Mr. Ledyard and himself he did not think there was any discussion of the terms upon which the complainant should use the station for freight or passenger business, or what it should pay for switching. The understanding was entirely in regard to the bridge. The understanding was that the defendant was to take up the complainant's tracks in Front street so as to permit the necessary changes to be made to enable the defendant to reach the new bridge, and that for surrendering its right of way in Front street and taking up its tracks the complainant should have a perpetual use of the bridge, a perpetual use of certain tracks of the defendant, and the complainant was to take down its bridge, and certain tracks were to be set apart for its use. The witness cannot say how much track was to be set aside for complainant's use. He says that he cannot give any sort of an estimate.

The foregoing embodies all the testimony of the party who claims to have made the agreement on behalf of the complainant, in regard to its terms. A fair construction of this testimony leaves every part of the alleged agreement uncertain and indefinite except so much as relates to the right to use the bridge. The court, if this testimony stood alone and uncontradicted, would not be authorized to enforce the contract as it is alleged in the bill to have been made. The only additional testimony touching the terms of the alleged agreement is that of Mr. Walker. He was the agent of the complainant from 1871 to 1881, at Michigan City. He testifies that he accompanied Mr. Malott and Mr. Ledyard along the tracks, when the terms of the agreement were discussed, and says that he cannot say that he heard all of their conversation. The material part of his testimony in regard to the terms of the agreement is that Mr. Ledyard proposed to Mr. Malott that the defendant would construct the bridge at its own expense if the complainant would abandon its track west of Trail creek, and such portions as it might be necessary to abandon east of the creek; and in consideration of that the complainant should have the right to cross the bridge with its passenger and freight trains to the defendant's passenger and freight depots, and that, in lieu of the coach track which it surrendered, the defendant would construct a coach track on the northerly side of its yard west of Trail creek at a convenient place, with standing room sufficient to accommodate the com-

plainant's passenger coaches, the use of which it was to have without charge. On his cross-examination he says that there was no agreement entered into in his presence; no papers exchanged or made. His recollection is that, so far as the discussion went, the defendant was to make the change in its track, and to build the new draw-bridge; and, after it had done all of this work, it was to allow the complainant to come in and use such terminals as were necessary for it to use without any compensation other than the surrender of its rights in Front street. If all that is stated by this witness is true, it would still be impossible for the court to adjudge the nature and extent of the use which ought to be decreed to the complainant. The agreement was to run forever, and the decree would have to ascertain and determine the nature and extent of the mutual rights of each party for all future time. The evidence adduced does not furnish such clear and definite data as would enable the court to frame a satisfactory decree.

This testimony on behalf of the complainant is contradicted fully and sharply by Mr. Ledyard, who testified on behalf of the defendant. But, if the court were of opinion that the testimony adduced by the complainant was so clear, certain, and precise that it would, standing alone and uncontradicted, furnish a sufficient basis on which a decree could be founded, it would not aid the complainant's contention for the reason that, in the opinion of the court, the documentary evidence produced on the hearing clearly shows that the discussion of the parties, if any took place, in the summer of 1878, went no further than preliminary negotiations which never resulted in a definite agreement or contract. The claim, and the only claim, on behalf of the complainant, is that the defendant granted the valuable rights and terminal facilities alleged to have been yielded to the complainant in consideration of its surrendering valuable rights of way and tracks west of Trail creek, consisting of a main track extending to the defendant's depots, and a side track, and a coach track, and a certain track on and rights in Front street east of Trail creek. The complainant's witnesses disagree as to the character and extent of this right of way and tracks. All agree, however, that no change was made in the rights and tracks of the complainant on either side of Trail creek from 1876 down to the time when the complainant claims to have surrendered them to the defendant. The defendant produced a number of witnesses whose testimony sharply conflicted with that of the complainant's witnesses on these subjects. On April 25, 1876, the two parties entered into a traffic agreement, which was in writing, and signed by David Macy as president of the complainant, and by H. B. Ledyard as general superintendent of the defendant. This agreement recites that the complainant had no depot grounds or terminal facilities at Michigan City, and that it desired to use the passenger and freight houses and the engine house of the defendant, and to have lumber and other freight destined to points on or reached by the complainant's road loaded on the tracks or in the freight house of the defendant. The agreement then proceeds to set out in detail the charges which the complainant was to pay for such service. A second agreement was executed by these parties on Aug-



ust 16, 1877, which was canceled by the defendant on October 5, 1878. This agreement recites that the complainant had no depot grounds or terminal facilities at Michigan City, and that it desired to use the passenger and freight houses, and round house, etc., belonging to the defendant at Michigan City, and to have access to the same over the tracks of the defendant, the complainant agreeing to pay the charges specified in the agreement for such service.

It is difficult to reconcile these solemn written admissions made by the complainant with the claim now set up. After so great a lapse of time, it is certainly safer to accept the truth of these admissions rather than to rely upon the vague and uncertain memory of witnesses whose testimony is sharply contradicted by other witnesses produced by the defendant. Nor is this all the written contemporaneous evidence strongly tending to show that no agreement was entered into, and that the complainant did not yield the consideration which it claims to have done. Mr. Walker, who was the agent of the complainant, was a member of the common council of Michigan City during the years 1878 and 1879, and he would be presumed to have been conversant with all that was done by the common council in reference to the change of tracks and the building of the drawbridge. The agreement set up by complainant is claimed to have been made in the summer of 1878. A written agreement was entered into between the defendant and the city of Michigan City on August 24, 1878, which was accepted and adopted by an ordinance of the common council of that city on September 12, 1878. This ordinance was duly accepted in writing by the defendant on October 5, 1878, and it explicitly binds the city of Michigan City to procure and cause to be vested in the defendant the title and ownership of, in, and to all necessary right of way for the contemplated change, including tracks, side tracks, frogs, switches, and other fixtures, without any unnecessary delay, and also all land and lots, and parcels of land and lots lying between the present right of way owned or occupied by the defendant, and the additional right of way to be obtained as aforesaid. If the defendant had acquired during the preceding summer, from the complainant, the right of way and tracks which it asserts it had surrendered to the defendant, it seems inconceivable that the defendant would have entered into the contract embodied in this ordinance, or that the city of Michigan City would have agreed to procure at its own expense rights which the defendant then possessed under the terms of the agreement set up in the bill. An ordinance adopted on October 28, 1878, which was duly accepted in writing by David Macy, as president of the complainant, on November 2, 1878, would seem to show conclusively that no such agreement as alleged in the bill was made in the summer of 1878. This ordinance recites that the complainant had, by agreement with the defendant, contracted to pay one-fourth of the cost of the drawbridge to be constructed across Trail creek. If a definite agreement had been entered into between the complainant and the defendant in the summer of 1878 whereby the defendant was bound at its own expense to build the bridge, and to furnish perpetual use of its tracks across the bridge to its passenger and freight depots to the complainant without charge, in consideration of the complainant surrendering its tracks

and rights as claimed, how could it be possible that on November 2, 1878, the complainant agreed to pay one-fourth of the cost of building the drawbridge? There is other documentary evidence in the record which strongly corroborates that to which the court has already referred. The court entertains no doubt that no definite agreement, such as is alleged in the bill, was ever made; nor does it believe that anything more occurred between the parties than mere inconclusive negotiations.

It is insisted that the complainant has used the bridge and tracks of the defendant, under the agreement set up in the bill, from the time the drawbridge was completed until 1891, when the present suit was brought, and that such use is cogent evidence of the existence of the contract claimed to have been made. The contracts hereinbefore referred to show that the complainant used and enjoyed the depots and terminal facilities of the defendant at Michigan City prior to and up to the time of the building of the drawbridge and the change of the tracks. The evidence shows that the complainant has continued to use and enjoy the same privileges since the drawbridge was built, substantially as it did before. In order that possession should be sufficient to take the case out of the statute, it must be open, notorious, and exclusive, and taken under the contract, and referable to it. Where one is already in possession, a continuance under the contract will not be sufficient. The possession must be open and notorious. *Brawdy v. Brawdy*, 7 Pa. St. 157; *Moore v. Small*, 19 Pa. St. 461; *Brown v. Lord*, 7 Or. 302; *Charpiat v. Sigerson*, 25 Mo. 63. It must be exclusive. Possession as the agent of the vendor is not sufficient to take the case out of the statute. *Davis v. Moore*, 9 Rich. Law, 215. Nor is possession in common of other lands of the vendor. *Haslet v. Haslet*, 6 Watts (Pa.) 464. Nor is possession in common with the grantor or vendor sufficient. *Johns v. Johns*, 67 Ind. 440; *Wallace v. Long*, 105 Ind. 522, 5 N. E. 666; *Austin v. Davis*, 128 Ind. 472, 26 N. E. 890. Possession held in common with the grantor is as referable to an agreement for use in subordination to the title of the grantor as it is to a paramount right or title in or to the property used by the parties in common. Hence such possession affords no evidence of any paramount right or title. Besides, the evidence shows that there was no substantial change in the use by the complainant of the tracks and terminal facilities of the defendant after the agreement set up in the bill is alleged to have been made.

The complainant has failed to make out a case entitling it to the relief prayed for. The bill must be dismissed, at the complainant's cost. The defendant shall be, and it is hereby, enjoined and restrained from molesting or disturbing the complainant in the use of the drawbridge and the approaches thereto, or in the use of the passenger and freight tracks and terminal facilities of the defendant, as the same have been used and enjoyed by the complainant during the pendency of this suit, for the period of 90 days from the entry of the decree herein; and if within that time the complainant shall prosecute an appeal from the decree of dismissal herein, this restraining order shall then, and in that event, continue and remain in force until the final hearing and determination of said appeal. So ordered.

**POND-DECKER LUMBER CO. v. SPENCER.**

(Circuit Court of Appeals, Fifth Circuit. April 12, 1898.)

No. 600.

**1. CARRIERS—BREACH OF CONTRACT—INTERSTATE COMMERCE LAW.**

Where the agent of a connecting carrier, by mistake, has given to a shipper an unusually low rate on a shipment of a special and unusual character, and the initial carrier, without knowledge of such rate, breaks its contract of carriage by sending the goods over a different road from that prescribed in the bills of lading, so that the shipper is compelled to pay a much higher rate of freight, the initial carrier cannot escape liability for damages on the ground that the rate given was in violation of the interstate commerce law.

**2. SAME—MEASURE OF DAMAGES.**

In such case the road which willfully misrouted the goods is liable for the entire difference between the rate agreed upon and that which the shipper was compelled to pay, and its liability will not be limited to a lesser sum on the theory that it is only liable for such damages as might reasonably have been in contemplation of the parties when making the contract. 81 Fed. 277, reversed.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

W. R. Hammond, for appellant.

John T. Glenn, John M. Slaton, and Benj. Z. Phillips, for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. The Pond-Decker Lumber Company, intervener, wished to establish a sawmill plant at Deckerville, in Arkansas. It opened negotiations with the owners of a fully-equipped sawmill plant located at Tallapoosa, Ga., with the intention and expectation, if it purchased the same, to move it by rail from Tallapoosa, Ga., to Deckerville. The most direct railroad route is over the Georgia Pacific Railway to Birmingham, 103 miles; thence, by the Kansas City, Memphis & Birmingham road, to Memphis, 251 miles; and thence, by the Kansas City, Ft. Scott & Memphis road, to Gilmore, Ark., 25 miles. For the two railroads last named, J. J. Fletcher was the general freight agent. Prior to the purchase of the mill plant at Tallapoosa, and pending the negotiations therefor, and with a view to its consummation, the intervener corresponded with Fletcher to ascertain what through rate of fare his roads could give on this freight from Tallapoosa to Gilmore on the basis of there being six or seven car loads of it. Fletcher, as such general freight agent, wrote to the intervener that his roads could deliver the freight from Tallapoosa to Gilmore at the rate of 36 cents per 100 pounds. Thereupon the intervener purchased the sawmill and fixtures at Tallapoosa, and delivered it to the Georgia Pacific Railway, the amount of the freight so delivered being 11 cars instead of 6 or 7, and the gross weight thereof 339,200 pounds. The delivery was made in three lots, for each of which a through bill of lading was taken, on the face of each of which was clearly designated the route by which the cars should be taken, viz. by the Kansas City,

Memphis & Birmingham Railway to Memphis, and the Kansas City, Ft. Scott & Memphis Railroad to Gilmore. The Georgia Pacific Railway Company willfully misrouted the cars, and willfully carried them beyond Birmingham, on its own line, to Winona, in the state of Mississippi, the point where it connects with the Illinois Central Railroad, where it delivered them to that railroad; and it carried them to Memphis, and delivered them there to the Kansas City, Ft. Scott & Memphis Railroad Company, collecting from this latter company fares and charges amounting to 54 cents per 100 pounds for the carriage to that point. When the cars reached Gilmore, intervener tendered its contract price, 36 cents per 100 pounds, to the local agent of the Kansas City, Ft. Scott & Memphis Railroad Company, and demanded the freight, which the local agent declined to deliver, on the ground that the freight had been misrouted; that his company had already paid to the other carriers more than 36 cents per 100 pounds. Intervener then applied to Fletcher, the general freight agent before named, who concurred in the action of the local agent, and declined to order the delivery of the freight upon the payment of the contract rate, on the ground that the freight had been misrouted; that they had had to pay more to the other carriers than the rate contracted for; and demanded, as a condition to the delivery of the freight at Gilmore or at Deckerville, that the intervener should pay 64 cents per 100 pounds instead of 36 cents, which, after considerable delay, the intervener was constrained to do. Thereupon the intervener made its claim against the receiver of the Georgia Pacific Railway Company for the difference between the contract price, of 36 cents per 100 pounds, and the price it had had to pay, amounting to \$949.76, and claiming interest thereon from the 8th day of December, 1894, the time when it had to pay the same. Reference of the intervention was made to W. D. Ellis, Esq., as special master, before whom a hearing was duly had, and who made his report thereof on April 11, 1896. He finds and reports as a fact that Fletcher had a right to contract for a through rate from Tallapoosa, Ga., to Gilmore, in the state of Arkansas; that the route by the Georgia Pacific from Tallapoosa to Birmingham, and by the Kansas City, Memphis & Birmingham from Birmingham to Memphis, and by the Kansas City, Ft. Scott & Memphis Railway from Memphis to Gilmore, is the most direct route between Tallapoosa and Gilmore; that there was no rate by the interstate commerce commission on freight like this from Tallapoosa to Gilmore, but that there were local rates on the several lines of road between the various points designated which, combined together to form a consolidated rate, would amount to 66 cents per 100 pounds on this class of freight from Tallapoosa to Gilmore; that the contract to ship this freight at a rate of 36 cents per 100 pounds, made on the part of the railway companies by J. J. Fletcher, agent, was made by mistake on the part of the agent as to the amount of the local rates, but that no fraud or misrepresentation was practiced by intervener in obtaining the rate; that the evidence preponderates in favor of the proposition that the low rate of freight given induced the intervener to purchase the property at Tallapoosa. He finds

and reports (as matter of mixed fact and law) that the defendant accepted the property for shipment, and was bound to send it by the route named in the bills of lading; that the sending of the goods by way of Winona, Miss., was a violation of the contract between the defendant and the Pond-Decker Lumber Company. He finds as a fact that the payment of 64 cents per 100, instead of 36 cents per 100, was directly traceable to the breach of its contract by the Georgia Pacific Railway. He finds that the defendant is liable to the intervener in the sum of \$949.76, with interest from the 8th day of December, 1894, at the rate of 6 per cent. per annum. The matter coming on to be heard before the circuit court, on very comprehensive exceptions to the master's report, that court ruled that the intervener is not entitled to recover in the cause the full amount found in its favor by the special master, to wit, the sum of \$949.76; that the intervener is not entitled to recover interest on that amount or on any other amount from the 8th day of December, 1894; that the intervener is entitled to recover from defendant the sum of \$300, with interest at 6 per cent. per annum from April 11, 1896.

The intervener was allowed to appeal, and assigns as error: (1) The court erred in decreeing that the intervener is not entitled to recover the full amount found in its favor by the special master, the sum of \$949.76. (2) The court erred in decreeing that the intervener is not entitled to recover interest on that amount, or on any other amount, from the 8th of December, 1894. (3) The court erred in decreeing that the exceptions taken to the master's report, so far as they are made to the excessiveness of the finding in favor of the intervener, be sustained. The appellee contends that the special contract for 36 cents per 100 pounds was void, because (1) it was in violation of the clause of the interstate commerce act which requires a uniform rate to be charged to all shippers alike, and showed that this was less than the regular rate; and (2) that, even if the contract was binding, the defendant had no notice of its special terms, and would not be bound by the damages, because they were not such as would flow from the tortious act, and would not be within the contemplation of the parties.

It is not suggested that the contract between the intervener and Fletcher without reference to the interstate commerce act was not a valid contract, and one which the intervener could have enforced against the corporations that Fletcher was authorized to bind. Counsel for the appellee have not, either in their oral argument or in their brief, pointed out to us the particular provision or provisions of the interstate commerce act which declare or render the contract between Fletcher and the intervener invalid. When they do undertake to locate the provision or provisions of that act which have that effect, we think they will experience some difficulty. Leaving out of view for the present all consideration of the very exceptional character and amount of this through shipment, intended to have been made over three connecting but independent carriers, starting in one state, passing partly through three other states, and terminating in a fifth state, we think the rule suggested by the contention of counsel would put an unreasonable burden upon shippers. It would require that each shipper should be an expert rate-sheet reader. Besides that, he would

have to visit the local offices of each of the connecting lines, to inspect the rate sheets that are to be posted at certain points according to the requirements of the interstate commerce act, in order to advise himself as to what were the local rates on the connecting carriers between the points at which the separate carriers connected. It would require of him to know or assume as matter of law, which is not law at all, that the carriers could not contract for a through route at a lower rate than the combination of the locals would aggregate. It is expressly provided that in case independent connecting carriers contract or agree with each other for through carriage over their lines, and fix through rates therefor, such joint tariffs shall be filed with the commission (whose office is in the city of Washington); and such joint rates shall be made public when directed by the commission, and the commission shall from time to time prescribe the measure of publicity which shall be given to such rates. Section 6, Act to Regulate Commerce. Must the shipper, before making any contract,—that is, getting any binding rate for through carriage,—make personal investigation or inquiry at the office of the commission in the city of Washington to learn if a through joint rate over the route his goods are to be carried has been filed there, and what are its terms? And if he should make a mistake in any of these inquiries, and obtain a contract with the carrier for a through rate, would his contract be struck with nullity, so that not only the carrier contracted with could plead the mistake and avoid the contract, but any stranger, or, to state it most fairly, either of the other connecting carriers in the route that violated its contract of carriage could question the validity of the contract made for a through rate with all of the others? Undoubtedly, the interstate commerce act purposes to control the carriers in such way as will insure to persons and localities shipping by them just, fair, and equal treatment. It commands many things to be done. It forbids the opposite of these, and any and every evasion of them by commission or omission. It denounces penalties against the carriers, or, where the carrier is a corporation, against its agents, for the doing of the things forbidden, or procuring or abetting the doing thereof, or the omission to do the things required, or the procuring or abetting any person to so offend. It provides remedies for the enforcement of its requirements in reference to just and equal treatment by carriers of all persons and localities for whom they carry. But it nowhere intimates by any express language that contracts made by carriers within the scope of their general powers are to be declared, in any collateral proceeding which may arise, null and void by reason of some alleged or supposed departure from the requirements of that act with reference to the matter of fares and charges. On the contrary, as we read the act, it is strongly implied that the carrier will not only be liable to the government and to any private party injured for its violations of the provisions of the interstate commerce act, but that it will also most certainly be bound on its contract to the party with whom it contracts. If it were otherwise, it would, as we have said, put on shippers a burden too grievous to be borne, and open a door to the practice of fraud and oppression by the agents of corporation carriers.

The opinion of the learned judge of the circuit court, which appears

in this record, shows that he did not sustain this contention of counsel for the appellee, and that his action on the exceptions to the report was based rather on his partial concurrence in the second suggestion of counsel which we have mentioned. In one part of his opinion he uses this language:

"The contention of counsel for the Intervener is, however, that the circumstances surrounding this shipment were such as to put the receivers on notice that a special rate had been given the shippers. What are these circumstances? First. The unusual character of the shipment. It was an entire sawmill, so far as it could be taken down, and it was all shipped at one time. There were eleven car loads embraced in one shipment. Secondly. It was billed to go a particular route. It is claimed that these circumstances are sufficient to put a railroad man familiar with the practice of railroads and freight agents in such matters on notice that a less rate than the regular rate would be given, and that an experienced railroad man would also know that the same could be given without violating the interstate commerce law, or any law, because it was an unusual shipment, and there would be no discrimination or undue preference against other shippers, as no shipment of similar character would ever probably be made. Conceding that the agents of the receiver were put on notice that something less than the usual rate might be allowed for a shipment of this character, can it be held that they must take notice and must contract in contemplation of a mistake on the part of the general freight agent of connecting lines? It is a fact established in the case, and the master so finds, that the rate given by Fletcher, the general freight agent of the connecting lines, being a remarkably low rate when compared with the regular rate, was made by mistake. It cannot be true that the initial carrier can be held to have had in contemplation at the time goods are received for carriage that a connecting line would make a mistake as to the rate on the goods given the shipper. It seems from the facts in this case that the general freight agent was under a misapprehension as to what the regular rate was. Now, if this general freight agent, with a knowledge of what the regular rate was, had made some reasonable reduction from it, and the proof showed that such reduction was usual or even frequent in a shipment of unusual character, and a recovery was based on such facts, there would be some ground for sustaining it under the rule contended for on the part of the intervenor."

The evidence clearly establishes that the defendant, not negligently, but willfully, sent the goods by its own line, from Birmingham to Winona, and by the Illinois Central Railroad from Winona to Memphis, and that, by this willful misrouteing, intervenor was in fact damaged to the extent found by the special master, viz. \$949.76, which it was compelled to part with on the 8th of December, 1894, in order to get its goods. In the case of *Langdon v. Robertson*, 13 Ont. R. 497, which seems to have exercised a controlling influence over the judgment of the learned judge of the circuit court, it is announced that the measure of damages furnished by the evidence (in that case claimed to be most like this) is either nominal or the full amount paid by the plaintiff; and further on it is said that, if the plaintiff recover, he is entitled to interest from the time he paid. It seems to us that if the delivery to, and receipt by, the Georgia Pacific Company, of this freight, and the routing of it as required and is conceded in the through bills of lading, was sufficient to put the agents of the receiver on notice that less than the combination of the locals of the connecting independent carriers might have been allowed by the other two, who seem to have been under a common control, and whose freight agent, Fletcher, had a right to contract for a through rate from Tallapoosa, which right he could only have by some contract or agreement, express or implied, with

the Georgia Pacific, it was equally sufficient to put them upon notice or upon that inquiry which, properly pursued, would have secured actual knowledge of the exact terms of the special contract. In this case of willful misrouteing it appears to us to come with very bad grace from the offender to show that, when he was "willing" that he should offend, he should sit down coolly, and calculate what might, could, would, or should be the rate at which these goods had been contracted to be carried, in order that he might ascertain whether he could take the risk, or how much of the risk he would have to take to violate his contract. The defense does not commend itself to our judgment or conscience, especially when made by a party who was the hand of a court of conscience in running this railroad. The rule has been long established that, for negligent breaches of this sort, the liability for the breach is measured by the damages that would be reasonably in the contemplation of the parties, although, where the breach was inadvertent or negligent, there could be no actual contemplation about it, in point of fact; for in such cases we cannot suppose that, at the time of making the contract, the parties contemplated that it would be broken. But, recognizing that one might fail to perform through some oversight, omission, or negligence of servants, such party is held to be charged by the law with liability only for such damage as might reasonably be expected to flow therefrom. The application of this rule to cases that arise is often difficult, and the fact is found to be, as we should reasonably expect it would be found to be, that its application to different cases is as variable as the cases themselves; and the settled current of authority as to such application, if such a settled current has been evolved, is very narrow and limited in its bearing. The case that we are considering presents to us no difficulty whatever. We think the contract with Fletcher was a valid contract. The exact amount of the freight carried is given in pounds. The calculation of the amount that the intervener should have paid, and the amount that it had to pay, and the difference between these amounts showing its exact damage, is a matter of the simplest arithmetic. The date when it had to be paid and was paid is fixed beyond dispute. We therefore concur in the finding of the special master that a decree should be entered in favor of the intervener for the sum of \$949.76, with interest thereon at the rate of 6 per cent. per annum from the 8th day of December, 1894; and it is now ordered that the decree appealed from be, and it is hereby, reversed, and the cause remanded to the circuit court, with direction to overrule all of the exceptions to the master's report, and to confirm that report, and thereafter to proceed as equity may require.



THIRD NAT. BANK OF PHILADELPHIA v. NATIONAL BANK OF  
CHESTER VALLEY.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1898.)

No. 649.

1. SPECIAL MASTER—REFUSING TO ADJOURN.

It is not an abuse of discretion for a special master to refuse an adjournment for the purpose of permitting a party to have executed and returned certain interrogatories, when the cause has been adjourned several times since the close of the evidence, and no such application has then been made.

2. SAME—COURT HEARING ADDITIONAL TESTIMONY.

It is not error for the court, in considering a special master's report, to refuse to consider certain depositions that had not been used before the master.

3. SAME—FINDINGS.

Where a rule is entered, on the consent of all the parties, referring a cause to a special master to hear and report the facts and the law involved in the whole case, his findings will not be disturbed unless clearly in conflict with the weight of evidence.

4. APPEAL—POINT NOT MENTIONED IN ASSIGNMENT OF ERRORS.

The court will not consider on appeal a question not raised before the lower court, and not mentioned in the assignment of errors.

Appeal from the Circuit Court of the United States for the Northern District of Georgia.

Theodore F. Jenkins and H. B. Tompkins, for appellant.

Wm. D. Ellis and J. R. Gray, for appellee.

Before PARDEE, and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. Some time before January 1, 1891, Samuel W. Groome sold to the Marietta & North Georgia Railway Company a lot of rolling stock, making a contract in his own name, in which he reserved title to the property to secure unpaid balances, which unpaid balances were evidenced by promissory notes. This contract and the notes went into the hands of appellant, which was then put on notice that Samuel W. Groome had bargained and sold the property to the railway company as his own. After the appointment of James B. Glover as receiver, in January, 1891, Groome filed an intervention, claiming title to the property, and asked that it be delivered to him, or that the receiver purchase it from him. Appellant had notice of this proceeding, and, among other acts, delivered to Groome the contract and notes, in order that he might establish his claim. It is shown that it authorized and empowered Groome to make said agreement as though he were the actual owner of said equipment, and ratified the agreement after it was made. Groome's title to the property was contested by the trustee, but was upheld by the master to whom the intervention was referred; whereupon exceptions were filed by the trust company, and, upon a hearing, the court confirmed the report of the master. and the receiver was directed to buy from Groome the property in question. From this decree there was taken an appeal to this court, which was defended by Groome in his own name, and re-

sulted in an affirmance of the judgment of the circuit court. Pursuant to the judgment and decree rendered in Groome's favor, the receiver purchased the property from him, and issued receiver's certificates or notes in various sums payable to Samuel W. Groome or bearer, two of which notes are the subject of this controversy. The two notes in controversy were purchased by appellee,—one on January 7, 1892, and the other on February 1, 1892. Appellee investigated the record, and discovered therefrom that Groome appeared to be the owner of the notes or certificates, and learned from Groome that he was the owner. It also employed counsel in Atlanta to investigate the records of the court, and was advised that the title on the record to the property was clear in Groome. After this investigation was had, and the advice received, and one of the certificates purchased, the following letter was addressed to the receiver:

"Philadelphia, January 22, 1892.

"Dear Sir: You will please take notice that of the notes issued by the Marietta and North Georgia Railway Company to Samuel W. Groome on account of the contracts of the said company with the said Samuel W. Groome relating to certain rolling stock, the notes a list of which you will find inclosed, and aggregating \$60,339.77, are owned and held by the Third National Bank of Philadelphia; and whatever sums of money or other thing which may be coming from the said railway company or from you on account of said contracts, or either of them, should be paid or delivered to the said bank. Will you please advise me by return mail, or as soon thereafter as you conveniently can, when you will be ready to pay the money ordered by the decrees of the above court, as confirmed by the appellate court of the 5th district, and acknowledge the receipt of this note, together with the inclosure, and oblige.

"Yours resp'y,

Theo. F. Jenkins,

"Counsel for Third National Bank of Philadelphia.

"To J. B. Glover, Esq., Receiver of the Marietta and North Georgia Railway Co."

After further correspondence on the subject, the receiver, by petition filed on February 18, 1892, brought the matter to the attention of the court. This petition gives the first intimation on the record that the appellant claimed title to these receiver's certificates. On March 15, 1897, the appellant filed its intervening petition, setting up its claim to the certificates. On March 27, 1897, appellee answered, and on the same day the circuit court entered this order:

"Counsel consenting thereto, it is ordered that the within intervention and answer of respondent thereto be, and the same are, referred to B. H. Hill, Esq., as special master, who is directed to hear and report the facts and the law involved in the questions at issue."

On August 19, 1897, the special master, Benjamin H. Hill, submitted to the parties his report, which, after stating the history of the litigation, the pleadings of the parties, and the proceedings before him as such master, proceeds thus:

"In the first place, I find and report every issue of fact made by the pleadings, which are hereinbefore fully set out, in favor of the National Bank of Chester Valley, Pennsylvania. The evidence before me, which is not disputed, conclusively establishes the truth of the issues made by the intervention of the Third National Bank of Philadelphia, and the answer of the National Bank of Chester Valley, Pennsylvania, in favor of the latter.

"I specifically find and report the following conclusions of fact: (1) Samuel W. Groome sold to the Marietta & North Georgia Railway Company a lot of roll-

ing stock, making a contract in his own name, reserving title to the property until it should be paid for, the purchase money being represented by promissory notes. These notes went into the hands of the Third National Bank, which bank was thereupon by said notes put upon notice that Groome had sold the rolling stock of the railway company as his own property. (2) Samuel W. Groome filed an intervention in his own name against the receiver appointed in the cause of Central Trust Company v. The Marietta & North Georgia Railway Company, claiming the title to said property, and asking that it either be delivered to him by the receiver, or that the court should order the receiver to pay him for it. (3) The Third National Bank of Philadelphia had notice of such intervention, and enabled said Groome to establish his claim to the property. (4) The trustee contested the title of Groome to the property, but Groome's title was upheld by the master to whom the question was referred; and on exceptions the report of the master finding title in Groome was confirmed, and on appeal to the United States circuit court of appeals the decree of the circuit court was affirmed. The intervener had notice, both actual and constructive, of all of these proceedings, but made no claim to the property or any interest therein. (5) Acting under orders of the court, the receiver purchased the property from Groome, and issued to Groome certificates in various sums, payable to 'Samuel W. Groome, or bearer'; the Third National Bank of Philadelphia still failing to set up any claim or interest in said property or in the certificates issued to Groome. (6) The receiver's certificates were thereupon delivered by the receiver to Samuel W. Groome, no one else claiming any interest or right to them. And said Groome, on the 30th day of December, 1891, offered one of the certificates for \$5,000 to the National Bank of Chester Valley; and said bank had the question of the legality and validity of such certificates investigated by its counsel in Atlanta, Georgia, who reported in favor of the validity of said certificates; and on the 7th day of January, 1892, one of said certificates for \$5,000 was transferred bona fide, and for valuable consideration, to the National Bank of Chester Valley, and on the first day of February thereafter the other certificate, for \$5,000, was in the same manner transferred to said bank. (7) The National Bank of Chester Valley therefore came into possession of said certificates lawfully, paying therefor in good faith, and without the slightest notice of any adverse claim of the intervener or anybody else, full value. (8) I find further, under the evidence submitted to me, which is not disputed, that said two certificates belonged to Samuel W. Groome, and he had a right to transfer the same, and that the said National Bank of Chester Valley, in buying the same from him, got a good legal title thereto. (9) I find, further, that the Third National Bank of Philadelphia made no claim to said certificates, or of having any interest therein, until the 27th day of May, 1892, when it filed its answer to the petition of J. B. Glover, receiver, in this court, wherein it for the first time disclosed or set up any interest in said certificates, which long after the two certificates in controversy had been legally sold and transferred by Samuel W. Groome to the said National Bank of Chester Valley. (10) I find, therefore, that outside the question of the legal title, which I find as above to be in the National Bank of Chester Valley, the Third National Bank of Philadelphia is estopped in equity by its own conduct from setting up or claiming any right of ownership or any interest in said two certificates in controversy now in the possession of the said National Bank of Chester Valley. This doctrine of estoppel is so clearly applicable to the facts of the case that I deem it wholly unnecessary to cite any decisions to the court in support of the finding on this point. (11) I do not consider it necessary for the determination of this case to decide the question of whether or not receiver's certificates are negotiable instruments in the ordinary sense of the word 'negotiable,' because I think it unquestionably correct that Samuel W. Groome, under the facts in this case, was the owner of said certificates, and had a right to sell them. On their face, they are payable to said Groome or bearer.

"I therefore report that the intervener, the Third National Bank of Philadelphia, has no right, either in law or equity, to the said certificates, or to the funds in the hands of Robert J. Lowry, commissioner, which he holds to pay them; but that, both in law and equity, the two certificates in controversy belong to the National Bank of Chester Valley, Pennsylvania, and that the said Robert J. Lowry, commissioner, should be directed by the court to pay the

funds in his hands which said two certificates are entitled to receive, with interest, to the said National Bank of Chester Valley or its order, upon the delivery of said certificates properly canceled, to said Robert J. Lowry, as such commissioner. The proceedings and the evidence taken before me in the case are filed with this report properly verified."

This report was filed in the court September 10, 1897. Besides certain exceptions to the merits which we do not deem it material to give in detail, the appellant submitted to the master this exception to his report:

"First exception: That the said special master did, on the 27th day of June, 1897, refuse to continue said cause for the purpose of allowing said intervener to have executed and returned interrogatories and the answers sought to be elicited thereby from the witnesses residing in the city of Philadelphia, in the state of Pennsylvania; whereas said master should have allowed said intervener the time to have gotten the said evidence and the said witnesses on the interrogatories which had been filed in the office of the clerk of the United States court prior to the time at which he overruled the intervener's motion for a continuance, and directed the case to proceed. That intervener had expected to have said witnesses present at said hearing, and had had reason and the right to expect that said witnesses would be at said hearing, and had made every effort to get them present, and had from the witnesses themselves promises of their appearance when said witnesses were prevented from attending said hearing on account of business which was not in their control. Intervener respectfully submits that, owing to these facts, it was entitled to at least the time absolutely necessary for the return of its interrogatories and the answers thereto, and that said intervener should not have been deprived of its right to have its witnesses heard before the said special master, which, under the circumstances, was error, which has deprived intervener of the right and opportunity of bringing to this court the real facts upon which its right and title to the receiver's certificates in question is based."

The case came on for hearing before the circuit court on the exceptions to the master's report, and, in delivering its decision, the learned judge thereof used the following language:

"The only matter that need now be discussed is the earnest contention of counsel for the Third National Bank of Philadelphia that no title passed to Groome as to any of the receiver's certificates delivered to him by the receiver, and consequently he could convey no title to the National Bank of Chester Valley. It seems to be a fact that the certificates were delivered by the receiver to Groome's attorney, because of his belief that the old notes were in the possession of Groome's attorney, and would be promptly delivered up. This turned out to be a mistake, but afterwards the matter was rectified, so far as the court or its receiver was concerned, by the delivery of the notes by counsel of the Third National Bank to the court. It may be that Groome having obtained possession of the notes by means of representations which were made to the receiver as to the old notes under misapprehension, even if honestly made, would have justified the court in recalling the certificates or in directing the receiver not to pay them. But this was a right of the court. Any failure of Groome to get title to the certificates was only as against the court and its officer. As against the Third National Bank, there is abundant evidence in the record to show that Groome was authorized by it to receive the certificates, or, at least, was put by the action of the Third National Bank in position to receive them, and, as to innocent parties without any notice of the Third National Bank's claim, to part with them, and convey title to innocent purchasers. The whole proceeding to assert claim to this rolling stock in this court was in Groome's name. The reservation of title and the contract on which the rights of the parties stood and were determined was in Groome's name; and Groome's proceedings herein must have been, and unquestionably were, known to the Third National Bank. It is unnecessary to decide the question of Groome's right to these certificates as against the Third National Bank, as I am satis-

fied that, in any view of the evidence, the Third National Bank is now estopped from setting up a claim to the amount due on these certificates as against the National Bank of Chester Valley.

"As to the request of counsel of the Third National Bank that the court open and examine certain interrogatories now in court, and which were submitted to the special master, I am satisfied that the special master did not abuse his discretion in this matter. It would be contrary to all precedent and proper practice for the court to examine this evidence, and consider it now in connection with the special master's report. The only method that could be adopted would be to refer the matter back to the special master; and under the facts stated by him, and conceded to be true, I do not feel justified in doing this. The exceptions of the Third National Bank to the report of the special master are all overruled, and the report is confirmed."

And thereupon the court passed its decree in these words:

"It is ordered, considered, and decreed that the said National Bank of Chester Valley be, and it is hereby, decreed to be entitled to the funds in the hands of Robert J. Lowry, Esq., special commissioner, amounting to \$14,308.89, to be appropriated to the payment of the two receiver's notes or certificates, for \$5,000 each, given by J. B. Glover, receiver, to Samuel W. Groome, or bearer, and to be paid the full amount of said sum upon said notes in preference to any claim or demand, less such amount as has been paid to the special master, B. H. Hill, Esq., and the stenographer, and such amounts accrued or to accrue of cost and expenses as may be properly chargeable against said fund."

The first four errors assigned relate to the merits of the controversy, and are to the effect that the decree against the appellant was wrong in every particular. The fifth and sixth specifications of error are as follows:

"(5) That the court erred in not opening and considering certain depositions that were given by Louis Wagner and Thomas J. Budd, of the city of Philadelphia, and state of Pennsylvania, being the president and cashier, respectively, of said Third National Bank of Philadelphia, having been received in court before the argument upon said exceptions to the report of the said special master, and the court having refused and declined, upon motion of counsel for said National Bank of Chester Valley, to open and consider the same, and which depositions cannot be made a part of the record because the court declined to open and consider the same, although they are filed in the court. (6) The court erred in rendering any opinion or decree or judgment in said intervening petition of the Third National Bank of Philadelphia without opening and considering said interrogatories; and the court further erred in the rendering of its opinion and decree against the appellant, and in favor of the appellee, the National Bank of Chester Valley."

In reference to the fifth and sixth specifications of error, we concur in the view expressed by the circuit court that the special master did not abuse his discretion in declining to continue the hearing, and permit the appellant to take by deposition the testimony of the witnesses named in these assignments. In the exception above set out to the master's report, it is stated that intervener had expected to have these witnesses present at the hearing, and had reason and the right to expect that the witnesses would be at the hearing, and had made every effort to get them present, and had from the witnesses themselves promises of their appearance when the witnesses were prevented from attending the hearing on account of business which was not in their control. From the assignments of error which we are discussing, it appears that the witnesses were Louis Wagner and Thomas J. Budd, president and cashier, respectively, of the appellant. It appears from the master's report that, in pursuance of the order of ref-

erence, the hearing before him began on May 10, 1897; that after taking the evidence of the witnesses then offered by the National Bank of Chester Valley, and the documentary evidence offered by the Third National Bank of Philadelphia, by consent of parties the hearing was adjourned subject to a notification from the special master as to when it would again convene. Acting under this consent, the special master reassigned the continuation of the hearing to June 14th. On that day the counsel representing the intervener (appellant here) and counsel representing the National Bank of Chester Valley, appellee, appeared before the master. Counsel for the appellee stated that he had no further testimony to offer, and counsel for the appellant stated that he had none ready to offer, and did not know whether he would offer any more or not. Thereupon, by consent of both parties, the master again reassigned the hearing of the case for 10 days from that date. By distinct announcement it was understood by counsel for both parties that the hearing on the adjourned date would be peremptory, and that there should be no further continuance by the master at the instance of either party. At the expiration of the 10 days, the same counsel for both parties appeared before the master, when the counsel for appellee stated that he had no further testimony to offer, and the counsel for appellant stated that he had just prepared a set of interrogatories which he desired to have answered. Counsel for the appellee objected to the continuance, and the master, in view of what had occurred before him previously, and further being of the opinion that sufficient time had been given the appellant for taking testimony, decided that he would not further postpone the hearing of the cause, and asked counsel if they desired to be heard in argument. Both stated that they would submit written arguments to the master. The master consented to give them such time as they deemed necessary for the preparation of briefs. They concurred that five days would be sufficient time for that purpose. Before the expiration of the five days, counsel on behalf of the National Bank of Chester Valley submitted a brief. Counsel for the Third National Bank of Philadelphia did not submit a brief or signify his purpose to do so. After the expiration of the five days, the master made up his report and conclusions from the brief of counsel for the appellee and the evidence that had been submitted. It was suggested in the oral argument before us that the proceedings before masters in the Northern district of Georgia are generally somewhat irregular and the practice lax. It is evident from the ruling of the circuit court in this case that such proceeding and practice are not sanctioned by the learned judge who usually presides in that court, and who presided on the hearing of this case; and we concur in and commend his efforts to restore such proceedings to a course of such regular conduct and rational practice as shall comport with the proper speeding of the cause on trial before the master. If the master was right in declining to continue the hearing in order to give time for the testimony to be taken and brought in, manifestly the circuit court was right in refusing, after the report of the master had been filed, to open the testimony, and consider it in connection with the master's report.

In regard to the merits of the case, to which the assignments of error

not copied into this opinion are addressed, it is to be observed that, in reference to all the matters in this case, the court, on consent of both of the parties, entered its rule that the pleadings of the appellant and of the appellee (intervener and respondent below) should be referred to the special master, with directions to hear and report the facts and the law involved in the questions at issue; that is to say, by consent of counsel, the whole case was referred to a selected special master, who was directed to hear and report the facts and the law involved in the whole case. Substantially similar in all of its material features to this reference was the reference to the special master in the case of *Kimberly v. Arms*, as shown in the opinion of the supreme court (129 U. S. 512, 9 Sup. Ct. 355). In that case exceptions to the findings of fact and of law contained in the report of the special master had been sustained by the circuit court, and the report practically set aside. The circuit court had refused to treat the findings as presumptively correct, so as to impose upon the excepting parties the burden of showing error in them. This was the first question considered on appeal. It is fully discussed, and the conclusion reached that the circuit court did not give to the findings of the master the weight to which they were entitled; that they should have been treated as so far correct and binding as to not be disturbed unless clearly in conflict with the weight of the evidence upon which they were made. Of course, it must always be in the sound discretion of the trial court to determine when the findings are clearly in conflict with the weight of evidence upon which they were made. In this case the trial court had determined that the findings of the special master are not only not clearly in conflict with the weight of the evidence upon which they were made, but are amply supported by the weight of the evidence, in which view of the case we concur.

Counsel for the appellant, in their printed brief, make, and insist on, as their sixth contention, that as the testimony shows Groome received for the two receiver's notes of \$5,000 each from the appellee, the National Bank of Chester Valley, only \$7,200 in money, the appellee in no event would be entitled to recover from the fund more than this amount actually paid by it to Groome. The testimony does show that the appellee paid to Groome in cash \$3,700 for one of the certificates, and gave him credit on his overdrawn bank account for \$1,500, the certificate, with accrued interest, amounting at the time to \$5,200; and that for the other certificate the appellee paid \$3,500 in cash, and credited the still overdrawn bank account of Groome with the balance, \$1,500. This contention was also insisted on in the oral argument of counsel, but it is not alluded to in the exceptions to the master's report. There is nothing to indicate that the point was made before the master or before the circuit court in its consideration of the exceptions to the master's report. It is not mentioned in the assignments of error, and therefore the suggestion comes to us in a manner which does not warrant us in entertaining it or allowing it, however sound it may be and prevalent it might have been if it had been duly made.

After a careful examination of the case, we find no error for which the judgment should be reversed, and it is therefore affirmed.

## MITCHELL v. DOUGHERTY.

(Circuit Court, E. D. Pennsylvania. December 27, 1897.)

## 1. ARBITRATION—AGREEMENT TO SUBMIT.

Parties may bind themselves to submit to the judgment of an arbitrator as respects all questions arising out of their contractual obligations; and, if they do so, they may not afterwards avoid his jurisdiction by reason of an alleged mistake in judgment on his part.

## 2. SAME—WHAT INCLUDED.

Under an agreement in a building contract that the decision of the architects and engineers shall be final in all disputes "relative to or touching" the contract, an alleged wrongful dismissal of one of the parties from employment under the contract must be submitted to them for final decision.

**Sur rule for judgment for defendant notwithstanding verdict.**

This suit was brought by the plaintiff to recover from the defendant the value of certain work done by him in part performance of a contract entered into between the plaintiff and defendant for the roofing and tiling of a certain building, and also to recover the profits that the plaintiff claimed he would have made had the work been completed by him. The allegation of the plaintiff was that he was hindered and prevented from completing the contract in its entirety by the defendant, and was thereby authorized in abandoning the work undertaken by him. The defendant had previously entered into an agreement with Archbishop P. J. Ryan for the erection of the building, upon which the plaintiff subsequently covenanted to do the work of roofing and tiling. This contract between the defendant and Ryan, together with the specifications annexed thereto, were recited in the contract between the plaintiff and the defendant as being made part thereof. The specifications referred to provided that the tile which should be used upon the building should be what is known as "Ludowici" tile.

The evidence which was produced on the part of the plaintiff tended to show that after he had commenced the work undertaken by this contract, and while actually prosecuting the same, he was ordered by the defendant to stop the work, as the defendant contemplated using "Celadon" tile, instead of "Ludowici" tile. In consequence of this order, the plaintiff stopped his work, and at the request of the defendant, furnished him with an estimate of the cost of completing the work with the "Celadon" tile, which estimate was somewhat larger than the cost of completing the contract in accordance with the original provisions. The plaintiff was then instructed to make this change, with the assurance that the architects would consider the question of compensation thereafter, although the contract between the plaintiff and the defendant provided that no increased price could be obtained in consequence of any change in the specifications unless such price was agreed upon in advance, in writing. After repeatedly notifying the defendant of his desire to prosecute the work undertaken by him, the defendant not only neglected to permit him so to do, but actually employed other parties to complete the work.

The defense relied upon was, substantially, that the plaintiff's work was imperfect in many respects and had been condemned as such by the architects who ordered so much of it as had been completed to be removed, in consequence of which the change in the tiling was suggested. The defendant further contended that the plaintiff neglected to correct the imperfect work, or to proceed with his undertaking in other respects.

The other facts necessary to an understanding of the case are set forth in the opinion.

Richard C. Dale, for plaintiff.

J. W. Logue and Pierce Archer, for defendant.

BUTLER, District Judge (after stating the facts as above). On the trial the following point was presented by the defendant, and reserved:



"That the plaintiff is bound by the provisions of the contract entered into between Dougherty and the owner, waiving suits at law, in reference to any dispute arising out of the contract, and he is only entitled to recover upon an award made by the architects. There being no evidence that such an award has been made, or no reference by plaintiff to architects, the verdict must be for the defendant."

A verdict having been rendered for the plaintiff the point must now be disposed of.

It is well settled that in contracts such as the one involved, parties may bind themselves to submit to the judgment of an arbitrator as respects all questions arising out of their contractual relations. In the contract between Dougherty and Archbishop Ryan it is provided that:

"It is mutually agreed and distinctly understood that the decision of the engineers and architects shall be final and conclusive in any dispute which may arise between the parties to this agreement relative to or touching the same, and each and every of said parties do hereby waive any right of action, suit or suits, or other remedy in law or otherwise by virtue of said covenants so that the decision of said engineers and architects shall in the nature of an award be final and conclusive upon the rights and claims of the said parties;"

—And the contract in suit is expressly made subject to this provision. The only question therefore is whether the dispute involved in this suit is covered by the provision. The plaintiff contends that it is not, as the parties could not have contemplated it; that it arises out of the defendant's dismissal of the plaintiff from the work without cause, while the disputes contemplated were such only as might arise respecting the work and the manner of performing it; and furthermore as the dismissal which gave rise to the dispute occurred in consequence of the arbitrators' mistake, and they are therefore subject to bias against the plaintiff, it could not have been contemplated that such a dispute should be submitted to their determination. There is much force in this contention; and if it had not been passed upon by the courts I should deem it worthy of serious consideration. A careful examination of *Navigation Co. v. Fenlon*, 4 Watts & S. 205, *Fox v. Hempfield*, 14 Leg. Int. 148, *Connor v. Simpson*, 104 Pa. St. 440, *Howard v. Railroad Co.*, 69 Pa. St. 489, and *Reynolds v. Caldwell*, 51 Pa. St. 298, will show that substantially the same contention was made in these cases and overruled. The plaintiff in several of them was wrongfully dismissed from the work, in plain violation of the contract, and yet the dispute which thus arose was held to be one for the arbitrator, under a submission similar to that here involved. In *Navigation Co. v. Fenlon* the terms do not expressly confine the disputes to be submitted to those which may arise out of the contract, but by plain implication they clearly do; and the submission is so construed in all subsequent cases in which it is mentioned, except *Lauman v. Young*, 31 Pa. St. 306, where the court was seeking to distinguish the case before it by so narrow a construction of the submission there involved, as to exclude the question from the arbitrator's jurisdiction. That case, in my judgment, is not in harmony with *Navigation Co. v. Fenlon* nor with the subsequent cases, above cited. It was decided however upon the court's construction of the peculiar terms of the submission, which differ from those here

involved. In *Fox v. Hempfield* and the other later cases above cited, the submission was identical, substantially, with that before us. There can be no doubt that the arbitrator may so disqualify himself by acts subsequent to his selection, as to relieve parties from the submission; and if the conduct of the architects which gave rise to the dispute involved in this suit, had been the result of malice or intentional wrong, instead of mistake, a different case would be presented. Under such circumstances he might be pecuniarily responsible to his employer for the damages, and in consequence be disqualified. It is not suggested that the engineers were guilty of such misconduct. Their refusal to determine the cost of alterations in advance was doubtless the result of their construction of the rights of the parties under the contract, and although wrong, (as pointed out in the court's charge to the jury) no more can be justly said than that their judgment was in fault; and as the plaintiff bound himself to submit to such judgment he cannot appeal to this mistake to oust their jurisdiction. This is distinctly ruled in one or more of the cases above cited.

The rule for judgment must therefore be made absolute and judgment be entered for the defendant accordingly.

As the court of appeals may possibly reach a different conclusion the rule for new trial should be disposed of. It is sufficient to say that it cannot be sustained. The questions of fact were fairly submitted to the jury. To disturb the verdict because the court may think it might justifiably have been rendered for \$800 or \$1,000 less would not be warranted. The testimony was conflicting and the jury was as capable of passing upon it as the court.

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#### UNITED STATES v. FIRST NAT. BANK OF BELLAIRE.

(Circuit Court, S. D. Ohio, E. D. March 7, 1898.)

##### 1. MOTION FOR NEW TRIAL—SURPRISE.

Where, three months after the entry of judgment, a motion is made for a new trial on the ground of surprise at the testimony of a witness, and that the only person conversant with the facts sworn to by such witness was out of the state at the time of the trial, and an affidavit of such absent person is presented contradicting the testimony of the witness, and it appears that some of the material statements in such affidavit are in contradiction to his deposition taken in another cause concerning the same transaction, the motion will be denied.

##### 2. BILL OF EXCEPTIONS—EXPIRATION OF TIME.

The time to obtain a bill of exceptions will not be extended after the expiration of the term succeeding the trial term.

Harlan Cleveland, for plaintiff.

Tallman H. Armstrong, for defendant.

SAGE, District Judge. This case was tried at the June term, 1896. The jury returned a verdict for the plaintiff. The plaintiff moved for a judgment non obstante veredicto, and for a new trial. At the same term the time for preparing a bill of exceptions was extended until and through the month of December, 1896. On the

18th of December of that year the court ordered judgment for the plaintiff non obstante veredicto, and on the 22d of December judgment for the plaintiff was entered accordingly. On the 11th of March, 1897, the defendant moved the court to set aside the judgment and grant a new trial, on the ground of surprise; the defendant claiming to have been taken by surprise by the testimony of Albert W. Roome. Other grounds were newly-discovered evidence, that the judgment was not sustained by sufficient evidence, was contrary to law, error in the assessment of the amount of recovery, and other reasons. All the reasons, excepting surprise and the allowance of interest from April 1, 1891, were fully discussed upon the hearing of the motion for judgment, and will not now be reconsidered. The interest was rightly allowed from the date of demand upon the defendant for payment. At the trial of the case there was no claim of surprise at the testimony of Roome, and no continuance was asked. On the argument of the motion for judgment non obstante veredicto, defendant made no claim of surprise. That claim was not made until nearly three months after the judgment had been entered. In support of it the affidavit of the paying teller of the bank is filed, denying the testimony of Roome, which was that about the 23d or 24th of October, 1889, he showed to Randolph the forged draft, and notified him that the woman to whom the draft was payable, and whose indorsement was forged, had died in 1883; also, the affidavit of A. P. Tallman that at the time of the trial, and after Roome's testimony had been given, it was impossible to procure Randolph's evidence, as he was then living in the state of Illinois. But it appears from the evidence of Roome that, when he went to the bank for the express purpose of notifying the bank of the forgery, Caroline Hinkey, who had the draft cashed, and was presumably guilty of forgery of the indorsement, had been taken to West Virginia in order to evade the authorities. It appears from the transcript of the evidence in the case of *U. S. v. American Exch. Nat. Bank*, 70 Fed. 232, to recover the amount of this draft, that the deposition of H. E. Randolph, taken April 4, 1892, was read in evidence. In that deposition he testified that the first he knew of Caroline Hinkey's right to receive the money on the draft being questioned "was the time that Capt. Little took her over into West Virginia in order to evade the authorities. This was after she had drawn the balance on the certificate of deposit; it was quite a little while afterwards." This testimony agrees exactly with Roome's as to the time; that is to say, that it was while Caroline Hinkey was in West Virginia to evade the authorities. He further testified that he could not remember definitely, with reference to the time of the payment of the money, when it was that he heard that Caroline Hinkey had committed forgery in indorsing the draft. He said that "it might have been three months, and it might have been but one month." The check was cashed August 2, 1889, and Roome gave the notice to the bank in the latter part of October, 1889. It further appears, from the record of evidence given in New York, that at that time the officers of the Bellaire Bank did not pretend that

they did not have notice of the fact that the indorsement of the draft was forged. Roome was a witness in that case, and testified at the trial as to the notice given to the Bellaire Bank, just as he did at the trial of this case. If a new trial were granted now, and Randolph were to swear according to the statements of his affidavit, he would be contradicted by his own deposition, taken April 4, 1892. There is, therefore, no sufficient ground for the motion to set aside the judgment, which is overruled.

I am appealed to to make an order to enable the defendant to procure a bill of exceptions that will be recognized as valid by the court of appeals, and that, if necessary, I make an entry nunc pro tunc. There is nothing in this case which would authorize the court to make an entry nunc pro tunc, and I am unable to see that there is any other entry that can be made that will enable the defendant to take a bill of exceptions. The time for taking such a bill expired, by limitation of the express order made, on the last day of December, 1896. The order might then have been made extending the time through and until the end of that term, but I know of no practice allowing a bill of exceptions after the expiration of the term succeeding the trial term. I have, on one or two occasions, where there was special reason therefor, on the application of counsel, set aside the judgment,—not, however, in cases where there has been trial by a jury,—and re-entered it early in the following term, so as to enlarge the time for taking an appeal. But the time for taking a writ of error in this case has long since expired, and I know of no means whereby the defendant can now obtain a valid bill of exceptions.

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CHICAGO TITLE & TRUST CO. et al. v. STATE BANK OF AMBIA.

(Circuit Court of Appeals, Seventh Circuit. May 17, 1898.)

No. 475.

STATE BANK—IMPAIRMENT OF CAPITAL—INDIANA BANK ACT.

Under section 13, of the Indiana bank act, as amended March 9, 1895, providing that, when the capital of a state bank becomes impaired, the auditor of state shall levy an assessment upon the shareholders to make good the deficiency, and, if any shareholder fails to pay such assessment, shall cause his stock to be sold to the highest bidder, the proceeds of such sales do not belong to the bank, but must be paid to the shareholder, less expenses of sale.

In Error to the Circuit Court of the United States for the District of Indiana.

Plaintiffs in error alleged in their petition that the defendant in error was a bank of discount and deposit organized under the law of Indiana with a capital stock of \$25,000, divided into 250 shares; that plaintiffs in error owned 100 of these shares, for which \$100 per share had been paid by one McConnell; that they had owned these shares since the 2d day of January, 1896; that on August 1, 1896, the state auditor directed an assessment of 60 per cent. to make good an impairment of the capital stock of said bank; that on August 1, 1896, the directors of said bank gave to plaintiffs in error notice of said assessment, amounting to the sum of \$6,000 on their stock; that they failed to pay said assessment; that on the 10th of November, 1896, the auditor valued

the said shares at \$40 per share, and directed that the same be sold at public auction after three weeks' notice; that afterwards said bank gave notice that upon Saturday, the 2d of January, 1897, at 12 o'clock noon, at the front door of its banking house at Ambia, Ind., said shares would be sold, etc.; that said shares were sold pursuant to said notice for the sum of \$40 per share, aggregating \$4,000 in cash, which money was received by the cashier of said bank; that immediately thereafter plaintiffs in error tendered the said cashier the 100 shares of capital stock so sold and demanded the \$4,000, less the expenses of said sale, but that said cashier and defendant in error refused to pay the same, or any part thereof. Defendant in error demurred to the petition outlined above, and intended to make a case within the statute quoted below in the opinion. The demurrer was sustained, and judgment rendered upon the same and for costs against these plaintiffs in error, who now bring the record to this court.

Samuel O. Pickens, for plaintiffs in error.

Daniel Fraser, for defendant in error.

Before WOODS and SHOWALTER, Circuit Judges, and BUNN, District Judge.

SHOWALTER, Circuit Judge, after making the foregoing statement, delivered the opinion of the court.

We are not referred to any by-law of the defendant in error or to any statute of Indiana which obligates the stockholders of corporations such as this defendant in error to make good any mere impairment of capital other than the following provisions, being part of what is now section 13, as substituted by amendment March 9, 1895, for the original section 13 of the act of February 7, 1873, of the Revised Statutes of Indiana, entitled "An act to authorize and regulate the incorporation of banks of discount and deposit in the state of Indiana":

"Whenever the auditor of state shall have reason to believe that the capital stock of any of said associations is reduced by impairment or otherwise, below the amount required by law or by its articles of association and certificate of increase or decrease of capital, as the case may be, the auditor shall require the deficiency to be made good and the board of directors shall immediately give notice of such requisition to each stockholder and of the amount of assessment which he must pay, by notice made to such stockholder at his place of business or served personally upon him. If any stockholder shall refuse or fail to pay the assessment specified in the notice within sixty (60) days from the date thereof, said directors shall have the right to sell said stock, or any part thereof, to the highest bidder at public or private auction, and with or without notice as the auditor may direct the sale to be made, but such stock shall not be sold for a less sum than valuation put thereon by the auditor and certified by him to the board of directors, and the auditor may revalue such stock, and new offers for sale may be made at any time, and from the proceeds of sale shall first be deducted the costs thereof.

"If any association shall neglect for sixty (60) days after the auditor shall have required such deficiency to be made good to comply with such request, the auditor shall report the fact to the attorney-general, who shall at once institute such legal proceedings as shall be proper to wind up the defaulting association according to law, and in [any ?] violation of law, or default named in this act shall be sufficient cause for the appointment of a receiver for any such association."

The directors are empowered to sell, provided the purchaser will pay as much as the value certified by the auditor; but it is nowhere stated in this statute that the price received by the directors shall go to and become the property of the bank. Presumably, the price,

less the expenses of the sale, would belong to the owner of the stock sold. In such case the bank would lose nothing. The purpose of the statute is apparently to enable the bank to get rid of unwilling stockholders, and go on with its business. The extra obligation of shareholders for debts and liabilities of the corporation in default of assets is fully provided for in other portions of the statute. No obligation of that sort is involved here. The statute does not in terms or by necessary implication create an obligation on stockholders to pay more than the full par value of the shares merely to replenish or replace capital lost in the business of the corporation. Counsel do not question the validity of the amendment as concerns the sale of shares in the manner provided in case the holder does not choose to pay the assessment made by the auditor. Apparently the bank may be wound up if stockholders, or persons willing to become stockholders, by purchase in the manner directed, do not replenish the capital as demanded by the auditor. But, whatever may be the precise meaning and policy of this statute, we do not find in it satisfactory ground for the ruling that these plaintiffs in error, owning the 100 full-paid shares, must forfeit \$4,000,—that being the entire value of the shares sold pursuant to the direction of the auditor,—because they did not elect to pay \$6,000 additional in order to replenish the capital, and enable the business to continue. The statute does not say that the \$4,000—the price received for these shares—should be forfeited by the owners; it does not say that the bank should become owner either of the shares or the money received as the price of the same. The directors had, according to the statute, the power to sell for the price fixed by the auditor, but not the right to withhold that price, less the expenses of the sale, from the owner of the shares. Whether or not, if such were the expressed meaning, the statute would be valid or constitutional, is a question which need not be discussed. The judgment is reversed, and the cause remanded for further proceedings not inconsistent with this opinion.

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SOUTHERN RY. CO. v. SHAW.

(Circuit Court of Appeals, Fifth Circuit. April 19, 1898.)

No. 625.

1. TRIAL—ARGUMENT OF COUNSEL—IRRELEVANT TESTIMONY.

The court may properly direct counsel to desist from discussing to the jury immaterial evidence that has been ruled out.

2. SAME—REQUEST TO CHARGE—UNFAIR STATEMENT OF EVIDENCE.

Requests to charge, which do not fairly state the testimony, and which sum up the evidence for the defendant without stating with anything like judicial fairness what it tends to prove, are properly denied.

3. NEGLIGENCE—STEALING RIDE—DUTY OF RAILROAD COMPANY.

After the presence of a person stealing a ride on a train is discovered, the railroad company owes him the duty which humanity imposes, and his efforts to cling to the train to prevent falling under the wheels cannot be considered as a resistance to those attempting to remove him while the train is in motion.

## 4. SAME.

Where a person stealing a ride on a train continues to get on after being put off, it does not entitle the railroad company to use increased force, especially where the trespasser is a child 10 years old.

## 5. SAME—ORAL REQUESTS MADE DURING ARGUMENT TO JURY.

The court is not bound to notice oral requests to charge, made by counsel during his argument to the jury.

In Error to the Circuit Court of the United States for the Southern District of Georgia.

Walter B. Hill and N. E. Harris, for plaintiff in error.

R. C. Jordan, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

McCORMICK, Circuit Judge. Dennis Shaw, by his next friend, Mary Doyle, the defendant in error, brought his action against the Southern Railway Company, the plaintiff in error, to recover damages for personal injuries inflicted on him by a moving train of railroad cars which was being operated by the plaintiff in error, stating his case, so far as we deem it necessary to quote from his petition, thus:

"That on or about the 20th day of August, 1895, your petitioner, who was a minor of only ten years of age, and whose mother and father were both dead, lived with a colored man in the city of Macon, who continually beat, abused, and so cruelly treated your petitioner that he could no longer live with him. That on or about said 20th day of August, 1895, your petitioner left the city of Macon, and walked as far as the first station on defendant's road south of Flovilla, Georgia. That while your petitioner was at said station, on said 20th day of August, 1895, one of the passenger trains of the defendant, which was going north, stopped at said station, and your petitioner, desiring to get to Atlanta, Georgia, being tired and footsore, and having no money with which to pay his fare, got under one of the cars of said train, holding on by means of the beams, fastenings, and iron rods under said car. That your petitioner rode in this position until the train reached Jackson, Georgia, at which station defendant's train again stopped. That, just as the said train was leaving Jackson, and after it had begun to move with considerable speed, the flagman on said train, which said flagman was a servant and employé of the defendant, discovered your petitioner riding under said car; and, instead of stopping the train, and removing or having your petitioner removed, as he had a right to do, and as it was his duty to have done, he, the said flagman, recklessly, wantonly, willfully, and maliciously caught and grabbed your petitioner by the leg, and jerked, pulled, and kicked him loose from under said car."

The plaintiff in error (the defendant below), besides the general denials, not necessary to be quoted, answered:

"That on the 20th day of August, 1895, a number of negro tramps were attempting to steal a ride upon its north-bound passenger train, known as train 'No. 7,' going from Macon to Atlanta. That it was discovered, just as said train moved off from Jackson, in said county of Butts, that these tramps or trespassers were riding upon the trucks of one of the coaches of said train. Thereupon the train was stopped, and the train hands ordered said trespassers to get off the trucks, which they then and there did, the train having come to a full stop when they were ordered off and when they got off. Thereupon the train again moved off, and, after proceeding only a short distance, it was again discovered by the train hands that all or some of these trespassers had again gotten upon the trucks of said car. That thereupon the train was again stopped, and the said train hands ordered the said trespassers to get off of said trucks, which they then and there did while the train was standing still, and then the defendant's train proceeded on its route to Atlanta. \* \* \* Defend-

ant does not know the age of the plaintiff, but denies that his father was dead, and also denies that the plaintiff was beaten, abused, and cruelly treated by the colored man with whom he lived in the city of Macon. On the contrary, the defendant is informed that the plaintiff lived in Macon with his father; that his father treated him kindly; and that the plaintiff, without cause, or the knowledge of his father, ran away from home."

The judge, in the opening of his general charge to the jury, used this language:

"The action is brought by the plaintiff to recover damages for the mutilation of his person,—the loss of one arm and a portion of the hand of the other arm. It is not disputed that the plaintiff was injured. The extent of his injuries is not controverted; nor is it disputed that the injuries were sustained because one of the cars of a passenger train of the defendant company ran over and crushed the arm of the plaintiff and a portion of his hand. The plaintiff's case depends upon the question whether or not he has satisfactorily maintained by proof his contention that he was unlawfully, recklessly, and negligently ejected from the cars of the defendant company."

On this vital issue, thus clearly stated to the jury, there was much testimony offered which tended to support the plaintiff's case, and much other testimony in conflict therewith. The case came on for trial on the 30th of April, 1897, and remained on trial continuously (excluding Sunday) until the 4th of May. Before the court began the charge to the jury, the defendant's counsel submitted the following.

"Requests to Charge by Defendant.

"Dennis Shaw, by Next Friend, vs. Southern Railway Company.

"Defendant's counsel respectfully ask the court to give in charge to the jury the following requests (the same being made as separate requests):

"(1) In this case the plaintiff, by his own admission, was a trespasser upon the defendant's train. In such case there is no presumption against the defendant company, even though the defendant was injured by the running of the cars of the railroad. The burden of proof is on the plaintiff to show that, if a trespasser, he was injured by the defendant or its agents in such manner as to entitle him to recover under the rules of law as given you by the court. The plaintiff must show by the preponderance of the evidence that he was injured in the manner alleged in his amended declaration.

"(2) 'Where no duty of diligence appears relatively to the person injured, there can be no presumption of its breach, notwithstanding the broad language of section 3033 of the Code. That section imposes the burden of proving the observance of such diligence as was due; not the burden of proving that none was due. For a railroad to be exempt from liability for a personal injury done by the running of its locomotives or cars, it is only necessary for it and its agents to exercise all ordinary care and diligence (if any) due from it and its agents relatively to the person injured.' *Holland v. Sparks*, 92 Ga. 753, head-note 1, 18 S. E. 990. See, also, *Waterbury v. Railroad Co.*, 17 Fed. 682, note, art. 1, § 5.

"(3) For the purpose of expelling a trespasser from a train, the employes of a railroad company may lawfully use whatever amount of force is reasonable, proper, and necessary.

"(4) In this case the plaintiff states that he was stealing a ride from Flovilla to Jackson; that, after the train left Jackson, it slowed up, and that when it slowed up he could have gotten off with safety; that he did not then get off; that afterwards the flagman of the train attempted to pull him off; that he resisted this effort forcibly. Upon this state of facts, appearing from the plaintiff's admissions, the court charges you that, if you believe the plaintiff's statement to be true, then the defendant's agents had the right to use some force in removing him from the train, and such as was necessary for the purpose.

"(5) The railroad company in this case was not under any duty to the plaintiff as a trespasser. The only limitation upon its right to remove a trespasser



from the train is that the force used in such removal shall not be unnecessary or wanton or malicious, or exercised for the purpose of injuring the plaintiff.

"(6) If, in this case, the jury believes the plaintiff's statement to be true, and that he was upon the train after it had 'slowed up' for the purpose of getting him off; that he remained on the train in spite of his knowledge of this purpose; that the train afterwards stopped,—the plaintiff stating that he could have gotten off, when it stopped, with safety, and that after the train began to move it moved forward at the rate of only three or four miles an hour; that this rate of motion was about half as fast as a man ordinarily walks, and that while the train was moving thus slowly the flagman attempted to pull the plaintiff off,—the plaintiff resisting; and that the flagman believed, and had reasonable cause to believe, that at this rate of speed the plaintiff could be removed from the train without injury; and that the flagman for the sole purpose of removing the plaintiff, and not for the purpose of injuring him, removed the plaintiff, and that the falling of the plaintiff under the wheels was unavoidable and unintended accident,—then, in this case, the defendant will not be liable.

"(6) If the jury believe from the evidence that the plaintiff got off the train at Jackson, and that as the train moved off he got on again; that the train came to a stop, and that the plaintiff, with other trespassers, was then warned off; that when the train moved off from this stop the plaintiff again got upon it, and that there was a second stop of the train for the purpose of removing trespassers, and that at this second stop the plaintiff and other trespassers were again warned off, and that when the train moved off the plaintiff again got upon the train,—the court charges you that this continuing trespassing on the part of the plaintiff puts him in the attitude towards the defendant company of a persistent and obstinate trespasser, and that the degree of force which the defendant's agents were entitled to use in removing him from the train would increase along with each additional degree of persistency and obstinacy exhibited by the plaintiff, and the defendant would not be liable for the exercise of force in removing him from the train unless the force so exercised was out of proportion to the persistency and obstinacy of the plaintiff's efforts to continue upon the train, and unless the removal was accomplished with unnecessary, malicious, or wanton violence.

"(7) In this case the defendant's defense is a total denial of the plaintiff's allegation as to the manner in which he was injured; and if the jury believe from the evidence which has been adduced by the defendant that the plaintiff's allegations have been disproved, then the plaintiff cannot recover, and it is not incumbent upon the railroad company to account for the manner in which the plaintiff has been injured.

"(8) In considering the truth of the plaintiff's allegations, you will consider their reasonableness. And if you believe from the evidence that the plaintiff, if riding upon the truss rods, was at a point near the outside edge of the baggage car, and that, if he was pulled down from this position, he would not have fallen upon the rail, but would have fallen outside the rail; or if you find from the evidence that he was secreted under the trucks, and in the middle of the car, and if the plaintiff states that he was pulled and kicked from about the middle of the car; and if you believe from the evidence that on account of the height of the car above the ground, and on account of the distance from the middle of the car to the position a man would occupy on the outside of the same, it was physically impossible for the plaintiff to be kicked from the car in that position,—then all these matters are proper for your consideration in determining the truth of the plaintiff's statement.

"(9) In this case the defendant has adduced evidence tending to show that after leaving Jackson the plaintiff's train made a full stop, and that the trespassers on the train, including the plaintiff, were then warned off and got off the train; that, after the train moved on, they got back upon the train; that the train stopped a second time; that again the trespassers, including the plaintiff, were warned off and removed; that both of these stops were for the sole purpose of removing those trespassers from the train; that no one of the train employes at any time touched or got his hand upon the person of the plaintiff; that both of these stops of the train were south of the point where, upon the next morning, a quantity of blood

was found upon the track, and one of the plaintiff's fingers was picked up; that this point where the blood and the finger were found was at a point where the train was moving forward after its second stop, and two hundred and forty yards distant from the north end of the depot; that none of the train hands heard the cries of pain which the plaintiff declares he made at the time he was injured. Now, if the evidence which has been submitted by the defendant satisfies you of the general truth of the theory above outlined, then your verdict will be for the defendant."

On this paper the trial judge made the following note: "In so far as these requests are pertinent and permissible, the court prefers to give them in his own language." The judge, on his own motion, gave an extended and comprehensive charge to the jury, embracing such instructions as he considered pertinent to all the features of the case presented by the pleadings and the proof. There was a verdict and judgment in favor of the plaintiff for the sum of \$1,750, from which the defendant has sued out and prosecutes this writ of error.

The assignment of errors suggests: (1) That the court erred in ruling that the testimony of a certain witness (Hartswell), set out in the bill of exceptions, had anything to do with the case, and in directing the defendant's counsel to desist from their discussion of the same. The bill of exceptions referred to shows the testimony of that witness in full, and shows that at the close of his examination on the stand the court announced: "I fail to discover any materiality in any of this testimony. It is perhaps interesting as illustrative of a certain phase of life and existence, but it has no material relation to this case. The boy denies that the witness is his father. In law he is not his father, although perhaps the author of his existence." We have read the testimony of the witness referred to with care, and, like the trial judge, we cannot discover in it anything that is material to any of the issues in the case. The jury must have understood the court to have ruled it out. Counsel should have so understood it. And when, disregarding the clear announcement of the court, counsel was proceeding to discuss this testimony to the jury, the court properly forbade it.

The errors numbered 2 to 8, inclusive, suggest that the court erred in refusing requests to charge numbered 4 to 9, inclusive, as given above. We here quote with approval the language of a distinguished judge, who, on a like occasion, attached this note to a similar request for charges:

"The court declined to give the requests to charge the jury, as indicated above, for the reason that, in so far as they were deemed proper, they were thought to be covered by the instructions given, and also because it is regarded as a pernicious practice to couch voluminous instructions to the jury in the precise language desired by counsel, when the court, in the performance of its duty, thinks it more conducive to a fair trial to use language not colored by the zealous anxiety of the advocate, even though the language of the presiding judge may not be altogether so felicitous as that suggested by counsel. This is especially true when the requests for instructions are so extensive as practically to appropriate all the functions of the court with relation to instructions to the jury."

We have observed that in suits by persons claiming damages from railroad companies for personal injuries inflicted by the operation of their trains, an elaborate thesis on the subject of the carrier's

liability, compiled by the defendant's counsel from language found in the reported opinions of courts of last resort, or in the headnotes to such opinions, and applied argumentatively to the counsel's view of the proof in the particular case on trial, so as to embrace and exhaust every feature of it, is almost invariably presented to the court before the judge delivers his own charge to the jury. We think it is safe to say that the United States judges, who are appointed for good behavior, are somewhat conversant with the reported opinions of courts of last resort on questions so constantly before the courts as the questions involved in this case. The object in presenting such requests to charge appears to be to furnish a basis for assignments of error. It is not rational to suppose that learned counsel, practicing before a court presided over by a judge whose tenure is permanent, and with whose modes of thought and method of action they are or may become so well acquainted, reasonably expect such a judge to give exactly in the language they use the particular and numerous instructions they request. Considered, therefore, as a basis for an assignment of error, it is appropriate to suggest to such counsel that the object of an assignment of error is to reach the minds of the judges of the court of errors; and for this purpose the office of a requested charge is to make specific the counsel's exceptions to an erroneous charge given by the court, or an omission to charge on a point or matter calling for instructions.

We have observed, and have more than once remarked, on another general tendency in the practice of counsel representing railroad corporations (and not always restricted to them), inducing them to bring to this court, on one ground or another, all of the evidence offered on the trial in the circuit court. In the bill of exceptions in this case we find this language:

"Evidence was adduced in behalf of the plaintiff and defendant, which is hereto attached as 'Exhibit A,' and made a part of this bill of exceptions, and identified by the signature of said judge; said evidence being material to the understanding of the cause, and being all of the evidence that was adduced by either party in said cause, the whole of the same being material to an understanding of the exceptions made and errors assigned."

Waiving the compliment to the judicial vision of the circuit court of appeals, we suggest that it is not conducive to our understanding of the exceptions made and the errors assigned to send up to us 76 printed pages of questions and answers, showing the direct, cross, and redirect examination of various witnesses on the stand, the tendency of which testimony to support the contradictory contentions of the parties could easily have been clearly stated on a single page.

The fourth request should not have been given, because it did not fairly state the plaintiff's testimony. His testimony does not show that he forcibly resisted the effort to remove him from the train. It does show that, while the train was still moving at the rate of three or four miles an hour, the flagman seized him by his feet, and he held onto the rod with his left hand, to keep from falling so that the wheel would run over his arm. The fifth re-

quest was properly refused, because it is not sound as matter of law. Though the plaintiff was a trespasser, after his presence was discovered the corporation did owe him the duty which humanity imposed. The first request numbered 6 was properly refused, because it undertakes to give the plaintiff's statement,—referring, doubtless, to his statement as a witness on the stand,—and is subject in a higher degree to the criticism which we have made on request No. 4. The next request, also numbered 6, was properly refused, because the hypothesis which it submits to the jury finds no reasonable support from the testimony taken as a whole, and, further, because, in view of the fact that the train was moving at the time, the instruction is not sound, even if the hypothesis it submits was supported by the preponderance of the proof. And especially is this true when we consider the tender years of the trespasser. The seventh request should have been refused, because 12 men competent to sit on a jury do not require to be instructed that, if the plaintiff's allegations have been disproved, he cannot recover. And the concluding line of this request is a non sequitur.

Requests Nos. 8 and 9 should have been refused, because they undertake to sum up the evidence in behalf of the defendant, as drawn from the testimony offered by the defendant, and from the pleadings and the testimony of the plaintiff, and they do not state with anything like judicial fairness and fullness what the evidence tends to prove, but in a confused way seek to emphasize unduly certain detached elements in the case, consisting partly of direct testimony, but largely of conclusions of fact expressed by the different witnesses, and conclusions of fact and of law deduced by the counsel from the direct testimony and the conclusions of the witnesses. We conclude that there was no error in refusing these requests as tendered to the court before it, on its own motion, had charged the jury. The ninth error assigned is that the court failed to charge the jury with reference to the effect of the impeachment of the plaintiff by the proof of his previous contradictory statements. There was no request in writing tendering to the court a proper instruction on this subject, even if the case called for an instruction on the subject, which is by no means apparent to us. The record shows that in the midst of his oral argument to the jury, while discussing what the counsel claimed to be discrepancies between statements made by the plaintiff on the stand and statements he had made to others, counsel turned to the court, and orally requested the court to submit to the jury a proper instruction bearing upon that phase of the proof. It was not error in the court to omit to comply with this request thus made. The tenth, eleventh, twelfth, and thirteenth errors assigned suggest that the court erred in giving certain portions of his general charge. We do not discuss them in detail. We have examined them in detail, and read them carefully in connection with all of the other portions of the charge, and, thus read, we do not find in them any error for which the case should be reversed. It follows that the judgment of the circuit court should be, and it is, affirmed.

**WILLIS v. BOARD OF COM'RS OF WYANDOTTE COUNTY, KAN.**

(Circuit Court of Appeals, Eighth Circuit. April 18, 1898.)

No. 892.

**1. FEDERAL COURTS—FOLLOWING STATE DECISIONS.**

In cases depending upon the constitution or statutes of a state, the federal courts will adopt the construction of the constitution or statutes given by the highest courts of the state, but are not required to follow the decisions of the state courts where the question is one of general law.

**2. COUNTY AGENTS UNDER VOID STATUTE—VALIDITY OF CONTRACTS—ESTOPPEL.**

Road commissions appointed under Sess. Laws Kan. 1887, c. 214, since declared unconstitutional, were without authority; and road improvement certificates issued by them are not binding on the county, and it is not estopped to deny their validity because of having received the benefits of the labor and materials for which they were issued.

**3. IMPROVEMENTS MADE UNDER VOID STATUTE—SPECIAL TAXES THEREFOR COLLECTED—ESTOPPEL.**

Where roads were improved under Laws Kan. 1887, c. 214, before it was declared unconstitutional, and the county has collected money from property owners in the vicinity of the improvements, to pay the improvement certificates, it holds such money as agent or trustee of the certificate holders, and both it and the property owners are estopped to deny its liability therefor.

**4. REVIEW ON ERROR—MOTIONS FOR NEW TRIAL.**

To grant or refuse a new trial rests in the sound discretion of the federal courts, and their decisions thereon are not reviewable on error.

In Error to the Circuit Court of the United States for the District of Kansas.

Winfield Freeman (Silas Porter, on reply brief), for plaintiff in error.

George B. Watson (McGrew, Watson & Watson, on brief), for defendant in error.

Before BREWER, Circuit Justice, SANBORN, Circuit Judge, and RINER, District Judge.

RINER, District Judge. This was an action brought by George R. Willis, plaintiff in error, against the board of county commissioners of Wyandotte county, Kan., defendant in error, in the circuit court of the United States for the district of Kansas, to recover the sum of \$45,-836.82, with interest thereon, alleged to be due upon a number of road improvement certificates and interest coupons attached thereto, which were signed and issued by certain persons acting as road commissioners for Wyandotte county, pursuant to the provisions of an act of the legislative assembly of the state of Kansas approved March 5, 1887, entitled "An act providing for the improvement of county roads" (Sess. Laws Kan. 1887, c. 214).

The petition, after properly alleging the diverse citizenship of the parties, and that the amount in controversy, exclusive of interest and costs, exceeded the sum of \$2,000, contained 78 separate causes of action, each being based upon a different road certificate, or upon interest coupons, attached to the certificates, representing the annual interest due thereon. These different causes of action were in substantially

the same form, varying only as to amount, name of the party to whom issued, and the date of maturity. In each cause of action it is alleged that, pursuant to an act of the legislature entitled "An act providing for the improvement of county roads," approved March 5, 1887, the defendant, by its duly-authorized agents, executed and delivered, to a certain party therein named, its obligation in writing, whereby it promised to pay to the party named in the obligation, or bearer, the sum of money specified therein, together with interest thereon, at the rate of 7 per cent. per annum, payable annually on presentation and surrender of the interest coupons attached, and that the party to whom the certificate was issued, before maturity and for value, sold and delivered the obligation to the plaintiff, who thereby became, and still is, the owner thereof; that no part of said obligation has been paid, and there is due the plaintiff on the same the sum named in that cause of action.

July 17, 1894, pursuant to leave of court, the plaintiff amended his petition as follows:

"The plaintiff, for amendment to the petition, on leave of the court, adds the following to be inserted in the said petition at the end of the last cause of action, and before the prayer thereof. That all of the said certificates and coupons are long since overdue and wholly unpaid; that the defendant county, although demanded, has refused to pay the same, or any part thereof, and claims and alleges that it was not authorized to issue them. The plaintiff says that the defendant ought to be precluded from so saying, for the reason that said certificates were, and each of them was, issued for and on account of work and labor performed and material furnished in grading and improving the several county roads in said Wyandotte county, Kansas, mentioned in each of the said certificates; that said work was fully performed and material furnished under the direct supervision of the authorized agents of said defendant, according to the plans and specifications furnished and provided by the defendant therefor; when completed, was accepted by them; was a permanent and valuable improvement to each of said roads, by reason of which said defendant has received and enjoys a great and lasting benefit, greatly in excess of the cost thereof; and the defendant has collected a large part of the cost thereof from the property owners adjacent thereto, and now has in its treasury money so collected."

March 31, 1896, a demurrer to the amended petition was sustained, and a judgment was entered in favor of the defendant; whereupon the plaintiff sued out this writ of error. Three errors are assigned: First, the court erred in sustaining the demurrer of the defendant to the plaintiff's amended petition; second, the court erred in entering a judgment in favor of the defendant, and against the plaintiff; third, the court erred in overruling the motion of plaintiff for a new trial.

The first and second assignments of error present the same question, and may be considered together. The law under which these certificates were issued (Sess. Laws 1887, c. 214) was declared to be unconstitutional by the supreme court of Kansas in the case of *Commissioners v. Abbott*, 52 Kan. 148, 34 Pac. 416, and also in the case of *Hovey v. Commissioners*, 56 Kan. 577, 44 Pac. 17.

It has been repeatedly decided that the federal courts, in cases depending upon the constitution or statutes of a state, will adopt the construction of the statutes or constitution given by the highest courts of the state when that construction can be ascertained. *Polk's Lessee v. Wendel*, 9 Cranch, 87; *Nesmith v. Sheldon*, 7 How. 812; *Walker v.*

Commissioners, 17 Wall. 648. In the case last cited the supreme court said:

"In the construction of the statutes of a state, \* \* \* this court follows the adjudications of the highest court of the state. Its interpretation is accepted as the true interpretation, whatever may be our opinion of its original soundness."

And in *Claiborne v. Brooks*, 111 U. S. 410, 4 Sup. Ct. 489, the court stated the rule as follows:

"It is undoubtedly a question of local policy with each state what shall be the extent and character of the powers which its various political and municipal organizations shall possess, and the settled decisions of its highest courts on this subject will be regarded as authoritative by the courts of the United States; for it is a question that relates to the internal constitution of the body politic of the state."

The exception is where the question is one of general law. Thus, in *Hough v. Railway Co.*, 100 U. S. 213, it was said:

"Our attention has been called to two cases determined in the supreme court of Texas, and which, it is urged, sustain the principle announced in the court below. After a careful consideration of those cases, we are of opinion that they do not necessarily conflict with the conclusions we have reached. Be this as it may, the question before us, in the absence of statutory regulations by the state in which the cause of action arose, depend upon principles of general law, and in their determination we are not required to follow the decisions of the state courts."

Again, in the case of *Railroad Co. v. Baugh*, 149 U. S. 368, 13 Sup. Ct. 914, Mr. Justice Brewer, in delivering the opinion of the court, said:

"The question as to what is a matter of local, and what of general, law, and the extent to which in the latter this court should follow the decisions of the state courts, has been often presented. The unvarying rule is that, in matters of the latter class, this court, while leaning towards an agreement with the views of the state courts, always exercises an independent judgment."

Other cases, in which the supreme court of the United States has announced the rule substantially as in the two cases just referred to, might be cited; but it can serve no useful purpose to review the learning upon this proposition, as the case here is clearly a question of local law, and this court will follow the decision of the supreme court of the state of Kansas upon the question of the constitutionality of this statute. That court having decided that the statute is unconstitutional, its ruling will be adopted by this court in the disposition of this case.

The road certificates in suit were not issued or signed by the county commissioners, but by road commissioners appointed by the county commissioners under the provisions of section 6 of the act of the legislature above mentioned, which act constituted the only authority for the appointment of road commissioners. That act being void, because in conflict with the provisions of the constitution, there was no such office as road commissioner; and those who acted in that capacity, and issued these certificates, could in no way bind the county by their acts. They were entirely without authority to contract or to act for the county. These road commissioners being wholly without authority of law to act for and on behalf of the

county, the certificates issued by them did not represent a valid indebtedness of the county, and the county was not estopped from asserting their invalidity. Neither can it be said that the county was under an implied agreement, by reason of any act of the road commissioners, or because it had the benefit of the work, to pay what the services rendered in making the improvements were reasonably worth. The county commissioners neither had, nor assumed, the power to contract for the improvements, for which the certificates in suit were issued; and we think the appointment of the road commissioners and other acts performed by them, under the provisions of this void statute, did not bind the county to pay either the certificates or the value of the work. The only liability which it can be said the county may have assumed arises from the fact that it has collected moneys from the property owners adjacent to the improvements for the purpose of paying these certificates. In order to do this, the county assumed the role of the agent and collector of the certificate holders. Now, the county cannot be permitted to voluntarily assume the relation of agent and trustee of the holders of the certificates for the purpose of collecting the money from the property owners, and then to repudiate that relation in order to deprive the cestuis que trustent of the funds it collected for them, and to misappropriate them to its own use. The collection and acceptance of this money by the county constituted it a trustee of the fund for the holders of the certificates, and made it liable to them for every dollar it collected and failed to apply to the payment of the certificates. If the county has collected, from the parties who have the benefit of the improvements, moneys to pay therefor, we think it must be held that the county is liable to pay it over to the holder or holders of the certificates. It is money collected by the county for their use; and not only the county, but those who paid the money into the treasury of the county, are estopped from denying the liability of the county for the money thus collected. In the case of *Stewart v. Commissioners*, 45 Kan. 708, 26 Pac. 683, a taxpayer who had asked for the construction of a highway made under this same legislative enactment was held to be estopped from pleading the want of power in the county commissioners to make the improvement, and collect the tax from him. *Downs v. Commissioners*, 48 Kan. 640, 29 Pac. 1077; *Commissioners v. Abbott*, 52 Kan. 167, 34 Pac. 416. In the case of *Commissioners v. Hoag*, 48 Kan. 413, 29 Pac. 758, the county commissioners, without any authority whatever, paved a street in Kansas City, Kan., and one of the lot owners, who had petitioned for the improvement, and seen it made, was held to be estopped from defeating the collection of his proportionate part of the costs of the improvement levied under this chapter 214, which, if valid, would not include such a case.

From an examination of the above cases, it will be seen that the county commissioners of this county successfully invoked the principle of estoppel in the collection of the taxes to pay for these improvements, from the owners of property adjacent thereto, as provided by this void statute. If the county could invoke this doc-



trine in the matter of the collection of taxes to pay for the improvements, we can see no reason why the holders of these certificates of indebtedness, which were issued by the road commissioners, whom the county commissioners appointed and instigated to make the improvements and issue the certificates, may not invoke the same principle against the contention of the county that the improvements were made and the certificates issued without authority of law. The improvement of the roads, for which these certificates were issued, involved no moral turpitude, and was not forbidden by any statute. It is true, it was beyond the power of the county to make the improvements, because the law under which they assumed to act was unconstitutional; yet the county and its officers, the property holders who asked and were compelled to pay for the improvements, and the holders of these certificates, who paid out their money for material and labor to make the improvements, all believed, at the time these things were done, that their acts were authorized by law. In making these improvements, it cannot be said that the county was exercising its public or governmental powers. It was exercising its proprietary or business powers. It was acting and contracting for the private benefit of itself and its inhabitants, and, in the exercise of this power, it is to be governed by the same rules that govern private individuals and corporations. *Illinois Trust & Sav. Bank v. City of Arkansas City*, 40 U. S. App. 277, 22 C. C. A. 171, and 76 Fed. 271; *Safety Insulated Wire & Cable Co. v. City of Baltimore*, 25 U. S. App. 166, 13 C. C. A. 375, and 66 Fed. 140; *City of Cincinnati v. Cameron*, 33 Ohio St. 366; *Safety Insulated Wire & Cable Co. v. City of Baltimore*, 13 C. C. A. 375, 66 Fed. 140. The county commissioners appointed these road commissioners, induced them to contract for the improvements, saw the improvements made and the certificates of indebtedness issued to raise the money to pay for them, accepted and retained the benefit of them for the inhabitants of the county, compelled the parties who petitioned for the improvements to pay the taxes levied to create a revenue to pay for them, and the county now has the benefit of the improvements, and has the money collected to pay the certificates in its treasury, but declines to pay them, upon the sole ground that the county never had authority to do any of these things. This position cannot be maintained. That "the principle of estoppel applies as well where the proceedings of a corporation are questioned on the ground of the unconstitutionality of the statute under which they are had as where they are attacked upon other grounds" has been frequently decided. *State v. Mitchell*, 31 Ohio St. 592; *Tone v. Columbus*, 39 Ohio St. 281; *Counterman v. Dublin Tp.*, 38 Ohio St. 515.

In *Daniels v. Tarney*, 102 U. S. 415, it is said:

"It is well settled as a general proposition, subject to certain exceptions not necessary to be here noted, that, when a party has availed himself for his benefit of an unconstitutional law, he cannot, in a subsequent litigation with others not in that position, aver its unconstitutionality as a defense, although such unconstitutionality may have been pronounced by a competent judicial tribunal in another suit. In such cases the principle of estoppel applies with full force and conclusive effect."

Clearly, an individual or a private corporation would not be permitted to make any such defense, and, under the circumstances of this case, we can see no reason why a different rule should be applied in favor of this county. We think the county is just as much estopped from making such a defense as an individual or a private corporation. *Illinois Trust & Sav. Bank v. City of Arkansas City*, supra; *Water Works Co. v. City of Columbus*, 48 Kan. 113, 28 Pac. 1097. In the case of *Sleeper v. Bullen*, reported in 6 Kan. 300, it was held that a city was estopped from denying the validity of a contract under which a street was graded, after the grading had all been done.

To dispose of the third assignment of error, it is sufficient to say it has long been the established law of the courts of the United States that to grant or refuse a motion for a new trial rests in the sound discretion of the court to which the motion is addressed, and that the result cannot be made the subject of review upon a writ of error. *Insurance Co. v. Young*, 5 Cranch, 187; *Pomeroy v. Bank*, 1 Wall. 592; *San Antonio v. Mehaffy*, 96 U. S. 312; *Railroad Co. v. Heck*, 102 U. S. 120; *Boogher v. Insurance Co.*, 103 U. S. 90; *Jones v. Buckell*, 104 U. S. 554; *Criner v. Mathews*, 32 U. S. App. 405, 15 C. C. A. 93, and 67 Fed. 945; *Condran v. Railway Co.*, 32 U. S. App. 182, 14 C. C. A. 506, and 67 Fed. 522; *Woodbury v. City of Shawnee Town*, 20 C. C. A. 400, and 74 Fed. 205.

The judgment of the circuit court is reversed, and the case remanded, with directions to overrule the demurrer, and permit the defendant to answer.

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HART et al. v. BOWEN.

(Circuit Court of Appeals, Fifth Circuit. April 19, 1898.)

No. 597.

1. TRIAL—ORDER OF PROOF—DISCRETION OF COURT.  
It is within the discretion of a trial court to call attention to an omission of proof after plaintiff has formally closed his case, and on request to permit the omission to then be supplied.
2. SAME—REFUSAL OF INSTRUCTIONS.  
It is not error to refuse instructions asked, based upon general legal propositions, but not upon any evidence tending to show that such propositions are applicable to the facts of the case.
3. APPEAL—ASSIGNMENT OF ERROR.  
An assignment that the court erred in entering judgment in favor of the plaintiffs against the defendants is too general to be noticed.
4. SAME—ASSIGNMENTS MUST BE SPECIFIC.  
Assignments of error are required by the rules to point out the specific ground of error relied on, and an assignment that the court erred in charging the jury that there was no evidence establishing a defense is too general.
5. PARTNERSHIP—POWERS OF SURVIVING PARTNER—SETTLEMENT OF INDEBTEDNESS TO EMPLOYEE.  
For 10 years an employé worked for a partnership without the amount of his compensation having been fixed, being permitted to draw what money he needed, which was charged to his account. At the end of that time the senior partner died, the business being continued in the firm name by the surviving partner, who was a son and heir of the deceased partner, and the remaining heirs. Afterwards, on a settlement made with the surviving

partner and other of the heirs and the employé, the past salary of the latter was agreed upon, and the amount credited to his account on the books of the firm. *Held*, that such settlement was binding on the firm and the representatives of the deceased partner, unless set aside in a direct proceeding for that purpose on the ground of error, mistake, or fraud.

**6. HUSBAND AND WIFE—RIGHT OF WIFE TO SUE—PARAPHERNAL PROPERTY.**

Under the law of Louisiana a wife cannot maintain an action in her own name against others than her husband, except for the purpose of recovering or protecting her paraphernal funds or property.

**7. SAME—ESTOPPEL TO REQUIRE PROOF.**

Where a married woman deposits funds with a partnership as her separate paraphernal property, and they are recognized and treated as such by the firm and by the representatives of a deceased partner, her account being kept separate from her husband's, she may recover such funds in her own name, without proving their paraphernal character, defendants being estopped to deny the fact.

**In Error to the Circuit Court of the United States for the Eastern District of Louisiana.**

This action was instituted in the circuit court on the petition of Mrs. B. W. Bowen, wife of Reuben D. Bowen, and of said Reuben D. Bowen, each citizens of the state of Texas, and therein it was averred as follows: "That the estate of E. J. Hart, deceased, now being administered in the civil district court for the parish of Orleans under the number 45,308 of the docket thereof, and the commercial firm of E. J. Hart & Co., and Mrs. Juliana Hart, widow of said deceased, Miss Mary T. Hart, a feme sole of full age, Edmund J. Hart, Mrs. Julia H. Hall, widow of Charles K. Hall, deceased, John B. Hart, W. H. Jewell, Mrs. Henrietta H. Gordon, wife of W. A. Gordon, the individual members of said firm, each and all of said defendants being citizens of the state of Louisiana, and domiciled in this city and parish, are each justly and truly indebted in solido unto petitioners in the full sum of eighteen thousand one hundred and thirty-five dollars (\$18,135), with interest at the rate of six per cent. per annum, payable monthly, on ten thousand dollars from March 1, 1896, until paid, and on eight thousand one hundred and thirty-five dollars from April 1, 1896, until paid, being for \$18,122.13 your petitioner Mrs. B. W. Bowen has on deposit with said firm of E. J. Hart & Co. and a balance of \$12.87 to her credit on an open account with said firm. Petitioners aver that E. J. Hart, deceased, as aforesaid, was a member of said firm of E. J. Hart & Co., and a citizen of the state of Louisiana, up to the time of his death, and that said firm and the business thereof has since been carried on and conducted by the other defendants hereinbefore named; that for a number of years previous to the death of the said senior member of said firm, and to the present time, your petitioner Mrs. B. W. Bowen has kept a deposit account with the said firm upon the condition and with the agreement and stipulation that the said E. J. Hart & Co. should allow and pay her monthly interest at the rate of 6 per cent. per annum on the amounts to her credit both on her deposit and on her open account; that ever since July 27, 1895, the amount to the credit of your said petitioner Mrs. B. W. Bowen on her deposit account with said firm has been, and is now, \$18,122.13, and that up to March 1, 1896, the said firm paid to her each and every month the interest due thereon as stipulated and agreed, and she was also paid by said firm the interest on eight thousand one hundred and twenty-two and  $\frac{13}{100}$  dollars (\$8,122.13) of her deposit credit for the month of March, 1896, and up to April 1, 1896, but she has not been paid any interest whatsoever since April 1, 1896, although the same has been frequently demanded from said firm. Further, petitioners aver that your petitioner Mrs. B. W. Bowen has a right to withdraw the said deposit, and demand a settlement from said E. J. Hart & Co., at any time, and that the full amount of said \$18,135 was due and payable to her by said E. J. Hart & Co. as soon as demanded from them, and she has made due and frequent demand upon said E. J. Hart & Co. for the same, but without avail, and the said E. J. Hart & Co. still refuses and neglects to pay to petitioner any part of the amount so due to her or even the interest thereon. Further, petitioners aver that the said indebtedness of said firm belongs to your

petitioner Mrs. B. W. Bowen individually, and is her separate property." The petition closed with a suitable prayer for judgment. To this petition all the defendants appeared by counsel, and filed exceptions on the ground of vagueness and indefiniteness, and for grounds assigned as follows: "(1) That, although it is alleged in the body of the petition that the debt claimed is due to Mrs. B. W. Bowen individually, the action is brought in the name of both R. D. Bowen and his wife, Mrs. B. W. Bowen, and the prayer is for judgment in favor of both said petitioners, and thus defendants are not advised who is the real plaintiff, and in whose favor judgment is claimed. (2) That, although it appears on the face of the petition that Mrs. B. W. Bowen is a married woman, and that the deposit account alleged therein was kept with her as a married woman, yet it is alleged that the said indebtedness is her separate property, and no fact whatever is alleged upon which this allegation is based, or which would take this claim out of the rule and presumption of law that all property acquired during marriage by either spouse belongs to the community of acquets and gains subsisting between husband and wife. (3) That in other respects the allegations of said petition are so vague and indefinite that defendants cannot safely answer thereunto." On the hearing of these exceptions the court ordered that they be "maintained so as to require the plaintiffs to amend their petition so as to pray for judgment in the name of the wife, and thereupon the plaintiffs were allowed to amend their petition accordingly." No formal amendment appears to have been made, but thereafter the action proceeded the same as if the husband, Reuben D. Bowen, had been eliminated as a party from the case. The executors of E. J. Hart, deceased, answered with a special defense to the effect that the claim sued on was not the separate property of Mrs. B. W. Bowen, the plaintiff, but was a claim belonging to the community of acquets and gains subsisting between said Mrs. Bowen and her husband, and asserting that Mrs. Bowen had no right or power to sue on said claim or stand in judgment thereon; and generally they answered, alleging as follows: "That prior to the death of E. J. Hart, Sr., the firm of E. J. Hart & Co. existed and was composed of E. J. Hart, Sr., and E. J. Hart, Jr.; that at the death of E. J. Hart, Sr., which occurred on March 8, 1895, the said firm was dissolved, and the business thereof was continued by the surviving partner, E. J. Hart, Jr., as liquidating partner, and for purposes of liquidation only; and that the succession of E. J. Hart, Sr., was only bound for the debts of said firm existing at the date of his death, and for debts subsequently incurred for legitimate purposes of liquidation or inuring to the benefit of said firm in liquidation. That on March 8th, 1895, the death of E. J. Hart, Sr., the account of Mrs. B. W. Bowen showed that she was a creditor of said firm only in the sum of \$5,153.74; that thereafter said account was continued on the books of the firm in liquidation, and numerous items of debit and credit were entered thereon, resulting in a final balance as shown by said books in favor of Mrs. B. W. Bowen of the sum claimed in the petition herein, viz. \$18,135; that with regard to all said items (save one, which will hereafter be specially referred to) these respondents, while not undertaking to deny that they are charges which may be binding on the succession of E. J. Hart, yet say that it is their official right and duty to require due proof of such liability before judgment shall be rendered against said succession therefor; that the excepted item above referred to is a credit of \$10,000 entered on said account on the 27th of July, 1895, which said credit is claimed herein as a deposit, whereas no such deposit was made, but the same is a simple transfer to the account of Mrs. B. W. Bowen of an alleged credit standing on the books of the firm in liquidation in favor of her husband, R. D. Bowen, which transfer was made by order of her said husband; and respondents deny that said R. D. Bowen was entitled to any credit whatever, and aver that the credit in favor of Mrs. B. W. Bowen was without consideration, and was not binding on the succession of E. J. Hart. Respondents aver that from 1885 down to the death of E. J. Hart, R. D. Bowen had been an employé of E. J. Hart & Co.; that prior to January, 1890, he had been employed under an agreement to pay him commission on the goods sold by him, and that from and after January, 1890, he was employed at a fixed salary of \$150 a month; and that the aforesaid remuneration for his services was duly and fully paid him; that from the 3d of October, 1895, the said R. D. Bowen kept a continuous running account with the firm of E. J. Hart & Co.,

and at the death of E. J. Hart, Sr., said account showed a balance due by said R. D. Bowen of about \$12,000; that after said death, as respondents are informed, said R. D. Bowen made a claim upon the liquidating partner for additional remuneration for his services during the entire term thereof from 1885 down to July, 1895; that said claim was based on noncontract of the firm of E. J. Hart & Co., and on no legal obligation of said firm; that, nevertheless, the liquidating partner, E. J. Hart, Jr., for the reasons assigned in his separate answer herein, allowed said claim, and permitted a credit of the enormous sum of \$19,228.43 to be entered on the books to the credit of R. D. Bowen, thereby making him appear on said books as a creditor of said firm, whereas he was and is a large debtor; that shortly thereafter the said R. D. Bowen, who remained in the employ of the liquidator, ordered the transfer of \$10,000 from his account to the account of his wife, Mrs. B. W. Bowen, and the same forms a part of the amount claimed in this suit. Now, these respondents aver that the succession of E. J. Hart is in no manner bound by the aforesaid transactions, and that the said item is not due by said succession or by the firm of E. J. Hart & Co., in liquidation."

Several of the heirs of E. J. Hart, deceased, by the same counsel, filed an answer specially denying that they had ever been members of the firm of E. J. Hart & Co., and adopting all the special defenses to the plaintiff's claim set up in the executors' answer. E. J. Hart, the surviving member of the firm of E. J. Hart & Co., and an heir to E. J. Hart, deceased, filed a separate answer, adopting all the special defenses set up by the executors, and otherwise alleged as follows: "Further specially answering, this respondent says that true it is, as set forth in the answers of the executors above referred to, that this respondent, acting solely in his capacity of liquidating partner of the firm of E. J. Hart & Co., did consent to the entry on the books of said firm of a credit in favor of R. D. Bowen of \$19,228.43 on July 26, 1895; that this consent was given at the pressing solicitation of said R. D. Bowen, and upon his representations as to the value of the services which he had rendered the firm; and as to the inadequacy of the remuneration which he had received, and on his representation that respondent's father, during his life, had often indicated his purpose at some future time to make him an additional allowance for said past services, and that, had he lived, he would have done so. Respondent, at that time, was of the opinion that the services of R. D. Bowen had been inadequately remunerated, and he was aware that said Bowen had frequently importuned his father for an additional allowance, and that his father had put him off with promises that he would consider the matter, and determine about it at some future time; and, although there was no legal obligation, he then believed that, if his father had lived, he would, in a final settlement with said Bowen, have made him some additional allowance for his past services. Under these circumstances, and to put an end to Bowen's importunities, respondent consented to the entry of said credit; but both Bowen and respondent well knew that respondent was acting solely as liquidating partner, and that as such he had no power to bind the firm by creating a debt for past services, and that the validity and effect of said entry would depend upon its approval by the executors and heirs of E. J. Hart, or upon proof that it was a legal obligation of the firm, if contested by them. Respondent further says that it was well known and understood by Bowen that in making said entry respondent did not assume, or intend to assume, any separate or personal obligation therefor, but only such obligation as would result from his interest in the firm in case it should be approved by the other parties in interest, or should be maintained as a legal obligation of the firm, and respondent says that he was only a salaried partner in said firm, and had no interest therein except as one of the heirs and legatees of his father. Respondent further says that the transfer of \$10,000 of said credit by order of R. D. Bowen from his account to the account of his wife did not confer upon the latter any rights which R. D. Bowen did not have, and that her right to recover to the extent of said \$10,000 depends upon proof by her that the claim represented thereby was a valid and legal obligation of the firm of E. J. Hart & Co. to R. D. Bowen. Respondent specially denies that he is in any manner indebted for said sum, or for any other portion of plaintiff's claim, unless the court shall find the same to be an obligation of the firm, and equally binding upon the succession

of E. J. Hart; and that he is entitled to avail himself of all the defenses which have been set up in the answer of the executors which he has hereinbefore set up and adopted as a part of his answer. Respondent further says that since the entry of the credit of \$19,229.43 to the account of R. D. Bowen, he has discovered various facts and transactions of said Bowen while in the service of E. J. Hart & Co. which materially affect the value of his services, and the meritoriousness of his equitable claim for additional remuneration, and that, if he had known of these facts at the time, he would not have consented to said entry; and he further says that, while he then believed that his father, if living, would have made him some allowance on final settlement, he now believes that, if these facts had been made known to him, his father would never have done so."

Upon the issues made by these pleadings the parties went to trial before a jury, and the result was a verdict by direction of the trial judge in favor of the plaintiff and against all the defendants. The defendants, all joining, sued out this writ of error, assigning errors as follows: "(1) The court erred in reopening the case of plaintiffs after the plaintiffs had formally closed their case, and after counsel for defendants had opened the case for defendants, and in then permitting the plaintiffs to offer further evidence on the question of paraphernality of the claim of the plaintiff, upon which question no evidence had been offered by plaintiffs before they closed their case, all as fully recited in bill of exceptions No. 1, signed by the judge, and hereby referred to and made part of this assignment of errors. (2) The court erred in making the charge to the jury in refusing to make each and every one of the special charges requested by the defendants, being the twenty-three special charges stated at length in bill of exceptions No. 2, signed by the judge, and herein filed, which said bill of exceptions is hereby referred to, and made part of this assignment. (3) The court erred in stating to the jury that the evidence in the case established nothing that sustained any defense to the claim of plaintiffs, and in directing the jury to find a verdict for the plaintiffs, which action of the court is fully set forth in bill of exceptions No. 3, signed by the judge, and herein filed, which said bill of exceptions is hereby referred to, and made part of this assignment. (4) The court erred in entering judgment in favor of the plaintiffs and against these defendants."

Chas. E. Fenner, H. J. Leovy, and Guy M. Horner, for plaintiffs in error.

D. C. Mellen and J. Ward Gurley, for defendant in error.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PARDEE, Circuit Judge, after stating the issues and proceedings as above, delivered the opinion of the court.

The plaintiffs in error complain in their first assignment of error that the court below erred in reopening the case of the plaintiffs after they had formally closed their case, and after counsel for the defense had opened the case for the defendants, and in thereafter permitting the plaintiffs to offer further evidence. The bill of exceptions upon which this assignment is based shows the following proceeding:

"The counsel for plaintiff, after offering evidence, had formally announced that he had closed the case of plaintiff, whereupon counsel for defendant proceeded to open the case of defendant by addressing the jury, explaining the points on which he relied, and facts which he expected to prove, and, having closed his statement, was about to proceed to offer his evidence, when his honor, the judge, suspended the proceeding, and ordered the jury to retire; that, after the jury retired, his honor, the judge, addressed the counsel, and said to the counsel for the plaintiff that he had failed to offer any proof of the paraphernality of the wife's claim herein sued on, and inquired whether he desired to administer such proof; that thereupon,

after some discussion, the counsel for plaintiff expressed his desire then to offer such proof, and applied to be permitted to do so; that thereupon the counsel for defendants objected to the granting of the said application, on the ground that plaintiffs had formally closed their case, and that counsel for defendants had opened the case of defendants and that plaintiffs could offer no further evidence, except in rebuttal of testimony which might be offered by defendants; that his honor, the judge, overruled the said objections, stating that it was a matter within his discretion; and that, if he should sustain such objections, it would furnish grounds for the granting of a new trial, and he therefore granted the application of counsel for plaintiff, and ordered them to proceed with the offering of their testimony."

We understand it to be well settled that the order in which parties shall be permitted to offer their evidence in the trial of a case before a jury is a matter within the sound discretion of the trial judge. The facts recited in the bill do not show any abuse of such sound discretion, nor any resulting injury to the plaintiffs in error.

The second assignment of error is that the court erred in charging the jury, and refusing each and every one of the 23 special charges stated at length in the bill of exceptions No. 2. The bill of exceptions No. 2 does not show any charge to the jury given by the trial judge, but does show that, after the plaintiffs and defendants had closed the case, and the same was about to be submitted to the jury, the court refused to give as special charges to the jury some 24 distinct propositions of law, many based on cited textbooks and adjudged cases, but not based on any evidence tending to show that any one of the propositions suggested was applicable to the facts in the case. It is plain that this assignment of error cannot be considered.

The fourth assignment of error complains that the court entered judgment in favor of the plaintiffs against the defendants. This assignment is too general to be noticed.

There remains the third assignment of error, which complains that the trial judge stated to the jury that the evidence in the case established nothing that sustained any defense to the claim of plaintiffs, and directed the jury to find a verdict for the plaintiffs. This assignment is not in pursuance of our rules. It is too general and indefinite; and, but for the briefs of counsel, we should be at a loss to know the specific error or errors presented for review. Sooner or later some important case that should be reversed on error will be affirmed simply because counsel will not heed the rules of this court in regard to pointing out in the assignment of errors the specific errors on which they rely. The general ruling complained of is shown by a bill of exceptions, to which is attached all the evidence adduced in the case, from an examination of which we find the material facts proved to be as follows: In July, 1885, R. D. Bowen was employed by the firm of E. J. Hart & Co., and continued with that firm, occupying different positions, until March 15, 1896. At the beginning of his employment said firm was composed of E. J. Hart, Sr., and E. J. Hart, Jr., who continued to constitute the firm until the death of Hart, Sr., in March, 1895. Up to the death of E. J. Hart, Sr., no agreement was ever made as to the amount of salary to be received by Bowen, although

many efforts were made from time to time by Mr. Bowen to have a definite understanding, and have his salary fixed. E. J. Hart, Sr., would, however, always put the matter off, saying he would arrange it later, and that Bowen could draw what money he needed. The settlement of the matter was thus continually postponed, and up to the death of Hart, Sr., Bowen's salary had never been agreed upon. After the death of Hart, Sr., Bowen, unwilling that his affairs should remain longer in this uncertain state, renewed his efforts to have his yearly salary fixed from the time he went into the employment of the firm. The business was still being conducted in the name of E. J. Hart & Co., announcement being made about two days after the death of Hart, Sr., in the public press and in a circular letter that the death of Hart, Sr., would not interrupt the firm's business, and E. J. Hart, Jr., the surviving partner, and one of the executors of his father's will (his mother and one of his sisters being co-executors), was then in charge. After repeated conferences between Bowen and E. J. Hart, surviving partners, executor, and heir, Dr. John B. Hart and Walter Jewell, also heirs, defendants herein, a settlement was made on July 26, 1895, by which Bowen was allowed for his salary from August, 1885, up to July 25, 1895, \$33,950, and also \$5,590.60 amount advanced by him for account of the firm, aggregating \$39,540.60, which, being credited to his account, gave him a net credit on the books of the firm of about \$11,000. Until the latter part of February, 1896, Bowen had no intimation that this settlement would be questioned by any one. E. J. Hart, Jr., then told him that some of his father's heirs were making complaint about the settlement. They had all known of the settlement since the early part of the fall of 1895. Before Bowen received credit for the sum allowed by this settlement his account appeared to be about \$14,000 overdrawn. This was due to the fact that during the whole term of his employment he had been credited with only about \$500 for some years, \$600 or \$700 for others, and \$1,200 and \$1,500 for other years, and never more than \$1,800 for any year; and he had not been credited with several thousand dollars charged to his account, but which he had expended for the firm's benefit. The entries of the credits for salary were made, however, pro forma, and only for the avowed purpose of enabling the firm to balance the books and were not considered as binding upon Bowen or as fixing his salary. In order to keep the books straight, some sort of an entry had to be made, and these pro forma entries were resorted to, and Bowen was permitted to draw money as he needed it, until his salary should be fixed. For several years prior to the death of Hart, Sr., and up to the date of settlement, Bowen had been general manager of the firm, and for this period he was allowed by the settlement \$4,200 a year, and it was agreed that this salary should continue, and that he was to be paid \$350 a month. Bowen remained with the firm under this contract for seven and a half months; but, while he was paid and charged with that sum every month for seven months, they credited him with only \$150 a month. He was sent to New York in the fall of 1895 for the purpose of borrow-



ing for the firm \$55,000. To accomplish this, he was detained in New York over two months. He paid out of his own pocket all the traveling expenses of this trip, and all his expenses during his stay in New York, but E. J. Hart has refused to reimburse him, or to allow him credit therefor. Although the firm credited him with only \$150 a month for seven months (\$200 a month less than he was entitled to), and gave him no credit for the half of March, 1896, making a total shortage in credits due on his salary of \$1,575, and the firm entered nothing to his credit for the expenses of his trip to New York, which probably exceeded \$1,000 (he was not allowed under defendants' objections to prove the amount), the firm's account against him shows an indebtedness of only \$2,400. Prior to the institution of this suit, Bowen, hearing that Hart claimed he was indebted to the firm in the sum of \$3,000, repeatedly demanded his account from Mr. Hart, and wrote him two letters requesting the rendition of his account, stating that, if he owed the firm anything, he would pay it. He never got the account. Hart says he has no recollection of receiving these letters, but letter-press copies of them were introduced in evidence, and the witness who delivered them testified that he left one at the firm's office, and gave the other to Mr. Hart personally at his home. In 1893, upon the solicitation of the firm, who offered to pay her 6 per cent. interest on her deposits, Mrs. Bowen, the plaintiff below, and in her own right possessed of separate property and funds, opened an account with the firm by making a deposit of \$1,200. She continued from time to time to make other deposits of her own moneys, and from time to time, as she wished, drew out such sums as she needed. The firm acted as her banker, and kept her account separate and distinct from her husband's, and regularly allowed her interest on her deposits, always treating and recognizing her as the owner of these funds. When Hart, Sr., died, in March, 1895, she had to her credit \$5,157.74. At this time, Bowen, according to the firm's account with him, appeared to owe \$9,497.62, and he had for years appeared to be a debtor on this account. Nevertheless the firm had always paid Mrs. Bowen interest on her account. After the death of E. J. Hart, Sr., Mrs. Bowen continued to make deposits with the firm as before, and on July 25, 1895, the date of the settlement with Bowen, the firm owed her \$8,122.13. When R. D. Bowen's account was credited with the amount allowed on that settlement of July 26, 1895, he became a creditor for nearly \$11,000. He at once directed the firm's cashier, Mr. Sewell, to transfer \$10,000 from his own to his wife's account, which was done. The firm, through Mr. Sewell, then gave its receipts certifying that Mrs. Bowen had on deposit with the firm \$18,122, upon which they agreed to pay 6 per cent. interest per annum. They paid her interest monthly on the whole of this sum up to March 1, 1896, but for March they paid interest only on \$8,135, and after that time declined to pay her any interest. The executors' account was filed March 25, 1896, and accounted for the year's business after the death of E. J. Hart, Sr., and showed that, among others, they had made the following disbursements for account of the firm's business, viz.:

Bills payable, \$405,040.71; expenses, salaries, and interest, etc., in conducting the business of E. J. Hart & Co., \$120,899.17; paid for merchandise, \$391,593.11. During the whole of this period the business of the firm was carried on in the name of E. J. Hart & Co. All the letters, papers, and documents concerning the business were signed simply, "E. J. Hart & Co.," no indication being given of liquidation. On the contrary, they insisted that they had no intention of liquidation or retiring from business. In 1876, E. J. Hart, Sr., and E. J. Hart, Jr., organized the firm of E. J. Hart & Co. The articles of co-partnership contained the following provision: "In the event of the death of either partner, the business is to be continued by the survivor."

On these facts the trial judge directed a verdict for the plaintiff below on the ground that under them the defendants had no legitimate defense, and we agree with him in this conclusion. Under the facts proven, it does not appear that on a legitimate settlement and adjustment of accounts between R. D. Bowen and the firm of E. J. Hart & Co. (the claims and demands of Mrs. Bowen taken as valid) that Bowen is legitimately indebted to the firm in any sum whatever which could be offset against the demands in this suit, even if sued for by R. D. Bowen as community property. There is no doubt, under the evidence, that the compensation for the services rendered by Bowen to the firm of E. J. Hart & Co. was undetermined during the lifetime of E. J. Hart, Sr., and was a matter to be settled and adjusted, and, when settled, was to be in excess, not only of the pro forma credits made on the books, but in excess of the amounts which Bowen was allowed and did overdraw. Bowen thus had a legitimate claim for settlement with the firm of E. J. Hart & Co., and it was competent for E. J. Hart, Jr., the surviving partner, whether he was liquidating the partnership, or carrying on the same under the original articles of partnership, or with the consent of the heirs of E. J. Hart, Sr., to settle, adjust, and compromise the claim of Bowen. There is no dispute that this settlement adjusting and compromising the matters in dispute was made. After being made and executed, as it unquestionably was, it can only be avoided and set aside in a direct action for the purpose, and on grounds of error, mistake, or fraud. Certainly it cannot be attacked and annulled in a collateral action brought by Mrs. Bowen to recover her separate property. The \$10,000 transferred from the credit of R. D. Bowen to the credit of Mrs. Bowen was a perfect transfer, accepted and recognized by the firm, and, if a gift from the husband to the wife, was perfected in sufficient compliance with the provisions of the Louisiana Revised Civil Code relating to manual gifts. See *Stauffer v. Morgan*, 39 La. Ann. 632, 2 South. 98.

The alleged radical and fundamental error committed by the judge *a quo* in directing a verdict for the plaintiff, as assigned in the brief of the plaintiffs in error, was in holding that the plaintiff could recover judgment without proof of the paraphernality of the claim sued upon. The record does not show that the judge so held, and, if he did, it was unnecessary. We agree with the learned

counsel for the plaintiffs in error that under the law of Louisiana the wife in her own name cannot maintain an action against others than her husband, unless it be to recover or protect her paraphernal funds and property, and that the wife has no capacity to sue or be sued, or to stand in judgment for a community right or obligation. What doubt may have existed in our minds with regard to these propositions prior to the argument in this case has been wholly removed by the learned and exhaustive briefs on the subject, teeming with arguments and authorities, submitted by counsel for plaintiffs in error on and after the hearing in reply to the opposing counsel, who seemed to doubt. But we think that neither of these propositions controls this case. Mrs. Bowen had separate paraphernal property. It was managed and invested for her. The deposits made with the firm of E. J. Hart & Co. were made by her as of her paraphernal property. As such property, the firm of E. J. Hart & Co. received it, held it, paid interest on it, and fully acknowledged it up to about the time this suit was brought, and, so far as the evidence in this case goes, neither the firm of E. J. Hart & Co. nor any of the defendants have any legal interest or right to deny that the moneys sued for are Mrs. Bowen's separate paraphernal property. As the case shows that Mrs. Bowen claimed and deposited the moneys sued for as her paraphernal property, and as the defendants are estopped from denying the fact, we are of opinion that the paraphernality of the claim sued on was sufficiently proved to warrant the verdict directed. On the whole case, we find no reversible error, and the judgment of the circuit court is affirmed.

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WM. JOHNSON & CO., Limited, v. JOHANSEN.

(Circuit Court of Appeals, Fifth Circuit. April 12, 1898.)

No. 596.

1. MASTER AND SERVANT—INJURY TO SEAMAN—CONTRIBUTORY NEGLIGENCE.

Libelant, an able seaman, while painting a mast, fell to the deck and was injured. While doing the work he was seated in a boatswain's chair suspended by a line passing over a block aloft, the loose end being fastened by a toggle within his reach, and by means of which he was required to lower himself from time to time as the work proceeded. The appliances were arranged by himself. The evidence left in doubt the exact cause of the accident, but it resulted from the slipping of some of the fastenings, and not from the breaking of any of the parts. *Held*, that libelant was guilty of contributory negligence.

2. SAME—NEGLECTENCE OF BOTH MASTER AND SERVANT—DIVISION OF DAMAGES.

Libelant, a seaman, was required to go aloft and paint a mast. He was furnished with a boatswain's chair, a block, a rope, and a toggle for fastening the loose end of the line, by means of which he was required to lower himself from time to time while proceeding with the work. By reason of the slipping of the fastenings of the line the chair fell and libelant was injured. *Held* that, the vessel being in port, where no urgency existed, the master was negligent in furnishing a rope which, by reason of its newness, was so stiff as to be difficult to fasten securely with a toggle of the length supplied, and that, under the rule in admiralty requiring the division of the damages in proportion to the negligence of the master and servant respectively, libelant was entitled to recover one-half his actual damages.

**8. DAMAGES FOR PERSONAL INJURY—EXCESSIVE AWARD.**

Four thousand dollars is not excessive as an award covering one-half the actual damages sustained by an able seaman by reason of an injury which necessitated the amputation of one of his legs below the knee.

Appeal from the District Court of the United States for the Eastern District of Texas.

Libel by Halward Johansen, seaman, against Wm. Johnson & Company, Limited, owners of the British Steamship Edenmore, to recover for personal injuries. There was a judgment for libelant, and defendant appeals.

J. Parker Kirlin, Guy M. Horner, and W. B. Lockhart, for appellant.

John F. McLean, J. C. Walker, and J. B. Rosser, Jr., for appellee.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PARDEE, Circuit Judge. This libel was brought by the libelant, an able seaman of the crew of the British steamship Edenmore, to recover damages for personal injuries sustained through a fall from aloft to the deck of said ship, a distance of 30 feet, while the ship was lying at the wharf in the port of Galveston, Tex., in November, 1894. The Edenmore was a two-masted fore and aft rigged steamship, with two winches at the foot of the foremast, one, No. 2, about  $1\frac{1}{2}$  feet aft the mast, and the other about 5 or 6 feet forward. The boatswain of the vessel had ordered the libelant to go aloft and paint the foremast, and had furnished him the usual boatswain's chair, a new gantline, or rope, 1 inch in diameter, a block, and a toggle, or round wooden pin, about  $1\frac{1}{4}$  inches in diameter, and somewhere from 10 to 15 inches in length. The libelant testified that he asked the boatswain to furnish a man to lower him, and the boatswain said he would not do so, he had no time, and the libelant would have to do it himself; which statement is denied by the boatswain, who testified that the libelant made no request of him for a man at the base of the mast to lower him. The libelant arranged all the gear, going aloft, and hooking a block upon the arm of the foremast, and passing the gantline through it, bending one end fast to the sling which supported the seat of the boatswain's chair, securing the other or running end of the rope to the toggle pin, which he had thrust through the knot, taking a number of turns around the toggle. The libelant then seated himself in the boatswain's chair, and, as he painted the mast, was to lower himself from time to time by slacking away on the gantline. After the libelant had painted down the mast about three feet, the toggle slipped, or was jarred loose, or the turn of the gantline around the toggle slipped off, or the bend to the slings of the boatswain's chair became loose, and the libelant fell to the deck, striking the starboard barrel of the No. 2 winch, which had just previously been running, breaking his leg and otherwise injuring himself. His leg was so badly injured that it had to be amputated below the knee, and he suffered the pain and injuries usual in such cases.

The evidence with regard to exactly how the accident happened is conflicting. The libelant himself is by no means clear on the point, and probably he did not know with any certainty. The master, chief officer of the ship, second mate, and boatswain gave evidence all tending to show that the hitch of the gantline in the slings of the chair became unbent, letting the chair fall and the gantline run through the block and also fall. The weight of all the evidence is in favor of this view of the case. If it is the correct view, the libelant, by his negligence, contributed to his own injury. Without fully adopting this view, we are of opinion that the case made is one of negligence on the part of the libelant; for an able seaman, when given a stout rope, block, and a boatswain's chair, and no emergency intervening, ought to be able to so secure himself aloft that, retaining his strength and ordinary faculties, a fall is not possible. Under the circumstances attending the business of the ship and the work given the libelant, if the toggle given him was not long enough he could have applied for and obtained another; or, if the rope was too stiff and unpliant to bind about the toggle, there are other means of securing the running end of a gantline under such circumstances.

But finding that the libelant contributed to his own injury does not dispose of this case. The common-law rules with reference to contributory negligence do not control in the admiralty. In cases of marine tort the admiralty courts, where both parties are in fault, will divide the damages as the circumstances surrounding the tort in question may require. *The Max Morris*, 137 U. S. 1, 11 Sup. Ct. 29.

According to the allegations in the amended libel, it was the duty of the ship to furnish proper ropes, tackle, and other appliances, whereby libelant would be free and secure from danger while engaged in painting the mast; that the appliances furnished were a new, unpliant 2½-inch rope, and an insufficient toggle, whereby he was compelled to fasten himself while aloft painting said mast, which he was compelled to do by reason of the master's failure in stationing a man to lower him at the base of said mast; and the injuries to the libelant were received through the gross and willful negligence on the part of the master in furnishing the libelant with a stiff and cumbersome rope, and an improper toggle, and the failure of the master to station a man at the base of said mast to lower the libelant while painting the said mast, as it was his duty so to do, and in not furnishing libelant with proper rope and tackle. Under the evidence, we do not find that the master of the ship was guilty of negligence in ordering the libelant to paint the mast without stationing or providing a man to lower the chair as the progress of the work might require, but we do find that, the ship being in port with no pressing emergency requiring instant action, the ship was bound to furnish suitable and reasonably safe appliances to the libelant to enable him to do the work ordered, and that the rope and toggle furnished in this case was unsuitable and ordinarily unsafe to be used in the manner in which the libelant was expected to use and did use them. Ordinarily, a new rope

ought not to be objected to, and it is probably true, as the proctor for the appellant urges, that many of the claims that have been brought against vessels were to recover for injuries alleged to have been received by reason of the breaking of old and defective ropes, and that this is the first case in his experience where the furnishing of a new rope is assigned as a specification of negligence on the part of the ship. At the same time, we are of opinion, from the evidence in this case, that, in combination with the toggle, the new rope furnished was too stiff and too large for the purpose intended, and so stiff that, on the short toggle furnished, the rope, by reason of its unpliability, could not be made to grip or bind hard enough to hold the toggle in place, or to hold the half bitches or turns made around the same by the running part of the gantline, and we are satisfied that this was the direct cause of the accident. It may be, as urged so strongly by the appellant, that the libelant received these appliances and proceeded to use them without objection, but, if this be so, it must be considered that on board ships a sailor is not expected to, nor, as for that matter, permitted, before executing an order, to question the propriety of the order or the sufficiency of the materials furnished. As we find both the libelant and the ship in fault, we consider it a proper case to divide the damages between the negligent parties. The libelant lost his leg below the knee, suffered much from pain in the hospital, and, instead of being an able-bodied seaman, has now become a cripple, and no doubt an inefficient landsman. The district court, without specifying whether the fault was mutual or the ship only in fault, awarded damages to the libelant in the sum of \$4,000. Conceding the certain injuries suffered by the libelant, we are inclined to hold that the libelant has not recovered more than half his actual damages by the decree of the district court, and that said decree should therefore be affirmed; and it is so ordered.

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CITY OF NEW YORK v. DU BOIS.

(Circuit Court, W. D. Pennsylvania. December 23, 1897.)

**1. POWER OF ATTORNEY—CONSTRUCTION—AUTHORITY TO COMPROMISE SUIT.**

A power of attorney given by a plaintiff in a pending suit, which empowered the agent "to carry on and conduct to final consummation, or to compromise" the case, and all damages or demands therein claimed in such manner and on such terms as to him might seem expedient, does not authorize the agent to withdraw the litigation from the court in which it is pending, and by agreement with the defendants to create a special tribunal to determine the rights of the parties. The power given to compromise implies the exercise by the agent of his own judgment as to the terms accepted, and cannot be delegated by the agent to any other person or tribunal.

**2. SAME—EXERCISE OF POWER—UNUSUAL AND UNREASONABLE SETTLEMENT.**

Under a power of attorney authorizing an agent to compromise a pending suit, an agreement by the agent to a method of settlement which is unreasonable and unusual in its terms, and unfair, is not binding on the principal.

**3. REFERENCE—CONDUCT OF HEARING—NOTICE OF TAKING OF EVIDENCE.**

The taking of evidence by referees without notice of the time or place to the parties, or the conducting of private inquiries by a referee regarding matters involved, outside of the hearing, vitiates the award or findings.

**4. SAME—REFERENCE UNDER STIPULATION COSTS.**

Where referees were appointed, and entered upon their duties, under a stipulation between the parties which provided that their fees should be a stipulated sum for each session between certain hours, to be paid by the successful and taxed against the losing party, the successful party cannot recover from the losing party for fees paid the referees, in the absence of proof as to the number or length of sessions held, or that any fees were taxed against the defendant.

This was an action by the mayor, aldermen, and commonalty of the city of New York and the city of Brooklyn against John E. Du Bois. A jury having been waived, the court made the following finding of facts:

(1) On the 24th day of June, 1885, John Du Bois executed, and, on the 24th day of July, 1885, delivered to Thomas B. Farrington, a power of attorney, of which the following is a copy:

"John Du Bois vs. The Trustees of the New York and Brooklyn Bridge, impleaded with the Mayor, Aldermen, and Commonalty of the City of New York and the City of Brooklyn.

"In the Circuit Court of the United States, Southern District of New York.  
In Equity.

"Know all men by these presents, that I, John Du Bois, of the borough of Du Bois, in the county of Clearfield, in the state of Pennsylvania, being the above-named plaintiff, do hereby make, constitute, and appoint, and I have hereby made, constituted, and appointed, Thomas B. Farrington, of Minneapolis, state of Minnesota, my true and lawful attorney for me and in my name and stead to carry on and conduct to final consummation or to compromise the above-stated case, and all claim, demand, or damages therein claimed or mentioned, in such manner or on such terms as to my said attorney may seem expedient, with the same power, force, and effect as I could do if personally present; also to receive and receipt for all money in any manner accruing from or out of the same and for the same; and this power is hereby, in consideration of other valuable considerations and one dollar to me in hand paid, made irrevocable for and during the period of three months from the 14th day of September, A. D. 1885, this instrument being a renewal and extension for three months of a similar power of attorney executed on the 14th day of March, 1885, and made irrevocable for six months thereafter. As witness my hand and seal this 24th day of June, A. D. 1885.

"[Signed] John Du Bois. [Seal.]

"Witness: Geo. R. Vosburg."

(2) At the same time said Thomas B. Farrington executed and delivered to John Du Bois a separate instrument in writing, of which the following is a copy:

"Whereas, John Du Bois has delivered to me a power of attorney this day to settle and compromise a certain case in the circuit court of the United States in the Southern district of New York, wherein he is plaintiff, and the Trustees of the New York and Brooklyn Bridge, impleaded with the commonalty, the mayor and aldermen of the cities of New York and Brooklyn, the defendants: Now, in case I shall settle and compromise said claim, I agree that immediately after the receipt of the money, or so much thereof accruing from settlement, to pay over and deliver to my said principal, John Du Bois, the sum of twenty-five thousand dollars, and in no event to settle said case by compromise in such a manner that he shall not receive and realize said sum out of said compromise. As witness my hand and seal this twenty-fourth day of July, A. D. 1885.

Thos. B. Farrington.

"Attest: Geo. R. Vosburg."

(3) John Du Bois died May 5, 1886, having by his last will (duly probated after his death) devised and bequeathed his entire estate to John E. Du Bois, the defendant herein, whom he named as his executor, and to whom letters testamentary on said will were issued on May 18, 1886, by the register of Clearfield county, Pa.

(4) On the 10th day of June, 1886, the defendant executed and delivered to said Thomas B. Farrington an instrument of writing extending said power of attorney, of which the following is a copy:

"I, John E. Du Bois, in my own right and as executor of John Du Bois, deceased, do hereby make, renew, and extend the within power of attorney according to its terms, and with all the powers therein set forth, and make the same irrevocable for one year from this date. As witness my hand and seal this 10th day of June, A. D. 1886.

"[Signed]

John E. Du Bois. [Seal]"

(5) At the same time said Thomas B. Farrington executed and delivered to said John E. Du Bois a separate instrument of writing, of which the following is a copy:

"Whereas, John E. Du Bois has delivered to me a renewal and extension of a power of attorney this day to settle and compromise a certain case in the circuit court of the United States in the Southern district of New York, wherein he is plaintiff and the Trustees of the New York and Brooklyn Bridge, impleaded with the commonalty, the mayor, and aldermen of the cities of New York and Brooklyn, the defendants: Now, in case I shall settle and compromise said claim, I agree that immediately after the receipt of the money, or so much thereof accruing from settlement, to pay over and deliver to my said principal, John E. Du Bois, the sum of twenty-five thousand dollars, and in no event claim or charge him for my services therein, nor for fees, charges, or costs thereof, nor to settle said case by compromise in such a manner that John E. Du Bois shall not receive and realize said sum out of said compromise; and I agree to indemnify him against all fees, costs, and charges on account of said case. As witness my hand and seal this tenth day of June, A. D. 1886.

Thomas B. Farrington. [Seal]"

(6) By divers instruments of writing, signed by the defendant, and delivered to said Thomas B. Farrington between June 25, 1887, and September 10, 1892, the above power of attorney was extended upon the terms and conditions upon which it had theretofore been held, the last thereof being as follows:

"I hereby extend the above power of attorney upon the same terms and subject to the same conditions and stipulations under which it has heretofore been held for the term of one year from the 10th day of June, 1892. As witness my hand and seal this 10th day of September, 1892.

"[Signed]

John E. Du Bois. [Seal]"

(7) On the 9th day of June, 1888, the legislature of the state of New York passed an act, of which the following is a copy:

"Chap. 564.

"An act to authorize the adjustment of a claim by John E. Du Bois, as executor of the last will and testament of John Du Bois, deceased, and, in his own right against the cities of New York and Brooklyn, in relation to the construction of the bridge between those cities.

"Section 1. The mayors of the cities of New York and Brooklyn, are each authorized to appoint one person, and John E. Du Bois may appoint a third person, and the three persons so appointed shall examine and report whether or not the said John E. Du Bois, as executor of the last will and testament of John Du Bois, deceased, or in his own right, has a just and valid claim against the said cities, for the use, in the construction of the bridge between the said cities, of improvements in the mode of building piers for bridges and other structures, for which it is claimed that letters patent were granted to the said John Du Bois, now deceased, by the United States, dated the twenty-third day of September, eighteen hundred and sixty-two, which have been sustained by a decision of the supreme court of the United States, and if



they find that he has such a claim, what would be a fair and reasonable compensation for the use of said improvements, and upon a report by the three persons so appointed, or a majority of them, that such a claim is just and valid, if the report shall be approved in writing by the mayors of both of the said cities, the comptroller of each city shall pay to the said John E. Du Bois, as executor as aforesaid and in his own right, or his legal representatives, out of any of the revenues of the city the amount reported by the three persons so appointed to be a fair and reasonable compensation for such use, or such part thereof, as shall be authorized and directed in writing by the mayors of both of the said cities, in the proportion in which payments by the said cities, on account of the said bridge, are required to be made by law, upon the execution and delivery by the said John E. Du Bois as executor, as aforesaid and in his own right or his legal representatives, to each of the said comptrollers, of a release of any and all claims against the said cities for the use of said improvement.

"Sec. 2. The persons so appointed, shall have power in the performance of the duty aforesaid, to take testimony under oath, which any of them may administer, and to procure proper evidence by experts.

"Sec. 3. This act shall take effect immediately."

(8) Afterwards, and before June 4, 1891, the following stipulation in writing was executed:

"In the matter of the claim of John E. Du Bois, as executor of the last will and testament of John Du Bois, deceased, and in his own right, against the cities of New York and Brooklyn, in relation to the construction of the bridge between those cities.

"Before Stephen V. White, Jasper W. Gilbert, Charles M. Clancy, referees appointed pursuant to chapter 564 of the Laws of 1888.

"It is stipulated as follows: The fees of the referees shall be to each the sum of \$25 per session of from 12 to 4 o'clock, these fees to be paid at the close of the reference and the rendition of the report of the referees, and to be advanced by the successful and taxed against and paid by the defeated party. John E. Du Bois, individually and as executor, and the mayor, aldermen, and commonalty of the city of New York and the city of Brooklyn, and the Trustees of the New York and Brooklyn Bridge, agree that the action pending between them in the United States circuit court for the infringement of patents relating to the placing of piers in deep water shall be discontinued immediately upon the report of the referees appointed under chapter 564 of the Laws of 1888 being made, providing the same shall be adverse to the claimant, or in case the said report be favorable to the said claimant and the report be approved in writing by the mayors of both the said cities, and the amount awarded by the report so approved be paid; but it is expressly understood and agreed that nothing contained in this minute shall be construed as a stipulation or agreement on the part of the said mayors, or either of them, that the said report, when made, shall be approved by them, or either of them. Such discontinuance shall not be made provided the said act shall be repealed before the payment of the award. Written pleadings shall be prepared by the parties, the claimant to submit his pleadings within seven days, and the cities of New York and Brooklyn to have thirteen days thereafter in which to answer; and, if no further pleadings are submitted, the issues arising to be tried according to law, and that the rules of law governing the admissibility of testimony in cases in the courts of law shall be adhered to. Either party may read the testimony of the witnesses in the case of John Du Bois against the mayor, aldermen, and commonalty of the city of New York, the city of Brooklyn, and the Trustees of the New York and Brooklyn Bridge in said United States circuit court, with the same force and effect, and subject to the said objections, as though the same were taken herein, the parties so reading to produce, upon reasonable notice, for cross-examination, the witness whose testimony he reads. It is also stipulated that two referees may hold meetings and take testimony in the absence of the third referee. It is further agreed that nothing contained in the act of the legislature under which the referees are appointed shall be construed to affect in any way any defense before the referees which the two cities, or the trustees, or either of them, might urge in the courts of

the United States to answer to a suit upon the patent in question; and every such defense shall be available herein to the two cities and the trustees.

"Almet F. Jenks,

"Corporation Counsel of Brooklyn.

"Wm. N. Clark,

"Corporation Counsel of New York.

"Knevals & Perry, and

"N. J. & N. J. Waterbury, Jr.,

"Attorneys for John E. Du Bois."

(9) The said Thomas B. Farrington, assuming to act for the defendant, John E. Du Bois, but without any authority to do so other than that conferred by the above-recited power of attorney and the renewals thereof, of his own motion joined in the aforesaid reference under the said act of the legislature of New York, and employed therein counsel and attorneys at law, namely, Knevals & Perry and N. J. & N. J. Waterbury, Jr., and by his (Farrington's) authority, and not otherwise, they signed the above-recited stipulation. The defendant personally did not take any part in entering into said reference, or in making said stipulation, or in the proceedings thereunder. The defendant did not attend any of the meetings of the referees, and it does not appear that he had any knowledge of any of these matters until after the proceedings under the reference had fully terminated.

(10) On the 15th day of February, 1893, the above-named referees made a report in writing against the aforesaid claim of the defendant, and favorable to the plaintiffs herein, and delivered a copy of their report to each of the plaintiffs, but none to the defendant.

(11) On or about the 24th day of March, 1893, the referees rendered to the plaintiffs herein a bill for their services, namely, \$3,000 for each referee, making a total of \$9,000; and this sum was paid to the referees by the plaintiffs. For the reimbursement of the plaintiffs this suit was brought upon the above-recited stipulation.

(12) There never was any taxation of the fees of the referees. In making out their bill the referees paid no regard to the terms of the above stipulation, but charged what they considered was a fair compensation for their services, without taking into account the number of days they held sessions.

(13) It is difficult to determine with precision from the evidence the number of days upon which sessions were held by the referees. It would seem that they did not exceed eighteen. On several of these days only one referee attended, and on only about six days were the three referees present.

(14) The sessions of the referees were conducted without any regard to the provision in the stipulation, "The fees of the referee shall be to each the sum of \$25 per session of from 12 to 4 o'clock." It does not appear that a single one of the sessions held by the referees lasted four hours, or that they sat that long on any day.

(15) One of the referees,—Jasper W. Gilbert,—not regarding the reference "as a trial in court," privately consulted Mr. Van Buren, the engineer of the New York City waterworks, in respect to mechanical and engineering subjects connected with the subject-matter of the controversy, and these private consultations with Van Buren were for the purpose of "posting" said referee, or giving him information upon which to act, and they took place while the case was under consideration by the referees, and before report made.

At the trial the defendant's counsel submitted to the court the following propositions or points, to which the court made the subjoined answers:

(1) The plaintiffs have declared upon a certain contract which they allege was made between John E. Du Bois and them. Answer. This point is affirmed.

(2) That the contract referred to in the first point was not executed by John E. Du Bois personally, but, if executed at all, it was executed by Knevals & Perry and N. J. & N. J. Waterbury, Jr., claiming to act as his attorneys. Answer. This point is affirmed.

(3) There is no evidence sufficient to prove that Knevals & Perry and N. J. & N. J. Waterbury, Jr., or either or any of them, were agents or attorneys of John E. Du Bois. Answer. This point is affirmed.

(4) That the power of attorney from John Du Bois, dated 24th day of June, 1885, to Thomas B. Farrington, which was continued on the 10th of June, 1886, subject to conditions set forth in defendants' Exhibit 'C,' by John E. Du Bois, did not authorize Farrington to intrust a compromise to any other agent or attorney, or to employ any attorneys, for John E. Du Bois to compromise his claim. Neither was Thomas B. Farrington himself authorized in any event to compromise the claim as to John E. Du Bois on any basis by which John E. Du Bois should receive a less sum than twenty-five thousand dollars. Answer. This point embraces two propositions, each of which is sound. Thus regarded, the point is affirmed. But I do not mean to declare that the collateral papers which Farrington executed have any binding effect as against the plaintiffs. My views upon Farrington's authority are expressed in my opinion herewith filed.

(5) The alleged attempted compromise set out in the act of legislature and contract is so unreasonable, unequal, unfair, and outside of the usual and legitimate means and modes of compromise, that it was not within the power of either Farrington to employ attorneys to make such a contract for John E. Du Bois, nor of the attorneys who purported to execute for him to make it. Answer. This point is affirmed.

(6) The referees, having been selected as per stipulation entered into by attorneys at law claiming to represent the plaintiffs and defendant to pass upon issues referred to by act of 9th of June, 1888, were bound by the limitations agreed upon, and were obliged to conduct their investigation and make their report substantially as set forth in said agreement. Answer. This point is affirmed.

(7) Neither the referees nor either of the parties without the consent of the other party could change or vary any of the terms of the agreement of reference. Answer. This point is affirmed.

(8) The taking of evidence on the investigation of the case by the referees, or either of them, without notice of time or place to the parties to be affected by the testimony so as to permit a direct or cross-examination of the persons examined, was such an error or misconduct on the part of the referee or referees as would vitiate the award or finding, and would not be validated by the payments of fees by plaintiffs in this case, so as to compel the other party to pay back the fees thus advanced. Answer. This point is affirmed. Vide *Speer v. Bidwell*, 44 Pa. St. 23, 27; *Passmore v. Pettit*, 4 Dall. 270.

(9) If the uncontradicted testimony of Jasper W. Gilbert be regarded as true that he "did not regard it as a reference at all, as a trial in court, and therefore I spent considerable time in posting myself by consulting with Mr. Van Buren particularly, the engineer of our waterworks, on mechanical and engineering subjects," it was such an error or misconduct as vitiated the award or finding; and particularly would this be so when it is remembered that in the agreement of reference it is stipulated by the attorneys that the issues arising are to be tried according to law, and the rules of law governing the admissibility of testimony in cases in the courts of law shall be adhered to. Answer. This point is affirmed. Vide *Speer v. Bidwell*, 44 Pa. St. 23, 27; *Passmore v. Pettit*, 4 Dall. 270.

(10) As it does not appear the referees or the plaintiffs ever reported the alleged award to John E. Du Bois, nor gave him any notice thereof, nor taxed any fees or costs, nor gave him any notice of any claim for taxation, the plaintiffs are not entitled to recover. Answer. This point is affirmed in view of the lack of evidence to supply the place of taxation, or evidence to show that the referees earned any fees under the stipulation.

(11) That under the evidence in the case the judgment of the court should be for the defendant. Answer. This point is affirmed.

And thereupon the court delivered the following opinion.

Johns McCleave, for plaintiffs.

Geo. A. Jenks, for defendant.

ACHESON, Circuit Judge. It is not necessary to decide whether or not the collateral papers of July 24, 1885, and June 10, 1886, ex-

ecuted by Thomas B. Farrington, have any binding force as against the plaintiffs. In the view I take of the case, they may be and are excluded from consideration. Putting them aside altogether, with what authority was Thomas B. Farrington clothed? The utmost extent of his agency is to be found in the power of attorney of June 24, 1885. He had no other authority than is there defined. Now, clearly, he was thereby constituted a special agent, empowered to do specific acts only. There was then pending in the United States circuit court for the Southern district of New York a suit in equity, brought by John Du Bois against the plaintiffs in the present action, for the infringement of letters patent and the recovery of damages therefor. The power of attorney concerned that case, and empowered Farrington "to carry on and conduct to final consummation or to compromise the above-stated case, and all claim, demand, or damages therein claimed or mentioned, in such manner or on such terms" as to him might "seem expedient," with power to receipt for money accruing from the same, and to give a release and discharge therefor. Farrington was thus authorized to do one of two things, namely, either to carry on and conduct the patent suit in the circuit court to a finality, or to compromise it. In the attempted execution of his authority he did neither. Instead of carrying on the case in the circuit court, which was learned in the patent law, Farrington undertook, in connection with the defendants in the action, to withdraw the litigation from that jurisdiction, and to create a special tribunal to determine the rights of the parties. No such course of action was within the terms of the power of attorney, or the scope of the agency thereby created. Nor can the reference be sustained as a "compromise." In empowering Farrington to compromise the case Du Bois relied on the personal knowledge, ability, and integrity of his chosen agent. The agency was a personal trust and confidence. To compromise implied the exercise by Farrington of his own judgment as to agreed terms of settlement. Upon the plainest principles of the law of agency, the authority conferred on Farrington to compromise could not be delegated by him to others. Yet nothing less than this was attempted here. The decision of the three referees was to be substituted for the judgment of the agent, who had been selected because of his supposed personal fitness. Moreover, the stipulation pursuant to the New York act was, in its terms, very unusual. It was wonderfully one-sided. It secured to Du Bois nothing; not even fair play. A report favorable to him would have availed him naught unless approved by the mayor of each of the two cities,—his antagonists. Yet he was clothed with no such veto power in case of a report adverse to him. It is not to be believed that a mode of procedure so extraordinary and unnecessary was contemplated by Du Bois. By no fair reading of the power of attorney can its scope be extended so as to cover the transaction upon which the plaintiffs' claim rests. For these reasons, and other reasons appearing in the answers to the defendant's points, the finding of the court must be in favor of the defendant. And now, to wit, December 23, 1897, the court finds in favor of the defendant.

## In re LI SING.

(Circuit Court of Appeals, Second Circuit. April 7, 1898.)

No. 93.

**1. HABEAS CORPUS—EFFECT OF WRIT.**

The questions which can be presented upon the writ of habeas corpus to review the decision of a United States commissioner relate to the jurisdiction of the commissioner and the legality of his order.

**2. CHINESE—ACT OF SEPTEMBER, 1888.**

Section 12 of the act of September 13, 1888, making the decisions of collectors of customs as to the right of Chinese persons to enter the United States final, in all cases, unless reversed on appeal to the secretary of the treasury, even if it ever went into effect, is no longer so since the act of August 18, 1894.

**3. SAME—ACT OF 1894—DECISION OF COLLECTOR OF CUSTOMS.**

The provision of the act of August 18, 1894, making the decisions of collectors of customs, when adverse to the right of Chinese persons to enter the United States, reviewable by the secretary of the treasury alone, does not make such decisions conclusive upon the federal courts when favorable to such right.

**4. CONSTITUTIONAL LAW—RULE OF EVIDENCE.**

Section 3 of the act of May 5, 1892, requiring Chinese persons arrested under the act to establish by affirmative proof their right to remain in the United States, is constitutional.

**Appeal from the Circuit Court of the United States for the Southern District of New York.**

In June, 1893, Li Sing, then a resident of Newark, N. J., returned to China, and took with him a certificate issued by the imperial government of China at its consulate at New York, and signed by its consul, that he was permitted to return to the United States, and was entitled to do so, and which furthermore styled him a "wholesale grocer." This certificate was viséed in Hong Kong by the United States consul on June 27, 1896, when Li Sing was about to return to this country. He thereafter returned by the way of Canada, and presented the certificate to the United States collector of customs at Malone, N. Y., who canceled it on August 28, 1896, and permitted him to enter the country. On January 6, 1897, the United States officer who is called the "Chinese Inspector for the Port of New York" represented, in writing and under oath, to John A. Shields, Esq., United States commissioner for the Southern district of New York, that Li Sing had unlawfully entered the United States, was unlawfully within that district, and that he was, and had been for many years, a Chinese laborer, whereupon he was brought before the commissioner for examination. The counsel for Li Sing insisted before the commissioner that, by the action of the collector of customs at Malone, the question of the Chinaman's right to be and remain in this country was res adjudicata, and, furthermore, that he was a merchant. Testimony to this effect was given by Chinese witnesses exclusively, which was received by the commissioner, notwithstanding the objection of the attorney for the United States. The commissioner found upon all the evidence that Li Sing was at the time of the examination a Chinese laborer, was such at the time he departed for China, and for a term of years prior thereto, and was such after his return from China in August, 1896; and simply ordered his deportation, and did not order imprisonment, as a punishment or penalty. A writ of habeas corpus and a writ of certiorari were thereupon allowed by the circuit court for the Southern district of New York, upon Li Sing's petition; and after a hearing the writ of habeas corpus was dismissed, and the relator was remanded to the custody of the United States marshal for deportation. This appeal was taken by the relator from the order of the circuit court.

Wm. C. Beecher, for relator.  
Max Kohler, Asst. U. S. Atty.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts as above). The questions which can be presented upon the writ of habeas corpus relate to the jurisdiction of the commissioner, and the legality of the order of deportation. It is claimed that he had no jurisdiction, because the action of the collector at Malone was a finality, and that the relator cannot be detained, because the provisions of the third section of the act of May 5, 1892 (27 Stat. 25), under which his examination was conducted, were in violation of the constitution. The proceedings for Li Sing's deportation were instituted by Inspector Scharf, under section 12 of the act of May 6, 1882, as amended by the act of July 5, 1884 (23 Stat. 115), which provides that:

"No Chinese person shall be permitted to enter the United States by land, without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came."

The required certificate in regard to persons not laborers was specified in the sixth section of the same amended act; was to be obtained from the Chinese government by every Chinese person, other than a laborer, who was about to come to the United States; and was for the purpose of identifying the person, and evidencing the permission of the government for his departure. The section provided that this certificate—

"Shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disapproved by the United States authorities."

It is not now contended that, under sections 6 and 12, the opinion of the collector of customs in regard to the character of the certificate was final. "On the contrary, the implication of section 12 is strongly in favor of the view that the jurisdiction of the courts of the United States in the premises was not intended to be interfered with." *U. S. v. Jung Ah Lung*, 124 U. S. 621, 629, 8 Sup. Ct. 663. Section 12 of the act of September 13, 1888 (25 Stat. 476), is the one upon which the relator relies. This act was passed to take effect, as a whole, upon the ratification of a treaty then pending between the United States and the emperor of China, which was never ratified. Section 12 of this act provided that:

"The collector shall in person decide all questions in dispute with regard to the right of any Chinese person to enter the United States and his decision shall be subject to review by the secretary of the treasury and not otherwise."

If this section had gone into effect, and had continued to be in effect until August 27, 1896, when the collector at Malone acted in

the matter, his decision would have been final. *Nishimura Ekiu v. U. S.*, 142 U. S. 651, 660, 12 Sup. Ct. 336. The treaty not having been ratified, a new act, of October 1, 1888 (25 Stat. 504), was passed, which, as stated in *Wan Shing v. U. S.*, 140 U. S. 424, 11 Sup. Ct. 729—

"Declared that from and after its passage it should be unlawful for any Chinese laborer, who at any time before had been or was then, or might thereafter be, a resident within the United States, and who had departed or might depart therefrom, and should not have returned before its passage, to remain in the United States. And it further declared that no certificates of identity, under which, by the act of May 6, 1882, Chinese laborers departing from the country were allowed to return, should thereafter be issued; and it annulled every certificate of the kind which had been previously issued, and provided that no Chinese laborer should be permitted to enter the United States by virtue thereof."

It will be noticed that section 4 of the statute of May 5, 1882, had provided for certificates of identity which could be given to Chinese laborers departing from this country and intending to return, and that this new statute of 1888 prohibited the future issuance of such certificate to the laboring class, so that:

"The result of the legislation respecting the Chinese would seem to be this: That no laborers of that race shall hereafter be permitted to enter the United States, or even to return after having departed from the country, though they may have previously resided therein, and have left with a view of returning; and that all other persons of that race, except those connected with the diplomatic service, must produce a certificate from the authorities of the Chinese government, or of such other foreign government as they may at the time be subjects of, showing that they are not laborers, and have the permission of that government to enter the United States, which certificate is to be viséed by a representative of the government of the United States." *Wan Shing v. U. S.*, supra.

Section 3 of the act of October 1, 1888, provided that all the duties prescribed and powers conferred by section 12 of the act of May 6, 1882, already referred to, were made applicable to the provisions of the new act. It would seem from the contrariety between the acts of September and of October, 1888, that section 12 of the act of September 13, 1888, was not regarded as ever having gone into effect. *U. S. v. Gee Lee*, 1 C. C. A. 516, 50 Fed. 271. We intend to express no opinion in regard to section 13 of that act. The question is no longer a living one, for subsequently, in the act of August 18, 1894, c. 301 (28 Stat. 390), congress provided that:

"In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the secretary of the treasury."

This makes the decision a final adjudication only when adverse to admission. If the immigration or customs officer decides to allow the immigrant to enter, such decision has no more force, as a controlling adjudication, when the question of right to be or remain in the United States comes before court or commissioner, than it had under section 9 of the act of 1882, as amended in 1884, which was before the supreme court in *U. S. v. Jung Ah Lung*, su-

pra. *In re Li Foon*, 80 Fed. 881; *Lem Moon Sing v. U. S.*, 158 U. S. 538, 15 Sup. Ct. 967.

The relator asserts the unconstitutionality of the provisions of section 3 of the act of May 5, 1892, *supra*, which required a Chinese person who was arrested under the act to establish by affirmative proof his lawful right to remain in the United States, and of the provisions of section 2 of the act of November 3, 1893 (28 Stat. 7), which required a Chinaman to establish certain facts by the testimony of two credible witnesses, other than Chinese, upon an application for entrance into the United States on the ground that he was formerly a merchant in this country. It appears from the return to the writ of certiorari that all the witnesses for the relator were Chinese, but that the commissioner excluded nothing, and decided, upon the entire conflicting testimony, that the defendant was a Chinese laborer. The question of the constitutionality of section 2 of the act of 1893 does not, therefore, arise upon this record. The question of the constitutionality of provisions akin to those in section 3 of the act of May 5, 1892, in regard to requirements of proof, was settled in *Fong Yue Ting v. U. S.*, 149 U. S. 698, 729, 13 Sup. Ct. 1016. The opinions of the supreme court in *Wan Shing v. U. S.*, 140 U. S. 424, 11 Sup. Ct. 729, and in *Wong Wing v. U. S.*, 163 U. S. 228, 16 Sup. Ct. 977, are also suggestive upon the extent of the power of congress to make provisions merely for the deportation of aliens who are deemed to be unlawfully in the country. The order of the circuit court is affirmed.

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UNITED STATES v. BORGFELDT et al.

(Circuit Court of Appeals, Second Circuit. January 25, 1898.)

No. 27.

CUSTOMS DUTIES—CLASSIFICATION—"BROWNIE ALBUMS."

"Brownie Albums," or decalcomanie books, containing lithographic prints so prepared that they may be transferred to articles by what is known as the "decalcomanie process," were dutiable, under paragraph 436 of the act of 1890, as toys not otherwise provided for, and not, under paragraph 308 of the act of 1894, as lithographic prints.

Appeal from the Circuit Court of the United States for the Southern District of New York.

This was an application by George Borgfeldt & Co. for a review of a decision of the board of general appraisers reversing the action of the collector in classifying for duty certain imported goods. The court below affirmed the decision of the board, and the United States have appealed. The opinion filed below by TOWNSEND, District Judge, was, in full, as follows:

"The articles in question are 'Brownie Albums,' or decalcomanie books, containing lithographic prints so prepared that they may be transferred to articles by what is known as the 'decalcomanie process.' They were assessed, under paragraph 308 of the act of 1894, as lithographic prints. The importer protested, claiming that they were dutiable under various other provisions of said act, and, under paragraph 436 of the act of 1890, as toys. The board of general appraisers found that the articles were toys, and sustained the protest of the importer.



Paragraph 436 applies only to toys not otherwise provided for. Paragraph 308 contains no such provision. It is clear that these articles are toys, and the only question is whether they are otherwise provided for as lithographic prints. I am inclined to think, inasmuch as these articles differ from the ordinary lithographic prints, in being produced in book form, with a printed title page and directions for use, in being impressed on unglazed paper, and covered with a white-lead surface, so that they may be transferred to articles, in order thereby to furnish amusement for children, that they have been advanced from lithographic prints to a toy known as 'Brownie Album,' the object of which is not to serve as a lithographic print, but as a toy to be used in the way indicated by the printed directions. The board having found, therefore, upon satisfactory evidence, that the articles were toys, I think its finding should not be disturbed. The decision of the board of general appraisers is therefore affirmed."

Henry C. Platt, for the United States.

Albert Comstock, for appellees.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

PER CURIAM. We concur in the conclusions expressed by Judge TOWNSEND in his opinion rendered in deciding this cause in the court below, and his decision and that of the board of general appraisers are therefore affirmed.

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#### UNITED STATES v. FAWCETT.

(Circuit Court, S. D. New York. April 26, 1897.)

##### 1. CUSTOMS ADMINISTRATIVE ACT—DECLARATION BY CONSIGNEE.

Section 1 of the customs administrative act (1 Supp. Rev. St. p. 748), providing that all imported merchandise shall be deemed the property of the consignee, was intended to prevent frauds upon the government arising from collusive transfers, and confers no right upon a mere consignee to make a declaration as "owner" under section 5, but he must make the declaration as consignee, and in the declaration must state truly the name of the owner.

##### 2. SAME—FALSE DECLARATION—INDICTMENT.

In an indictment under section 6 of the customs administrative act, relating to knowingly making any false statement in a declaration for entry, an averment that the defendant "willfully declared that he was the owner of the goods, whereas in fact he was not the owner, as he then and there well knew," is sufficient upon demurrer.

##### 3. SAME—INTENT TO DEFRAUD.

An intent to defraud the United States is not an essential ingredient of the offense constituted by section 6 of the customs administrative act.

##### 4. SAME—FILING DECLARATION.

No offense is complete under section 6 until the false declaration there referred to is filed or offered to be filed with the collector when making or attempting to make entry of the goods.

##### 5. SAME—FALSE DECLARATION—FRAUDS IN GENERAL.

Section 6, specifically providing the punishment for false statements in declarations for entries, and providing a heavier punishment than is imposed by section 9 for frauds in general, must be held to apply exclusively to such false statements, and an indictment for that particular offense cannot proceed under section 9.

Wallace Macfarlane, U. S. Atty., and Max J. Kohler, Asst. U. S. Atty. W. Wickham Smith and Abram J. Rose, for defendant.

BROWN, District Judge. On the 12th of January, 1897, the defendant was indicted in the circuit court of this district upon the

charge that on the 22d day of March, 1895, at this port, for the purpose of securing the entry of merchandise imported into the United States he knowingly and willfully made the false statement, in the declaration for entry, that "he was the owner of the goods, whereas in fact he was not the owner, as he well knew." The first three counts of the indictment present this charge in different forms under the sixth section of the customs administrative act of June 10, 1890 (1 Supp. Rev. St. p. 748), which declares that "any person who shall knowingly make any false statement in the declarations provided for in the preceding section \* \* \* shall on conviction thereof be punished by a fine not exceeding \$5,000, or be imprisoned at hard labor not more than two years, or both, in the discretion of the court."

The fourth count is drawn under section 9 of the same act, which provides the same punishment (except that the imprisonment is not to be at hard labor) in case "any person shall make or attempt to make any entry of imported merchandise by means of any fraudulent or false invoice, affidavit, letter, paper, or by means of any false statement written or verbal, or by means of any false or fraudulent practice or appliance whatsoever."

Upon demurrer to the indictment, it is contended by the defendant's counsel that none of the counts sufficiently apprize the accused of the nature and character of the crime with which he is charged; that the first three counts are also insufficient, inasmuch as they do not allege any intent to defraud the United States.

For the purposes of the argument of the demurrer, but not otherwise, it was admitted that the defendant was the consignee of the merchandise imported; and on this view it is also contended by the defendant, that the first three counts do not set forth any crime, for the reason that the first section of the customs administrative act declares, "that all merchandise imported into the United States shall for the purpose of this act, be deemed and held to be the property of the person to whom the merchandise may be consigned"; and that therefore the defendant, as consignee, might lawfully make the owner's declaration under section 5 of the customs administrative act, although he was not the actual owner of the goods.

The provisions of section 5 of the act above named are, however, plainly incompatible with that construction. The distinction is there very clearly drawn between the form of declaration required to be made by a consignee, importer, or agent, when not the owner, and the declaration required when made by the actual owner of the goods. These very specific and clear provisions in section 5 override the general provision of section 1, so far as pertains to the declarations required to be made for the purposes of entry. The history of the phrase used in section 1, ever since the act of March 2, 1799 (1 Stat. 675), where it first occurs, and the adjudications upon it, show that the object of that provision was to prevent frauds upon the government arising from collusive transfers; and that it had no reference to the specific forms of declaration which by subsequent statutes (March 1, 1823; 3 Stat. 730) were required to be used according to the nature of the importation in each case. See *Harris v. Dennie*, 3 Pet. 302; *Howland v. Harris*, 4 Mason, 497, 500, Fed. Cas. No. 6,794;

*De Wolf v. Harris*, 4 Mason, 539, 540, Fed. Cas. No. 4,221; *Harris v. De Wolf*, 4 Pet. 147. Later statutes have simply repeated the original phraseology. Rev. St. § 3058. I have no doubt, therefore, that a mere consignee of goods, having no property interest in them, has no right to make a declaration as owner under section 5 of the customs administrative act, but must make the declaration as consignee, and in that declaration must state truly the name of the owner.

2. Disregarding the provision of section 1, therefore, as having no bearing upon the form of declaration required by section 5, there is no such ambiguity or uncertainty in the charge of the first three counts of the indictment as to require any further specification in order to give the defendant a sufficiently clear understanding of the nature and character of the offense charged. It is sufficient that the indictment avers that the defendant "willfully declared that he was the owner of the goods,—whereas in fact he was not the owner, as he then and there well knew." This declaration, and the import of it, are as direct and simple as in any ordinary averments of fact in indictments for perjury. See *U. S. v. Wood*, 14 Pet. 430. There may be peculiar circumstances in which the question whether a person was owner or was not the owner, might depend upon the determination of a question of law; but such a possibility surely does not affect the sufficiency of the ordinary forms of pleading. In any event, it would be necessary in order to convict, that the defendant should be found to have made the false claim of ownership knowingly. The indictment so charges; and of this fact the jury must be satisfied beyond reasonable doubt, or the defendant would be entitled to acquittal.

3. I do not think an intent to defraud the United States is any essential ingredient of the offense constituted by section 6. The object of that section is to secure truthful declarations on the entries of merchandise, according to the actual fact; and to secure this, section 6 provides that any person who shall knowingly make any false statements in such declarations in any material matter shall be punished. The intent or object of the accused in making such a false statement, is not, I think, material. The government is not required to prove the particular intent; nor can the defendant's motive or object be a justification. The first three counts should, therefore, be sustained.

4. The fourth count contains some additional averments; among others, that the defendant "did make entry of the said merchandise by means of a false and fraudulent declaration," etc. The declaration set forth in this count is, however, the same declaration as owner that is set up in the three preceding counts; and there is nowhere in the fourth count any specification of any falsity or false practice, or false paper, or false statement, other than in this same declaration, and the statement that the defendant was not the owner of the goods, precisely as in the preceding three counts. This is plainly covered by section 6. That section specifically provides the punishment for this particular class of false statements, and for no other class; and it provides a heavier punishment, i. e. at hard labor,

than is imposed by section 9 for frauds in general. In accordance with the decision in *U. S. v. Kuentsler*, 74 Fed. 220, it must be, therefore, considered that the specific provision of section 6 applies exclusively to false statements in declarations for entry, and that the indictment, therefore, cannot proceed under section 9 for that particular offense.

It is suggested for the government that section 9 provides a punishment for entering or attempting to enter goods by means of any fraudulent appliance, including a false declaration, etc.; while the offense under section 6 might be committed without any entry or attempt to enter the goods; and that as there was an entry in this case, the fourth count should stand. I do not think, however, that this construction can be given to section 6. On the contrary, I think no offense is complete under that section until the false declaration there referred to is filed or offered to be filed with the collector when making or attempting to make entry of the goods. Section 5 provides that whenever merchandise is entered, one of the following declarations \* \* \* shall be filed with the collector of the port at the time of entry. Section 6 declares that any person who shall knowingly make "any false statement in the declarations provided for in the preceding section" shall be punished. The declarations "provided for" are declarations filed with the collector at the time of making entry; so that the presentment of the false declaration to the collector for the purpose of making entry of the goods, is in my judgment necessary to the completion of the offense. Section 9, therefore, contains no additional or different ingredient applicable to the facts of the present case, where the only falsity is in the statement made in the declaration; and as section 9 provides a lighter punishment, it cannot be deemed to include the specific cases covered by section 6. The fact, moreover, that the punishment under section 6 is at hard labor, while that under section 9 is not, confirms the conclusion that the offense under section 6 could not be deemed complete unless the false declaration was used, or sought to be made use of, in making entry of the goods. For that is the only use that can be made of the declaration; and it is not credible that it was intended to punish falsity in a declaration never used, or sought to be used at all, more severely than other frauds by which an unlawful entry is in fact accomplished.

The demurrer as to the fourth count is, therefore, sustained, and as to the first three counts, overruled.

**MENASHA WOOD SPLIT PULLEY CO. et al. v. DODGE et al.**

(Circuit Court of Appeals, Seventh Circuit. February 7, 1898.)

**PATENTS—SEPARABLE PULLEYS.**

The Dodge & Phillion patent, No. 260,462, for an improvement in separable pulleys, construed on appeal from an order granting a preliminary injunction, and *held*, that infringement was not so clear as to warrant the court below in granting such an injunction. 85 Fed. 971, affirmed on application for rehearing.

Appeal from the Circuit Court of the United States for the Eastern District of Wisconsin.

This was a suit in equity by William W. Dodge, Melville W. Mix, and the Dodge Manufacturing Company against the Menasha Wood Split Pulley Company and others, for alleged infringement of letters patent No. 260,462, issued July 4, 1882, to Wallace H. Dodge and George Phillion, for an improvement in separable pulleys. The circuit court entered an interlocutory order granting a preliminary injunction, and the defendants appealed. On November 29, 1897, this court filed an opinion reversing the order below. 85 Fed. 971. The cause is now heard on a petition by the appellants for a rehearing.

Wm. F. Vilas and J. C. Kerwin, for appellants.

Lysander Hill and John W. Hill, for appellees.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

SHOWALTER, Circuit Judge. Notwithstanding the earnest argument presented on this application, we still concur in the conclusion already announced. Since that argument is directed more especially against what was said in my individual opinion, I take this opportunity, entirely on my own account, of putting down certain impressions apparently not already made clear. The patentees say in their specification:

"Heretofore separable pulleys have been made in parts fitted and bolted together prior to being bored and turned, and therefore they were fitted to the shaft and secured thereon in ordinary way. Such pulleys are not interchangeable as to shafts of different diameters. Our improvement obviates—First, the old and imperfect mode of fastening the pulley in place on the shaft; and, second, renders the same pulley readily applicable to shafts of different diameters."

The invention of the patent seems to concern, not the operation of a pulley as such, but the construction of a separable pulley with reference to the method of putting it on the shaft and holding it there. The patentees say further:

"The parts of the bar, B, are so placed in the rim segments that they will not touch each other at the axis or hub of the wheel when the ring segments are placed in position [that is, as I understand, with the meeting ends in contact]. The clamping bolts, G, G, are then inserted with pieces of thin wood or veneering, I, between the parts of the bar, B, to prevent them from springing together under the action of the bolts while being turned in the lathe. The exterior rim segments, d, e, f, g, are then applied, and secured by glue, nails, or other suitable means, and cut transversely in line with the previous cut."

As I understand, the meeting ends of the primary ring are brought into contact, and the strip, I, inserted so as to fill up the opening between the separated portions of the hub bar. The clamping bolts are then inserted, the nuts on these bolts are screwed down, and the two parts of the primary ring are thus held firmly together. The exterior ring segments are now put on the structure. The cut across these segments must therefore, in practice, be made before they are put on. The sentence last above quoted may read: "The exterior ring segments, d, e, f, g, are then applied and cut transversely in line with the previous cut, and secured by glue, nails, or other suitable means." It is nowhere stated in the specification that the meeting ends of the primary ring are separated when the ring halves are initially bolted together with the strip, I, between them. The contrary seems plainly implied from the specification and drawings. The strip, I, is sufficiently thick to prevent the springing together of the two separated portions of the hub or spoke bar under stress of the bolts when the ends are in contact. It was suggested by me in the opinion previously delivered that the exterior rim segments might be put on before the two parts of the primary ring had been bolted together. In that method of construction the two ends of the primary ring would be left apart the width of the kerf afterwards made in sawing asunder the exterior rim segments. After this sawing apart had been done, the two halves of the pulley could be placed with their meeting ends in contact, the strip of wood, I, could be inserted, and thereafter the bolts, and then the shaft hole could be bored truly central and the pulley turned on its face and edges.

It is suggested in the argument on the present application that the meeting ends of the primary ring remain apart when the bolts are inserted to bring the halves together against the strip, I. The strip, I, as indicated in the patent, is not thick enough to admit of this method of construction. The function of that strip is to prevent the springing together of the separated parts of the hub bar under tension of the bolts when the ends are in contact. Moreover, the structure of the rings, as described in the specification, is a rigid structure, not intended to be sprung or bent. And, still further, on the method proposed in the argument, the exterior outline of the pulley would not be an exact circle after the meeting ends are sprung together. Without dwelling on the matter, I do not clearly find in the specification of this patent the structure proposed in the argument.

In a pulley made on the method apparently used by this appellant, the meeting ends need not be together, even when the pulley is in place on the shaft. Strong bolts through the spoke bar near the hub and near the ends may well hold the kind of pulley last indicated firmly and securely on the shaft when the meeting ends of the rim and spoke bar are not in contact. Would the learned counsel for appellee contend that such a doubly bolted pulley was an infringement of either of the claims of this patent? These patentees did not secure any claim for holding the hub on the shaft without contact at the meeting ends functional towards that result. Shall the claims be construed as though the words "when the meeting ends of the rim are in contact" were not in them? If there were a claim like this, "a separable pulley,

whereof the meeting faces of the spoke bar and hub are slightly separated, combined with clamp bolts, G, whereby said hub is clamped upon the shaft," the question would be different. The argument that, in the case of the patent in suit, contact at the meeting ends is merely to complete and strengthen the rim, and that such contact is functionless in holding the pulley on the shaft, would seem to eliminate from each claim that factor expressed by the words "when the meeting ends of the rim are in contact."

The foregoing are merely my individual impressions from the record as it comes before us on this appeal. The order of the court is that the rehearing be denied.

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AMERICAN CARPET-LINING CO. v. BEALE et al. (two cases).<sup>1</sup>

(Circuit Court, D. Massachusetts. July, 1880.)

PATENTS—INVENTION—MACHINES FOR SEWING PARALLEL SEAMS.

The Canfield patent, No. 86,057, for an improvement in sewing machines for sewing parallel seams, considered on motion for preliminary injunction, and held valid and infringed.

These were two suits brought by the American Carpet-Lining Company against Joseph H. Beale and others; the first being upon letters patent No. 74,328, issued February 11, 1858 (reissue No. 3,247, dated December 29, 1868), for machines for sewing carpet linings; and the second upon letters patent No. 86,057, issued January 19, 1869, to Felix P. Canfield and Joel F. Fales, as assignee of said Canfield, for an improvement in sewing machines for sewing parallel seams. The causes were heard on motions for preliminary injunction.

J. E. Maynadier, for complainant.

W. M. Parker, for defendants.

LOWELL, Circuit Judge. In the former of these suits, which is brought on the Fales patent, there seems to be a fair question whether Fales was truly the inventor of the improvement, or whether it was made by Canfield. In the second, which is brought on the Canfield patent, there is no such defense, nor any defense, except that the patent is void on its face, for not clearly distinguishing between what is new and what is old. The point here taken is that, if Fales invented what is described in his patent, the specification of Canfield should have disclaimed it in terms. But the only objection taken to Fales' patent is that Canfield was the inventor. If so, the Fales patent is void; and Canfield truly says that he invented the whole improvement, if he does say so. If Canfield did not make the invention, the Fales patent is valid, and an injunction should issue on that. As a matter of combination, I think the Canfield patent can be sustained, even if Fales did invent a part of the new mode of

<sup>1</sup> This case has been heretofore reported in 5 Ban. & A. 529, and is now published in this series, so as to include therein all circuit and district court cases elsewhere reported which have been inadvertently omitted from the Federal Reporter or the Federal Cases.

operation, because what Canfield claims is one entire combination. Judge Blatchford has granted an injunction in a suit on this patent. There is no denial of infringement of the Canfield patent, except in argument, and a general denial in the answer. The evidence on both sides describes a machine which infringes Canfield. My conclusion is that a preliminary injunction should not be granted in the first-named suit, and that one should be granted in the second; and it is so ordered.

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## SOUTHERN LOG CART &amp; SUPPLY CO. v. LAWRENCE et al.

(Circuit Court of Appeals, Fifth Circuit. April 19, 1898.)

No. 675.

## 1. MARITIME LIENS—ADMIRALTY JURISDICTION.

A flatboat, with a pile driver and its engine erected thereon, which is mainly used in constructing bulkheads for the erection of channel lights, and which is also employed in transporting materials used in the work (being towed by a tug for this purpose), is to be classed as a "vessel" within the maritime jurisdiction, and subject to maritime liens.

## 2. SAME—SEAMEN'S WAGES.

Persons employed upon such a boat, who assist in moving her about, and who also work the pile driver and are engaged in constructing the bulkhead, are to be regarded as rendering maritime services, so as to give them a lien on the vessel for their wages.

Appeal from the District Court of the United States for the Southern District of Alabama.

This was a libel in rem by Millard T. Lawrence and others against an unnamed flatboat or pile driver of which the Southern Log Cart & Supply Company were claimants, to recover a balance of wages due for services rendered on the said boat. The district court held that the boat was a "vessel" capable of becoming the subject of a maritime lien, and that the services rendered by the libelants were maritime services, and accordingly rendered a decree in their favor. The opinion of the district judge, which contains a full statement of the facts, is reported in 84 Fed. 200.

Harry T. Smith, for appellant.

J. Ralston Burgett, W. D. McKinstry, and Leslie B. Sheldon, for appellees.

Before PARDEE and McCORMICK, Circuit Judges, and SWAYNE, District Judge.

PER CURIAM. For the reasons given by the learned district judge, and found in the transcript, the decree appealed from is affirmed.



## GROSSETT v. TOWNSEND.

(Circuit Court of Appeals, Ninth Circuit. February 14, 1898.)

No. 389.

## SEAMAN—SHIPPING ARTICLES—ALLOTMENT OF WAGES.

Act June 19, 1886, § 3, permitting a seaman to stipulate in his shipping agreement before a shipping commissioner for an allotment of wages to a creditor, was by implication repealed by Act Feb. 18, 1895, providing that the shipping agreement made before a shipping commissioner for a coastwise voyage shall not include the clause relating to an allotment of wages, and where such an allotment is made it is invalid, and money paid under it cannot be deducted from the seaman's wages.

Appeal from the District Court of the United States for the Northern District of California.

H. W. Hutton, for appellant.

George W. Towle, Jr., for appellee.

Before GILBERT and ROSS, Circuit Judges, and HAWLEY, District Judge.

GILBERT, Circuit Judge. On May 24, 1896, the libellant shipped as a seaman on the American bark J. D. Peters, at Port Townsend, in the state of Washington, for a voyage to Alaskan ports and to return to San Francisco. He signed the shipping articles before a United States shipping commissioner. The voyage was estimated to consume four months. It began May 24, 1896, and ended September 20, 1896. At the time of signing the articles it was represented to the master of the vessel and to the shipping commissioner that the libellant was indebted in the sum of \$25 to one Max Levy for board and clothing at Port Townsend. To secure the payment of that debt, the libellant made an allotment from his wages to be earned of \$10 per month for the first two months of the voyage and \$5 for the third month, and signed an allotment note of \$25 therefor. The note was paid by the agents of the vessel at Port Townsend. On the completion of the voyage it was claimed that the allotment note was invalid, and that the \$25 was unlawfully deducted from the libellant's wages by the master of the vessel. This suit was brought to determine the question of the legality of the allotment, and the principal question presented on the appeal is whether a seaman engaged in a coastwise voyage may make an allotment to the extent of \$10 per month of his wages to be earned on the voyage. In order to understand the scope and purpose of the more recent legislation upon this subject, it is necessary to refer to the earlier statutes. The act of congress of June 7, 1872 (17 Stat. 262), entitled "An act to authorize the appointment of shipping commissioners, by the several circuit courts of the United States, to superintend the shipping and discharge of seamen engaged in merchant ships belonging to the United States, and for the further protection of seamen," provides, in section 12: "That the master of every ship bound from a port in the United States to any foreign port, or of any ship of the burden of seventy-five tons or upwards bound from a port on the Atlantic to a port on the Pacific, or vice versa,

shall, before he proceeds on such voyage, make an agreement in writing or in print with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned." Then follows an enumeration of the items which must be contained in the agreement, the last of which is: "Eighthly. Any stipulations in reference to advance and allotment of wages or other matters not contrary to law." The section concludes with the proviso that section 12 "shall not apply to masters of vessels where the seamen are by custom or agreement entitled to participate in the profits or result of a cruise or voyage, nor to masters of coastwise nor to masters of lake-going vessels that touch at foreign ports." By section 13 it is provided that the agreement must be signed by each seaman in the presence of the shipping commissioner, who shall certify the same. Sections 16 and 17 provide as follows:

"Sec. 16. That all stipulations for the allotment of any part of the wages of a seaman during his absence which are made at the commencement of the voyage shall be inserted in the agreement and shall state the amounts and times of the payments to be made and the persons to whom such payments are to be made.

"Sec. 17. That no advance of wages shall be made or advance security be given to any person but to the seaman himself or to his wife or mother, and no advance of wages shall be made or advance security given unless the agreement contains a stipulation for the same and an accurate statement of the amount thereof; and no advance wages or advance security shall be given to any seaman except in the presence of the shipping commissioner."

By the act of January 15, 1873, congress amended section 12 of the former act, and provided that that section should not apply to masters of vessels when engaged in trade between the United States and the British North American possessions, or the West India Islands, or the republic of Mexico. By the act of June 9, 1874, it was enacted that none of the provisions of the act of June 7, 1872, "shall apply to sail or steam vessels engaged in the coastwise trade, except the coastwise trade between the Atlantic and Pacific coasts, or in the lake-going trade, touching at foreign ports or otherwise, or in the trade between the United States and the British North American possessions, or in any case where the seamen are, by custom or agreement, entitled to participate in the profits or results of a cruise or voyage." It will be seen that the act of 1874 effectually modified the prior legislation concerning shipping commissioners, and excluded from its operation vessels in the coastwise trade, with the exception named. In other words, in the shipping of seamen for coastwise voyages other than those between the Atlantic and Pacific coasts, the agreements of masters with the seamen were not thereafter required to be signed under the superintendence of a shipping commissioner, it being the purpose of the amendatory act to leave masters at liberty to obtain and make contracts with seamen for voyages upon such terms as to advance or allotment of wages or otherwise as might be agreed upon, as to all voyages in the coastwise trade, with the exception named. So stood the law until the act of congress of June 26, 1884 (23 Stat. 55), entitled "An act to remove certain burdens on the American merchant marine," etc., which prohibited any advance of wages whatever, and any allotment except to a wife, mother, or other relative, by stipulation in the shipping agreement. This provision, by its terms, applied to sea-

men on all vessels except whaling vessels. The act of June 19, 1886, § 3 (24 Stat. 80), after providing, in section 2, "that shipping commissioners may ship and discharge crews for any vessel engaged in the coastwise trade," etc., amended section 10 of the act of 1884 by striking out the portion relating to wife, mother, or other relative, and provided that a seaman "might stipulate in his shipping agreement for an allotment to his wife, mother or other relative, or to an original creditor in liquidation of any just debt for board or clothing, which he may have contracted prior to the engagement, not exceeding \$10.00 per month for each month of the time usually required for the voyage for which the seaman has shipped, under such regulations as the secretary of the treasury may prescribe." It will thus be seen that from and after the date of the amendment of 1886 all seamen shipped at American ports, for any voyage, were given the power to contract, but only by a written stipulation in their shipping agreements for an allotment of wages to the limited amount of \$10 per month for each month of the time usually required for the voyage, and no more, and only as an allotment to wife, mother, or other relative, or to an original creditor to pay a just board or clothing debt already contracted; and, further, that it was permitted, but not required, that crews for coastwise voyages be shipped before a shipping commissioner. On August 19, 1890 (26 Stat. 320), "An act to amend the laws relative to shipping commissioners" was passed, providing "that when a crew is shipped by a shipping commissioner for any American vessel in the coastwise trade," etc., "as authorized by section 2 of an act approved June 19, 1886, \* \* \* an agreement shall be made with each seaman engaged as one of such crew in the same manner and form as is provided by sections forty-five hundred and eleven (section 12 of the act of 1872) and forty-five hundred and twelve of the Revised Statutes." On February 18, 1895 (28 Stat. 667), an act was passed to amend the act of August 19, 1890. It declares that when a crew is shipped by a shipping commissioner for any American vessel in the coastwise trade, as authorized by section 2 of the act of 1886, "an agreement shall be made with each seaman engaged as one of such crew, in the same manner as is provided by sections four thousand five hundred and eleven and four thousand five hundred and twelve of the Revised Statutes, not however including the sixth, seventh and eighth items of section four thousand five hundred and eleven. [Then follows a provision applying sections 4519, 4526-4530, 4535, 4536, and 4542-4547 to the agreement.] \* \* \* But in all other respects such shipment of seamen shall be regarded as if both shipment and agreement had been entered into between the master of a vessel and a seaman without going before a shipping commissioner." The sixth, seventh, and eighth items so excluded from the agreement are the following:

"Sixth. A scale of the provisions which are to be furnished to each seaman. Seventh. Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishments for misconduct, which may be sanctioned by congress as proper to be adopted, and which the parties agree to adopt. Eighth. Any stipulations in reference to advance and allotment of wages, or other matters not contrary to law."

Does the act of 1895, by enacting that, in cases of shipment before a shipping commissioner for a coastwise voyage, the shipping agreement shall not include the eighth item of the schedule, which was theretofore an essential feature in the agreement in cases where there was to be an allotment, by implication repeal the authority which had been conferred to make allotment of wages to be earned in coastwise voyages; or was it the intention only to prescribe what should be the form of the written contract in cases of shipment for coastwise voyages, and to say that the last three items of the schedule need not be inserted, and that as to those items the contracting parties were free to make such agreement, verbally or otherwise, as they might choose to make? The law of 1884, as amended in 1886, declared that all allotments should be unlawful unless contracted for by a written stipulation inserted in the shipping agreement. The law of 1895 does not expressly repeal any of the provisions of the prior laws. In declaring that in shipping before a shipping commissioner for a coastwise voyage the agreement shall not include a stipulation for allotment, we think it was the intention to deprive the parties in such a case of the power of contracting for allotment. When a law declares that an allotment may be made only by written agreement, and subsequently it is enacted that in certain cases the contract of shipment shall not contain that stipulation, it seems clear that as to those cases the later law was intended to take away the power conferred by the former. It is urged against this construction that force and effect cannot be given to that clause of the act of 1895 which provides that "in all other respects such shipment of seamen and such shipping agreement shall be regarded as if both shipment and agreement had been entered into between the master of a vessel and a seaman without going before a shipping commissioner," unless it is held that it was the intention to leave the seamen free to make such contracts as might be agreed upon between them and the masters concerning allotments, and that the "other respects" so referred to can be no other than the three items which it is declared shall not be included in the contract. To determine whether such was the intention of this provision, it is proper to refer to the provisions of the existing law which are therein made a criterion, viz. the law controlling agreements between masters and seamen in cases where the latter are shipped without going before a shipping commissioner. That law, as we have seen, absolutely prohibited any allotment, except by a written stipulation. While the contract of shipment of seamen for a coastwise voyage was permitted to be made without going before a shipping commissioner, it was nevertheless necessary that all contracts of allotment should be in writing, otherwise they could not be made. The last clause of the law of 1895 is directly preceded by provisions which declare that certain specified sections of the Revised Statutes are applicable to cases of shipment for coastwise voyages before a shipping commissioner, omitting others which are not deemed applicable. It is reasonable to infer that the last clause, so far as "other respects" are concerned, has reference to provisions of the Revised Statutes which are so omitted, and which do not pertain to allotment, and that as to those matters in shipping for a coastwise voyage it was

the intention of the statute to leave parties free to contract as if they had not gone before a shipping commissioner. But if it is conceded that the "other respects" referred to include the subject of allotment, it still does not aid the contention of the appellee. The contracts authorized to be made without the intervention of the shipping commissioner were nevertheless subject to the prohibition against allotment unless made by a written stipulation in the shipping agreement. To say that in respect to allotment the contracts should be as if made without going before a shipping commissioner, was to say that allotment could only be made in the manner authorized by the law applicable to such shipment, and the logic of the appellee's contention leads to the conclusion that the present state of the law is this: First, the contract of shipment shall contain no provision concerning allotment; second, there shall be no allotment except by a written stipulation in the contract. It is urged against the construction which we place upon the statute that it leads to the incongruous result that seamen shipped without going before a shipping commissioner have leave to contract by written agreement for an allotment of wages, not to exceed \$10 per month, for a coastwise voyage, while those who are shipped before a shipping commissioner are deprived of that power. It is true that the inequality of the law as thus stated would present a strong argument against the construction which we have adopted, were it not that the construction contended for by the appellee leads to a result equally incongruous. Upon the construction which he contends for it would follow that seamen shipped before a shipping commissioner might make any contract which they saw fit to make in regard to allotment, without the safeguard and protection of a written agreement, while those otherwise shipped could only contract for allotment in the prescribed manner, in the limited amount, and for the specified persons named in the act of 1886. The conclusion at which we arrive is in harmony with the purpose of the legislation upon this subject. The statutes prohibiting allotment are directed against evils which have often been alluded to in the decisions of admiralty courts. The intention has been to protect the sailor against imposition and fraud. It was evidently believed by congress that for a coastwise voyage of brief duration there was no necessity for an allotment for the wife, mother, or creditor of the sailor. This was the construction placed upon the law by the officers of the treasury department at the time when it went into effect. In a case of doubt as to the meaning of a statute, it is proper to consider the contemporary construction placed upon it by those upon whom the duty is imposed of enforcing its provisions. *Schell's Ex'rs v. Fauché*, 138 U. S. 562, 11 Sup. Ct. 376; *Hahn v. U. S.*, 107 U. S. 402, 2 Sup. Ct. 494; *U. S. v. Pugh*, 99 U. S. 265; *Peabody v. Stark*, 16 Wall. 240; *Edwards' Lessee v. Darby*, 12 Wheat. 206. The decree will be reversed, and the cause remanded to the district court for further proceedings not inconsistent with the views expressed in this opinion.

## HUNTER v. E. S. CORNING &amp; CO.

(Circuit Court of Appeals, Seventh Circuit. March 23, 1898.)

No. 468.

## INTERNAL REVENUE—TAXATION OF SPIRITS—SOAKAGE.

Under Rev. St. § 3248, declaring it to be the true intent and meaning of internal revenue laws that all "distilled spirits, spirits, alcohol, and alcoholic spirit," shall be subject to the tax, the soakage of a barrel of spirits is liable to taxation if, by any process, it is extracted from the wood, so as to become merchantable. It is no obstacle to the collection of the tax thereon that the usual allowance for soakage was originally made on the package, the tax then paid, and the proper stamps affixed, or that there are no specific regulations by the commissioner of internal revenue for the collection of the tax on soakage so extracted.

Jenkins, Circuit Judge, dissenting.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

The judgment under review was given for the recovery of taxes alleged to have been unlawfully collected by the plaintiff in error, James W. Hunter, as collector of the internal revenue for the Fifth collection district of Illinois, of the defendant in error, which is a corporation under the name of Corning & Co. The case is in effect an agreed one, and the question is whether, upon the facts stipulated, the judgment rendered is right. Besides a written waiver of trial by jury, the parties subscribed and filed the following agreement, which is entitled in the cause: "The following facts as to the manner, mode, and process by which the plaintiff extracted from the wood of the barrels a portion of the spirits as soakage therein, are mutually agreed to in connection with the statements set forth in the plaintiff's declaration. The distiller's original spirit packages having had effaced and obliterated all stamps, marks, and brands, after they were emptied by the plaintiff, were then by the plaintiff subjected to a process of steaming; and the steam was then condensed, viz. the steam was conveyed by a pipe or hose to the packages which had once contained the spirits, and the packages were then subjected to the process of steaming by which the spirits previously absorbed by said packages were driven out of the packages, and, with the steam, were carried through the bung holes to a condenser, and that the spirits thus obtained were the same spirits to recover the taxes levied and collected on which this suit was brought. It is also stipulated that the facts set forth in the special count are to be taken to be true for the purpose of this trial, and as evidence. It is further stipulated that the only cause of action held by the plaintiff against the defendant is the cause of action set forth in the special count of the declaration, and that, as to the remaining counts of the declaration, they may be and are hereby dismissed."

The averments of the declaration, in so far as they are now material, are that the defendant in error, prior to March 31, 1897, had been engaged at Peoria, Ill., in compounding and in selling at wholesale and retail, whereunto it was duly licensed, whiskies, gins, spirits, and other alcoholic and vinous liquors, and that prior to that date it had purchased at one time 25 and at another time 15 barrels of spirits of the American Spirits Manufacturing Company, which was engaged in the production of spirits, alcohol, and high wines at the Monarch Distillery at Peoria, Ill.; that on the barrels so purchased were the proper warehouse numbers and tax-paid stamp numbers, and that the proper tax thereon had been in fact paid by the manufacturer and received by the government; that, under and by virtue of the internal revenue laws of the United States and the rules and regulations of the commissioner of internal revenue, a certain allowance was made to the manufacturer of distilled spirits for soakage, and that the packages aforesaid had received the benefit of such allowance to the manufacturer of said spirits, and that said manufacturer had in all respects fully complied with the internal revenue laws of the United States, and all rules and regulations thereunder pertaining to the manufacturing tax upon the spirits

aforesaid; that after emptying and using the contents of the 25 barrels first named, under and by a process in use by the plaintiff, it extracted from the wood of the barrels a portion of the soakage therein, amounting to 42.20 gallons of 15 per cent. proof; that the proof gallons thereof were 6.33; and the taxable gallons 6.3, if liable to tax; and that in like manner it extracted from the 15 barrels, after emptying and disposing of the contents thereof, as soakage 34.73 net wine gallons of 13 per cent. proof, making 4.51 proof gallons and 4.5 taxable gallons if the same were subject to tax; and that, on the spirits so produced, the defendant, as collector, exacted of the plaintiff the sum of \$11.88, of which repayment had been duly demanded and refused.

Reference has been made to the following provisions of the Revised Statutes:

"Sec. 3247. Every person who produces distilled spirits \* \* \* shall be regarded as a distiller.

"Sec. 3248. Distilled spirits, spirits, alcohol, and alcoholic spirit, within the true intent and meaning of this act, is that substance known as ethyl alcohol, hydrated oxide of ethyl, or spirit of wine, which is commonly produced by the fermentation of grain, starch, molasses or sugar, including all dilutions and mixtures of this substance; and the tax shall attach to this substance as soon as it is in existence as such, whether it be subsequently separated as pure or impure spirit, or be immediately, or at any subsequent time, transferred into any other substance, either in the process of original production, or by any subsequent process.

"Sec. 3249. Proof-spirit shall be held to be that alcoholic liquor which contains one-half its volume of alcohol of a specific gravity of seven thousand nine hundred thirty-nine ten-thousandths (.7939) at sixty-nine degrees Fahrenheit. And for the prevention and detection of frauds by distillers of spirits the commissioner of internal revenue may prescribe \* \* \* rules and regulations to secure a uniform and correct system of inspection, weighing, marking and gauging of spirits."

"Sec. 3251. There shall be levied and collected on all distilled spirits on which the tax prescribed by law has not been paid a tax," etc.

"Sec. 3254. All products of distillation, by whatever name known which contain distilled spirits, or alcohol, on which the tax imposed by law has not been paid, shall be considered and taxed as distilled spirits."

By section 48 of the act of congress approved August 27, 1894, the rate of tax on spirits was fixed at \$1.10 per gallon.

As commonly defined, "distill" means "to drop; fall in drops; flow in a small stream; trickle." Cent. Dict. A "still" is "an apparatus for separating by means of heat volatile matters from substances containing them, and recon-densing them into the liquid form. It consists essentially of two parts,—a vessel in which the substance to be distilled is heated, and one in which the vapor is cooled and condensed." *Id.*

John C. Black, for plaintiff in error.

John S. Stevens, for defendant in error.

Before WOODS, JENKINS, and SHOWALTER, Circuit Judges.

WOODS, Circuit Judge, after stating the case as above, delivered the opinion of the court.

The intention of congress that all "distilled spirits, spirits, alcohol and alcoholic spirit," whether produced by fermentation or otherwise, should be subject to the tax prescribed, is evident; and it is not perceived that there is in the supposed lack of a specific regulation provided by the commissioner of internal revenue any obstacle to the full enforcement of that intention. What is subject to the tax is to be determined by the statute, and not by any rule which the commissioner is to adopt in order "to secure a uniform and correct system of inspection, weighing, marking, and gauging of spirits." "The true intent and meaning" of the act is to impose the prescribed tax on that substance known as "ethyl alcohol or spirit of wine." That the arti-

cle produced by the defendant in error was of that character is not disputed, but it is said that Corning & Co. was not a distiller or producer, within the meaning of the law; that, when the spirits in the package have been gauged, the packages duly stamped and branded, and the tax paid, the government releases all claim upon it, and the purchaser who buys it has a right to use it as he pleases; that the soakage allowance is made because the spirits are deemed to be lost to the distiller, and are lost to him as he does not receive anything for the staves; that in law there is no restriction upon the use of a still by a rectifier, either to redistill his spirits, or to recover spirits from the charcoal used in his rectifiers; that there is no provision of law applicable to the case; that no fraud was attempted; and that no mistake was made. All this is a statement of the question, rather than a solution of it. The chief proposition is that there is no provision of the statute which authorizes the collection of this tax; but the statute is to be fairly and liberally construed, for the purpose of effecting its evident purpose, as manifested in the express declaration which it contains of its true intent and meaning (*Smythe v. Fiske*, 23 Wall. 374; *U. S. v. Stowell*, 133 U. S. 1, 10 Sup. Ct. 244); and it needs no strained construction to include the spirits in question. It is true that the allowance for soakage was made to the distiller on the theory that it was lost. As an article of spirits capable of use as such it was lost, and in its exact identity in all of its parts as it went into the staves it has never been reproduced. If it was proximately a "proof-spirit," as defined in section 3249 of the Revised Statutes, when it went into the staves, it consisted of alcohol and water in about equal parts; but the result of the process employed by Corning & Co. was a product which in bulk exceeded many times the quantity allowed for soakage. It is perhaps to be presumed that the absolute or pure alcohol contained in the product was in all its particles the same which had soaked into the staves of the barrels, but that is by no means certain, since methylic alcohol may be obtained by the destructive distillation of wood itself; and it is not impossible that in this instance, by the process employed, which was a form of distillation, alcohol was extracted which had not been absorbed from the distilled contents of the barrels. But, while it is evident that the spirits produced by Corning & Co. were not in their constituent elements the identical spirits which had been soaked into the staves of the packages, it is not to be understood that the decision of the court is placed on that ground. Concede the identity, and it remains true that while in the wood the absorbed liquor was not a merchantable article. As such, it had ceased to exist. Allowance was made for it on the theory that it never would exist in its original identity and form again, and it was, of course, the privilege of the purchaser to use the barrel or staves for any conceivable lawful purpose; but it was not his privilege to extract the soaked alcohol, alone or in combination with that contained originally in the wood, and make of it a merchantable spirit to be put untaxed on the market, to compete with that on which the lawful duty had been paid.

A rectifier by reason of the fractional quantity which is disregarded in gauging, it is asserted, can obtain untaxed one-half to 1 per cent. of



the spirits which he purchases, and why, it is asked, is he not as much entitled to the soakage as to this untaxed quantity? The distinction is clear. It is the difference between inclusion and exclusion. Except the soakage, no part of the spirits in a package is in fact untaxed. The fractional quantity which is disregarded in the computation of the amount to be charged on the package bears its proportionate share of the entire tax, and goes into the market without violation of either the letter or the spirit of the law. The soakage, on the other hand, besides not being included in the basis of computation, is not a part of the quantity upon which the tax is levied; and, consequently, when extracted from the empty barrels in the manner stated, it is spirits on which the lawful tax has not been paid, and is subject to taxation no less than if produced, by the same or any other process, from imported barrels or staves, or from any other source or in any other mode which might be suggested. It is not inconceivable, nor necessarily improbable, that a process might be invented whereby the alcohol in fermented liquors, on which the tax is only a dollar for a barrel of 31 gallons, could be withdrawn, in whole or perhaps in such part as to leave the minimum quantity essential to the integrity of the liquor from which it should be taken, and, if the spirits produced from the staves of whisky barrels is not taxable because the free contents of the barrels had been taxed, still more ought the spirits to be exempt which, as constituent parts of beer or ale, had borne the tax imposed on those liquors. Again, under the regulations of the internal revenue department, whiskies, spirits, or high wines which have been held in bond are regauged when about to be put on the market, and allowance made for actual evaporation during the period of storage; and let it be supposed that means should be discovered by the use of which in the warehouses the evaporated spirits, after escape from the barrels, could be recondensed and saved: Would it be necessary to amend the law or to add to the rules of the department of internal revenue in order to bring under taxation the spirits so produced or recovered?

Little credit is due to the lawmaker who is driven to special enactments to supply the defects of a general law on a subject to which general provisions are applicable; and when a comprehensive statute has been so framed that, without distortion of its terms, it may be reasonably applied to extraordinary and unexpected conditions, it is no duty of the courts to impose upon it a narrow construction, which will include only anticipated transactions and conduct, leaving evasive schemes and devices, which, though unforeseen, are clearly within the aim of the law, to the awkward and inefficient remedies of special legislation.

The judgment below is reversed, with direction to enter judgment for the defendant.

JENKINS, Circuit Judge, dissents.

## NATIONAL FOLDING-BOX &amp; PAPER CO. V. ELSAS et al.

(Circuit Court of Appeals, Second Circuit. March 2, 1898.)

## 1. PATENTS—INFRINGEMENT.

A patent for a knock-down paper box, in which the flap constituting the locking device engages, straight edge to straight edge, with the slot in which it is inserted, is infringed by a box in which the slots, instead of being parallel with the vertical corner of the box, are inclined at an angle to it, and are also cut away at each side of the middle so as to give them a half-moon appearance, where the edges of the notched extension are made to correspond with the direction of the slot, so that, notwithstanding these changes, the edges engage straight edge to straight edge.

## 2. SAME—MARKING "PATENTED."

It is immaterial that complainant's device is marked with the dates of other patents besides that sued on, where such other patents are of no importance to the device described, or are without legal force.

## 3. SAME—MEASURE OF DAMAGES.

Where the infringement is of an entire new article of manufacture, the entire profits of which are attributable to the patented improvement, and where the measure of damages is necessarily determined by the losses of the complainant in its sales, the damages based upon a loss of the complainant's profit are not to be reduced by the deduction of a "manufacturer's profit."

## 4. SAME—DOUBLE DAMAGES.

Where defendants were deliberate infringers, having purchased their infringing goods after a preliminary injunction against them, and it appeared that their books had been sent out of the jurisdiction, to the embarrassment of the accounting, without any effort on their part to procure and produce them, *held*, that it was within the discretion of the circuit court to impose double damages.

## 5. SAME—IMPROVEMENTS IN PAPER BOXES.

The Ritter patent, No. 171,866, for an improved paper box, *held* not anticipated, valid, and infringed.

This is an appeal from a final decree of the circuit court for the Southern district of New York, which adjudged that the complainant was entitled to double damages for the infringement of claim 2 of letters patent No. 171,866, dated January 4, 1876, and issued to Reuben Ritter for an improved paper box. The litigation upon this patent commenced in the case of Box Co. v. Nugent, in which Judge Lacombe found upon final hearing that the defendants had infringed the second claim. 41 Fed. 139. In a subsequent case against the American Paper Pail & Box Company, Judge Lacombe granted an injunction pendente lite (51 Fed. 229), which order was affirmed by this court (1 U. S. App. 283, 2 C. C. A. 165). In the present case an injunction pendente lite was granted by Judge Lacombe, the case was heard upon final hearing by Judge Coxe (65 Fed. 1001), and the final decree was made by Judge Wheeler (81 Fed. 197).

Edmund Wetmore and Arthur v. Briesen, for appellants.

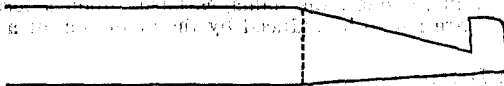
Walter D. Edmonds, for appellee.

Before WALLACE and SHIPMAN, Circuit Judges.

SHIPMAN, Circuit Judge (after stating the facts). The object of the invention was to make a broad, shallow box of stiff, coarse, and cheap strawboard from a single sheet of paper, without tacks and mucilage, which can be used for the carriage or storage of bulky

fabrics, such as ladies' dresses or suits of clothes. Before the invention, tubular paper boxes were used, the sides of which were permanently fastened together like those of an envelope, and when not in use could be collapsed, but were open at the ends, and were interlocked by hooks of the same material. The boxes of the patent in suit are known as "knock-down boxes," which are sent from the factory in an open, flat condition, and so remain until put into use. They are thus described by Judge Lacombe in the Nugent Case, *supra*, as follows:

"When put in use, their sides and ends are bent upwards, and flaps, projecting from the sides, are passed around the corners, and inserted into slots in the ends. There is thus formed a shallow rectangular box, with rectangular sides, which is held in shape without the use of rivets, mucilage, or any foreign substance. Paper boxes formed out of a single sheet of paper, and retaining their shape by an interlocking into slots of projection of their own material, were old. Plaintiff claims the application to such boxes, in combination with their shape, of the peculiar locking device described in his patent. The flap projection from the side strip is shaped thus (the dotted line representing the corner around which it is bent):



"The slot into which it is inserted is located in the end strip, perpendicular to the bottom of the box, and therefore parallel with the inner edge of the projection at the end of the flap. The slot is longer than the width of the flap which is to be thrust into it, and is located at such a distance from the corner that when the box is set up, and the flap thrust in, the projection of the latter will just pass within the box. The peculiar feature of this method of locking which complainant relies upon is the circumstance that the projection engages the straight edge of the projection with the straight edge of the slot; such engagement taking place sometimes at one point, sometimes at another, and sometimes, again, throughout the entire length of the projection. One supposed benefit derived from this peculiar mode of engagement is the securing of a greater degree of automatic adjustability, the box more readily accommodating itself to slight variations in the position of the parts relatively to each other, whether caused by imperfect cutting out of the blank or by carelessness in setting it up. This is said to be an important feature, in view of the fact that in such setting up the customer generally uses unskilled labor."

It is manifest from the character of the material which is and must be used in these boxes that, if the interlocking is by means of the pull of a lock upon the corner of the slot, the corner will be readily torn, and the box will become useless. In the patented lock the strain is distributed over the straight-edged surfaces of the retaining piece and of the slot, instead of being crowded into the end of the slot. It is also true that, because the side of the box which carries the hook or retaining piece rotates upon its hinge at the seam, the end of the straight-edge retaining piece is permitted to be inserted in the slot without danger of unduly bending and breaking that part of the lock. There was no other box of the kind in the market when it was first introduced, and it has gone into very extensive use. Upon the questions of anticipation and invention in view of the state of the art, the defendant introduced a number of patents. Three of them—one to Joseph P. Buckingham, No. 169,953, dated November 16, 1875, one to the patentee, No. 153,281, dated July 21, 1874, and a

French patent to Caussemille, issued June 2, 1869—were for knock-down paper boxes, but it is substantially admitted that each of them locked upon a different principle from that of the patent in suit. Two others described flexible envelopes, two described bale ties, and two described berry baskets. No one of these except the English patent to William Davis, dated January 21, 1868, to which the defendant attributes great importance, has any substantial bearing upon the questions in this case. The Davis patent was for a method of fastening paper bags or envelopes for the conveyance, by post or otherwise, of samples of grain or other articles, or to be used as receptacles for letters, and was an envelope closed on three sides, and having a projection or tongue upon the flap of the fourth side which tucked into a slot in the body of the envelope. It was a method of closing the mouth of a completed paper envelope. The retaining piece had what may be called a straight-edge projection, and an engagement took place between this straight edge and an edge of the slot. The defendants therefore assert with confidence that, inasmuch as the plaintiff's expert said that all that Ritter invented was his peculiar form of lock, adapted to a knock-down paper box, and inasmuch as Davis engaged straight edge with straight edge, a question of anticipation must be resolved in favor of the defendants. The counsel forgot that the expert's definition of the invention was, "Ritter's peculiar form of lock adapted to a knock-down paper box," or, as Judge Lacombe defined it, "The application to such boxes, in combination with their shape, of the peculiar locking device described in the patent." In the Davis envelope of flexible paper the projection could be doubled upon itself so as to enter the slot without breakage, but, if the envelope had been made of coarse strawboard, the attempt of the ordinary consumer to tuck the two parts together would have been practically useless. Therefore, in order to use the Davis projection in a strawboard box, it must be attached to some part which is so hinged that it can rotate backward, and enable the hook to be backed away, and thus avoid the strain from binding. If the capacity of the side of Ritter's box to be thrown backward is materially diminished, and the hook is required to be doubled upon itself, the capacity of the box for usefulness is practically destroyed.

It is next said that the improvement consisted in attaching the Davis tongue to the corner of the blank of the Buckingham box of 1875, and was, therefore, destitute of patentable invention. Claim 2 is for a combination, as follows:

"A box top consisting of the tops, f, f1, f2, f3 [the end of the box retaining the notched extension f4], connected together by notched extension, f4, passing through slots, f5 [in the corner of the said f2], in the manner and for the purposes described."

It is a familiar rule that where the thing patented is an entirety, the mere fact that the different elements are taken from different old devices or exhibits does not create conclusion of noninvention. *Imhaeuser v. Buerk*, 101 U. S. 647; *Dederick v. Cassell*, 9 Fed. 306. Although this is familiar, the same form of suggestion which was formerly used is still often pressed by a defendant, as though it necessarily had an important bearing upon the question of patentability. On this case it has no argumentative power, for that the com-

bination in a strawboard box was an inventive act seems self-evident when the history of the art has been read.

The question of infringement of the Ritter patent is, in the mind of the actual defendant, the one of importance in the case. It owns a patent, No. 377,640, dated February 7, 1888, issued to T. F. W. Schmidt, under which millions of boxes have been made since November, 1887, and by which it thinks infringement is avoided. The defendants' notched extension is somewhat curved in its central portion, instead of having the straight lines of the Ritter extension. It is true also, as the complainant's expert points out, that the slots of the patented device are parallel with the vertical corner of the box, while in the defendants' box the slots are inclined at an angle, but the edges of its notched extension also correspond exactly with the direction of the slot, and remain parallel with it. There is also in the defendants' box a cutting away of the portion of the paper at each side of the middle of the slot, so as to give it a half-moon appearance. No one of these changes alters the character of the locking device. The straight edges of the extension have their outward pull upon the sides of the slot, and do not bring up in its end or corner. The defendants' locking device is intentionally further off in appearance than the Nugent device was from the patented lock, but the result is the same, viz.: "When a pull comes, the straight edge of the thick cardboard composing the projection of the flap is brought up against the straight edge of the slot through which it was thrust." The mode of action in which the projection acts is the same with that of the Ritter lock and with a Nugent modification.

The next question is as to the proper rule of damages. In the careful and conservative report of the master he found that the entire profit in the box was due to the invention described and contained in the patent in suit, and that there was no testimony to the effect that any part of the profits arising from the manufacture and sale of the box according to the second claim of the patent is attributable to other inventions or improvements, or to other things than those expressly covered by that claim. The defendants seem to place stress upon the fact that some of the complainant's boxes have been marked with the dates of other patents besides that of the patent in suit. This solitary fact is of no importance if the patents are of no importance. The master truly found that none of the features described and claimed in the other patents, with one possible exception (in the Buckingham patent of 1877, No. 187,506), entered into the construction of the complainant's boxes, that this patent was without legal force, and that these possible features were fully covered by the patent in suit. In this patent of 1877, which is subsequent to the Ritter patent, diagonal slots were shown, and in the claims of the patent were mentioned in combination with other features of construction. Diagonal instead of vertical slots are used by the complainant, but the inventions of the claim are not used. Diagonal slots anteceded Ritter, and there was nothing patentable in them. No testimony on the subject of the Buckingham patent was given, except upon the defendants' cross-examination of the plaintiff's witness Munson, who testified in accordance with the master's findings. In view of these facts, discussion of the value of the Buckingham patent with respect

to an apportionment of profits seems superfluous, and that the whole profit on the Ritter box was due to this patent is also firmly established. The portion of the master's report which describes the difficulties which were thrown in the way of an estimate of the profits of the defendants, and the limitations which were placed upon his investigations, and which contains his findings in regard to the complainant's damages, is important. The defendants were in the habit of buying to some extent the product of the Dayton Paper Novelty Company, which is confessedly the real defendant in this case. The master says:

"The accounting is beset with difficulties, and has been prosecuted and contested with exceptional vigor. Much of the difficulty was caused by the absence of the business books and records of the defendants covering the period of infringement. They professed inability to make production upon the ground that all their books and papers had passed from their custody and control under a sale and transfer of the co-partnership to one Jacob Elsas, and a subsequent transfer by him to the Elsas Paper Company, of Pennsylvania. The facts as to such transfer as they appear in the testimony of defendant Elsas are as follows: On December, 1891, the defendants Elsas and Keller, for reasons satisfactory to themselves, agreed to sell all the firm property and assets to Jacob Elsas, who appears also to have assumed all the business liabilities. A formal transfer was made in January, 1892. Jacob Elsas proceeded to liquidate the co-partnership affairs, retaining defendant Elsas in his employ, to whom he gave a power of attorney. Later on, the Elsas Paper Company, of Pennsylvania, was formed, and the books, paper, property, and business were turned over to this corporation. Defendant Elsas was selected as its president, and he continued as the chief executive officer of this corporation until about January, 1895, when it went into liquidation, and established its office for that purpose in Atlanta, Georgia, to which place the books and papers in question were removed about May 1, 1895. It is supposed that these books and papers are there now. This suit was commenced in January, 1892, about the time of the dissolution of defendant's co-partnership and the transfer to Jacob Elsas. The decree was entered December 26, 1894, just preceding the liquidation of the Pennsylvania corporation. The books and papers were sent to Georgia about May 1, 1895, over four months after the account had been ordered, and five months, at least, before proceedings under the accounting were instituted before me. These facts do not warrant a finding that such books and papers were removed beyond the jurisdiction of the court because of the accounting; neither does the evidence justify a finding that the books and papers were within the power of the defendants to produce. It does appear, however, that the defendants did not exert themselves in the matter of production, doing nothing more than to write a letter, which was never answered. It does not appear that any explanation for ignoring this letter was sought, or any effort was made to ascertain whether such letter ever reached its destination. I am unable, from the evidence, to notice a finding that the defendants made a bona fide effort to produce or have produced on this accounting the books and papers in question. Such being the case, I am not persuaded that the complainant ought to suffer the entire consequences, and, in addition thereto, be charged with the costs and expenses of this accounting. I am convinced that the defendants made a substantial profit by their transactions in the infringing boxes over and above the business expenses properly chargeable thereto, the amount of which would have been disclosed by the books. But profits upon such accountings must be computed from the proofs, not guessed at, and the burden of furnishing the proofs rests upon the complainant." He further said: "Upon the question of damages, I am convinced from the proofs, and so find and report, that complainant and its predecessors possessed facilities of supply equal to the trade demand. I am not satisfied that there was any knock-down box in the market, other than the patented and infringing boxes, which fully satisfied the trade requirement. The patented box had been well introduced and was well known when the infringement began. The owners of the patent had been vigilant in its protection.

The defendants were well acquainted with its merits as a salable article, for they had been supplying it to their customers before they took up with the infringement, and they continued to do so for a long time thereafter. The infringing box was selected by them for their trade because it gave satisfaction equally as good, could be bought at better advantage, and possibly because the infringing manufacturers were a little more prompt in filling their orders. No special efforts seem to have been made by them or any one else to stimulate a demand for the infringement. They had been selling the patented box, and, as orders for knock-down boxes came in, the patented and the infringing box were sent for a time indiscriminately. This part of defendants' business practically ran itself. It is therefore to be presumed that, had the infringing box not been in the way, defendants would have continued to supply their customers with the Chicopee box. Selling price, construction of the box, and business exertions seem not to have influenced a single customer or dealer. Complainant therefore lost sales to the full extent of the demand supplied by defendants with the infringing box. There is no evidence to justify a conclusion that defendants would have supplied any portion of this demand with any box other than the patented box but for the infringement. It does not appear that they were acquainted with any other knock-down box, with perhaps one exception, the production of which was stopped by an injunction. Defendants' box department was a mere incident to their general business, receiving practically no attention other than to bill orders which came naturally and without effort. Irrespective of these considerations, the complainant had salesmen traveling throughout the territory in which defendants made their principal sales, canvassed the trade generally, and was ready to supply the entire demand. From these facts I deem it a safe and prudent conclusion that complainant and its predecessors would have supplied the demand filled by the infringing box but for the infringement. The damage inflicted is the loss of profit upon an equal amount of sales."

He further found a number of infringing boxes sold by the defendants, and the amount paid for them, and that the profits derived from the manufacture and sale of the patented box during a portion of the time of the infringement was 31 per cent., and that the selling price of the two boxes was alike, and that the proved loss to the complainant was \$382.90,—31 per cent. of \$1,235.19, the amount paid for boxes during the time when the profit was ascertained. The profit upon the patented boxes made before that time was not satisfactorily proved.

The defendants say that "manufacturer's profit" ought to have been deducted from this profit, and, if deducted, the net result would have been 2½ per cent. of \$1,235.19. This estimate is made as follows: The master found that the complainant's profit on the patented boxes was 31 per cent. The secretary of the plaintiff testified that his firm in 1890 made 28½ per cent. on unpatented tubular boxes having closing ends. Subtracting this amount from the 31 per cent., the remaining 2½ per cent. is said to be the entire profit when a reasonable manufacturer's profit has been deducted, if such profits were to be allowed. This estimate is based upon premises which prove nothing. When the complainant's damages are measured by the profits of the defendants, it is true that credits have been allowed to the latter "as a mere agency for producing the patented article, for a so-called 'manufacturer's profit.'" *Warren v. Keep*, 155 U. S. 265, 15 Sup. Ct. 83. This rule has generally been applied in cases where the patented invention is a distinct improvement, and a part only of the entire structure which was made and sold. *Buerk v. Imhaeuser*, 14 Blatchf. 19, Fed. Cas. No. 2,107. In a noted case, where the patent was for an entirely new product of a new process,

which was not separable into parts, and the infringing defendant made and sold the entire article, manufacturer's profits were not allowed, upon the ground that the entire profits, which were the difference between cost and yield, belonged to the owner of the patent. *Rubber Co. v. Goodyear*, 9 Wall. 788. In this case the complainant's damages are not measured by the profits of the defendants, but by its own losses. It is a case of the infringement of an entire article and of a new article of manufacture, the entire profits of which are attributable to the patented improvement. It was, when introduced into the market, a previously unknown article. The tubular boxes fastened together by mucilage and interlocking at the end, which were then in use, were an entirely different structure. The knock-down boxes shown in the patents of Buckingham and Caussemille were not in use. The Ritter device was a new kind of box for the purposes for which it was to be used. It is true that the principle of reduction of the profits of the defendant infringer by the deduction of manufacturer's profit when the patented improvement was a separable part of the entire structure has been thought applicable in two cases to a reduction of damages based upon loss of the complainant's profit, when the patented improvement was a distinct and separable part of the whole structure which the complainant made; as, for example, where the improvement was a small part of the structure of a watch. *Buerk v. Imhaeuser*, 14 Blatchf. 19, Fed. Cas. No. 2,107; *Robertson v. Blake*, 94 U. S. 728. The facts of this case have no resemblance to those of the cases just cited. There is no apparent reason why the loss which was suffered by the deliberate act of the defendants, which deprived the complainant of trade in the special articles of manufacture, every expense of its business going on as before to its full extent, should not be the actual profit which it would have made upon the sale of a number of boxes which it was prevented from selling.

The portion of the decree which doubled the damages is the final subject of alleged error. The master found that the defendants were deliberate infringers. They bought a part of their boxes from the Dayton Company under a guaranty against loss by reason of any claimed infringement. They were perfectly indifferent to the claimed rights of any one else, and purchased infringing goods from the Dayton Company on March 26, 1892, a month after the issuance of a preliminary injunction against them, and nearly 1½ months after the date of Judge Lacombe's opinion. While the master cautiously does not find a removal of their books and papers to evade the accounting, it appears that they did not exert themselves to produce them. They were passive instruments in the hands of the real defendant, and permitted all the difficulties which the master has detailed to be interposed. The doubling of the small amount of damages which the master was able to find was a proper exercise of power of the circuit court.

The decree of the circuit court is affirmed, without interest, and with costs of this court.



## THE PAUNPECK.

THE ANDREW J. WHITE.

HOBOKEN FERRY CO. et al. v. HALL.

HEIPERSHAUSEN v. SAME.

(Circuit Court of Appeals, Second Circuit. March 10, 1898.)

Nos. 79 and 80.

## 1. COLLISION—PRECAUTIONS AGAINST—FERRYBOATS AND TUGS.

While ferryboats crossing the Hudson from New York are privileged to entrance to and exit from their slips without embarrassment from the presence of other vessels, it is not for that reason negligence for a steam tug with a tow 150 feet astern to pass up the river opposite such slips 800 feet from shore, though another tug and tow are also coming up on a parallel course 350 feet outside of it.

## 2. SAME—VESSELS CROSSING—NEGLIGENCE CAUSING COLLISION.

A tug with a tow 150 feet astern, passing up the Hudson, obeyed the signal of a ferryboat, and allowed it to cross ahead. After the tug had crossed under the stern of the ferryboat, the latter, fearing collision with another vessel, stopped and backed, coming in collision with the tow. *Held* that, even if negligent in being too near the shore, the tug was not liable for the injury, which was not the proximate result of such negligence, but of the intervening negligence of one or both of the other vessels.

Appeal from the District Court of the United States for the Southern District of New York.

This was a libel by John W. Hall, owner of the schooner *Ettie H. Lister*, against the steam ferryboat *Paunpeck*, for damages for injuries in a collision. A cross libel was filed by the Hoboken Ferry Company, owners of the *Paunpeck*, against Hall and the steamtug *Andrew J. White*. Appeal from decrees holding both vessels in fault. Reversed, with instructions.

Albert A. Wray, for appellant the White.

James J. Macklin, for appellant Hoboken Ferry Co.

George B. Adams, for appellee.

Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

WALLACE, Circuit Judge. This is an appeal from two decrees of the United States district court for the Southern district of New York holding the steam ferryboat *Paunpeck* and the steamtug *Andrew J. White* mutually in fault for the damages caused by a collision between the *Paunpeck* and the schooner *Ettie H. Lister*, in tow of the *White*.

On April 24, 1894, the ferryboat *Paunpeck* left her slip at the foot of Christopher street, New York, at 5:46 p. m., bound for the foot of Newark street, Hoboken, across the river from, and a little to the southward of, Christopher street. There was an ebb tide running  $2\frac{1}{2}$  miles an hour. When she had gotten within about 100 feet of the mouth of her slip, she was slowed and stopped to allow a tug with a tow to cross the mouth of the slip ahead of her. After the tug and tow passed, the *Paunpeck* blew a long whistle, and went ahead under one bell. As she emerged from the slip, three tugs with tows were coming up the river,—the steamtug *E. L. Austin*, towing three scows tandem, about 200 feet off the pier line; the

steamtug Andrew J. White, with the Ettie H. Lister in tow astern on a hawser of about 150 feet, about 800 feet off shore, and about 1,100 feet below Christopher street; and the New York Central lighterage tug No. 17, with a car float in tow alongside on her port side, about 350 feet outside of the tug White, and about abreast of the wheel of the Lister. The White was making about four knots against the tide, and the New York Central tug was overhauling her. The Paunpeck, as she came out, blew a signal of one whistle, which was answered by each of the tugs with a like signal. The White, on answering the whistle of the ferryboat, immediately slowed. The Paunpeck continued on her course, passing in front of the White, about 150 feet away, and the White passed under her stern. After the White had gone under the stern of the ferryboat, the latter began backing, and an alarm signal was given on the White. But the Paunpeck continued to back, and, drifting down on the ebb tide, came into collision with the schooner. The collision took place about 200 feet below the ferry slip. The pilot of the Paunpeck checked her speed, blew an alarm whistle, and backed, while the New York Central tug was still 200 feet to the westward of him, and on his port bow. In his report to the supervising inspector he stated that as his vessel emerged from the ferry slip he blew a signal of one whistle to pass ahead of all the tugs, and that it was answered by each of them, but that the New York Central tug failed to comply, and, after he had passed ahead of the White, he was compelled to stop and back, to avoid collision with the New York Central tug. In fact, the New York Central tug had complied, and, if the Paunpeck had kept on, she would have passed safely in front of the New York Central tug.

The district judge found the ferryboat in fault because she unnecessarily backed when the New York Central tug would have avoided her if she had kept on, and also because it was imprudent for her to start on an ebb tide in front of the three lines of boats; and he condemned the White for fault "in running so near the slips with such a tow, and in line with another tow parallel and only a little outside of it."

It is no doubt obligatory upon vessels navigating the Hudson river opposite New York City to conform their movements, so far as is reasonably practicable, to the convenience of ferryboats in entering and leaving their slips. Because of the necessity that these transits be made with great frequency and regularity for the accommodation of the public, ferryboats are privileged to entrance and exit without embarrassment from the presence of other vessels in unnecessary proximity to the slips. Accordingly it is adjudged to be the duty of such vessels plying up and down the river "to keep a sufficient distance from the slips, and hold themselves under such control as to enable them to avoid ferryboats leaving their slips upon their usual schedule time." The Breakwater, 155 U. S. 252, 15 Sup. Ct. 99.

It would seem to be a somewhat violent application of the rule to hold the White in fault. She was proceeding sufficiently far off shore to allow the ferryboat ample room for any maneuver the latter might see fit to attempt in leaving her slip. There was no

reason why she should anticipate any hazard because the New York Central tug, with her tow, came up the river and overtook her on an outside and parallel course. If that tug had governed her movements properly, her presence would not have embarrassed the maneuver of the ferryboat. Any hazard from the proximity of that tug and tow was purely a speculative one.

If it should be assumed, however, that the White was in fault, the case is one where her fault was remote, and not contributory to the collision as a proximate cause. She had allowed the ferryboat the right of way, and the latter had availed herself of the privilege with safety. There would have been no danger in the situation except for the subsequent intervening negligence of others. Even if this intervening negligence was the misconduct of the New York Central tug in failing to slow as promptly as she should have done to permit the ferryboat to pass in front of her, the White was not responsible for her misconduct. But the intervening negligence was the misconduct of the ferryboat, and there would have been no collision if she had been properly navigated. It was caused by her fault in stopping and backing when she ought to have kept on in front of the New York Central tug. Her pilot was not justified in assuming that the New York Central tug would not perform her duty while there was yet time for her to do so, and in doing so he took the risk of being wrong in his assumption. The principle is applicable that no liability attaches to an act of negligence for a result which could not have been foreseen, or reasonably anticipated as the probable consequence, and would not have been induced but for the interposition of a new and independent cause. *The Clara*, 5 C. C. A. 390, 55 Fed. 1021; *Railway Co. v. Elliott*, 5 C. C. A. 347, 55 Fed. 949; *Railroad Co. v. Bennett*, 16 C. C. A. 300, 69 Fed. 525; *Motey v. Granite Co.*, 20 C. C. A. 366, 74 Fed. 155; *Scheffer v. Railroad Co.*, 105 U. S. 252.

The decrees are reversed, with costs, and with instructions to dismiss the petition of the Hoboken Ferry Company, and decree conformable with this opinion.

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MEIGS et al. v. HAGAN et al.

(District Court, E. D. Pennsylvania. April 4, 1898.)

COMMON CARRIER—EMPLOYED BY VENDEE—SUIT BY VENDOR.

Where property is delivered to a carrier employed by the purchaser to receive it, the right to sue the carrier for failure of duty vests in the vendee, and not the vendor. *Blum v. The Caddo*, Fed. Cas. No. 1,573, 1 Woods, 64, followed.

This was a libel in personam by H. V. L. Meigs & Co. against Peter Hagan and others, owners of the barge Morrisdale, to recover damages for breach of a contract of carriage.

Horace L. Cheyney and John F. Lewis, for libelants.

Henry R. Edmunds and John A. Toomey, for respondents.

Supplemental Brief on Behalf of Respondents.

The assumption by libelants that they were the shippers of the coal and that the bill of lading is the contract between the parties is without foundation. The uncontradicted testimony is that the boat was chartered to the consignees for the purpose of carrying the coal which had been sold to them by libelants

f. o. b. The bill of lading shows that the actual shipper was the Finance Company Commercial Agents of the Receivers of the Philadelphia & Reading Coal & Iron Company, who put the cargo aboard at their own wharves, for account of libelants, whose only interest was that of vendors. The bill of lading presupposes the charter, as it refers to the payment of freight by the consignee as agreed, that is the agreement between Hagan and McGinn as to the rate of freight, the consideration for the contract, with which the libelants or shippers had nothing to do, so that the bill of lading in this instance is nothing more than a receipt for the cargo and not a contract of affreightment as the libelants assume.

The libelants were careful to develop the fact that they sold the coal f. o. b. and when the disaster occurred were also careful to declare that they had no interest in the cargo after its delivery on board, which are all consistent with the contention that the charter and not the bill of lading is the contract of affreightment.

In *Blum v. The Caddo*, 1 Woods, 64, Fed. Cas. No. 1,573, the libelants claimed the right to sue because they made the contract of affreightment with the carrier, but it was also the fact that the freight was paid by the agent of the consignees. This case has never been overruled or questioned.

In *Griffith v. Ingledew*, 6 Serg. & R. 440, Gibson, J., in contending in his able dissenting opinion that the consignee had no right to sue in that case, says that the discriminative circumstances giving the right to sue are:

(1) An engagement to pay the freight by the person who brings the action.

(2) An order by the consignee to deliver the goods to a particular carrier for account and risk of consignee.

(3) Not merely the legal property but the beneficial interest in the goods existing in the person who brings the action.

A reference to the authorities relied upon by the libelants in their supplemental brief will show that these discriminative circumstances appear in the cases cited by them. In the case of *Dunlop v. Lambert*, 6 Clark & F. 600, the suit was by the consignor who made the contract and paid the freight. The court, on page 607, say: "The real question here is whether the appellant and respondents were the contracting parties, for if they were and the appellant paid the freight they are entitled to maintain an action." On page 620 the court further says: "It is no doubt true as a general rule that the delivery by the consignor to the carrier is a delivery to the consignee, and that the risk after such delivery is the risk of the consignee. This is so if without designating the particular carrier the consignee directs that the goods shall be sent by the ordinary conveyance; the delivery to the ordinary carrier is then a delivery to the consignee, and the consignee incurs all the risk of the carriage. And it is still more strongly so if the goods are sent by a carrier specially pointed out by the consignee himself for such carrier then becomes his special agent."

In the case of *Railroad Co. v. Schwartz*, 13 Ill. App. 490, the conflict of authorities upon this point is admitted.

In the case of *Packet Line v. Shearer*, 61 Ill. 263, the suit was brought by a husband who shipped a trunk to his wife. It was held he had a right to sue for its nondelivery. He probably paid the freight.

*Blanchard v. Page*, 8 Gray, 281, was the case of a shipment of goods on a general ship to be carried for a stipulated freight. The purchasers of the goods were Sutton, Griffith & Co. of Ft. Smith, Ark., who authorized and requested the plaintiff to ship the goods on board a vessel, to a forwarding house at New Orleans to be sent from there to the purchaser. The court considered the contract binding on the shipper to pay the freight, saying: "In the ordinary form of a bill of lading there is no express stipulation on the part of the shipper to pay freight but this liability results from his having engaged the ship owner to take on board and carry the goods at his instance." The court also found that the contract of shipment was made by the plaintiff as agents for the owners of the goods whose name was not mentioned in the bill of lading.

In the case of *Finn v. Railroad Corp.*, 112 Mass. at page 529, the court says, after referring to the decision in the above case: "When carrying goods from seller to purchaser, if there is nothing in the relation of the several parties except what arises from the fact that the seller commits the goods to the carrier as the ordinary and convenient mode of transmission and delivery in

execution of the order or agreement or sale, the employment is by the seller, the contract of service is with him and an action based upon that contract may be in the name of the consignor; if however the purchaser designates the carrier making him his agent to receive and transmit the goods, or if the sale is complete before delivery to the carrier, and the seller is made the agent of the purchaser in respect to the forwarding of them, a different implication would arise, and the contract of service might be held to be with the purchaser. This distinction we think must determine whether the right of action upon the contract of service implied from the delivery and receipt of goods for carriage is in the consignor or consignee."

Most if not all of the cases which hold that the consignor may sue for the nondelivery of goods are cases where goods have been delivered to a railroad or express company by persons to whom the bills of lading were issued, and who in the first instance were liable to pay the freight.

Among the cases cited by Judge Wood in the case of *The Caddo* are *Dawes v. Peck*, 8 Term R. 330, in which Lord Kenyon says the only case where a consignor can maintain the action is where he is answerable for the price of the carriage. And in *Evans v. Marlett*, another case cited by Judge Wood, reported in 1 Ld. Raym. 271, it was held that if goods by bill of lading are consigned to A., A. is the owner and must bring the action against the master of the ship if they are lost.

In *Joseph v. Knox*, 3 Camp. 320, Lord Ellenborough held the consignor could recover because the consideration in the bill of lading was paid by him, and on the same ground Lord Mansfield decided the case of *Davis v. James*, 5 Burrows, 2680.

BUTLER, District Judge. *Blum v. The Caddo*, 1 Woods, 64 [Fed. Cas. No. 1,573], is directly in point, as respects the libellant's right to sue, and is well supported by the cases cited in the opinion. It is a decision on appeal, in admiralty, and I therefore feel bound to follow it. The facts before me present the question in an unusually strong light for the respondent. The property was delivered to a carrier employed by the purchaser to receive it on his account. The carrier was therefore his agent, not by implication of law simply, but by express authorization. He was sent for the property by, and undertook to carry it for, the purchaser, who bound himself to pay for its transportation. The libellant, when applied to by the carrier for instructions after the accident, denied all interest in the subject, his view of the transaction then agreeing with the respondent's now.

The foregoing was written and intended to be filed as the opinion of the court, some months ago. When counsel were informed of what was about to be done, counsel for the libellant asked leave to file a supplemental brief, which was granted. It is now before me, with an answer from the respondent. A further examination of the subject, in the light of these briefs, has not changed my mind. The question whether a vendor of goods delivered to a common carrier may sue the carrier for failure of duty, under ordinary circumstances, has given the courts much trouble and caused many conflicting decisions. Where, however, the goods are delivered to the vendee's agent, who is a carrier, hired by him and sent for them at his cost, as in this instance, it seems generally to be conceded by the authorities that the right of suit is in the vendee. I do not propose to discuss the subject, but as the respondent's brief presents a fair consideration of it and the authorities, and expresses the views I have adopted, I will attach it hereto.

The libel must be dismissed, with costs.

## CONTINENTAL TRUST CO. v. TOLEDO, ST. L. &amp; K. C. R. CO. et al.

(Circuit Court, N. D. Ohio, W. D. April 1, 1898.)

## 1. RAILROAD COMPANIES—BONDS AND STOCK—VALIDITY.

Where one K. contracted to perform certain services in the reorganization of a railway company, for which he was to receive certain amounts of bonds and stock in the reorganized company, it being claimed that the bonds were issued for less than 75 per cent. of their par value, and were therefore void, under Rev. St. Ohio, § 3290, *held*, that the stock should be taken at its actual, and not at its par, value, in computing the amount received by the company for the bonds; that the stock so issued was not void by reason of its issue at less than par; and that the bonds were not void, it being determined by the above rule that their price exceeded 75 per cent of par.

## 2. SAME—PURCHASE BY DIRECTORS.

The purchase, by a director of a corporation, of bonds already sold in good faith to a third party, although such purchase be at less than par, does not fall within Rev. St. Ohio, § 3313, making void bonds so purchased by a director from the company.

## 3. CONTRACTS—VALIDITY—PUBLIC POLICY.

An agreement between one engaged in performing services in the reorganization of a railway company and the president of the company, by which the two are to become partners in a performance of the former's contract previously made with the company, and the president is to become entitled to part of the bonds which the contractor was to receive from the company, is void, as contrary to public policy, and vests in the president no title in bonds delivered to the contractor, and sold by him to third persons. Such bonds are not therefore void, under section 3313, on the ground that they were purchased by the president from the company at less than par.

## 4. SAME.

In the reorganization of a railway company, the bondholders of the old company consented to accept in place of their bonds preferred stock in the new company. As an inducement to them to consent to this, K., who was managing the reorganization, and who was to receive from the new company for his services a large amount of its bonds and stock, agreed to sell them a certain number of his bonds, giving them with each bond an amount of common stock of equal par value. Later, certain of these bondholders became directors, and purchased their bonds under this agreement while serving as such. *Held*, that these bonds were not void as having been issued to directors at less than par, because (1) they were not issued to the directors, but in good faith to K.; (2) there was no evidence to show that the concession made by them in accepting preferred stock for their old bonds was not worth as much as the stock bonus, so that the bonds in fact were sold at par; (3) they could not be held to have purchased them as directors, since they took them under a contract which was binding on all parties before they became such.

## 5. SAME—CORRUPT AGREEMENT BETWEEN CONTRACTOR AND PRESIDENT.

When a contractor enters into a corrupt agreement with the president of the corporation, which is the other party of the contract, such as would justify the corporation in rescinding the contract, but the contract is not rescinded, the corrupt relation is terminated before the termination of the original contract, and the work is satisfactorily completed, the fraudulent agreement will not avoid bonds issued to the contractor by the company in final settlement of their transactions.

## 6. CORPORATION—ACQUISITION OF PROPERTY—ASSUMPTION OF OBLIGATIONS.

When a corporation accepts title to property held by the vendor subject to the conditions of certain contracts, of which contracts the corporation has actual or imputed knowledge, it assumes the obligations of such contracts, without formal action by its directors.

**7. SAME—CONSOLIDATION OF RAILROAD COMPANIES.**

Upon the consolidation of several railroad companies under the Ohio statutes, all the property of the constituent corporations becomes vested in the consolidated corporation, and all their obligations become binding upon it, immediately upon the election of its first board of directors.

**8. SAME—PREFERRED STOCK.**

In the absence of prohibition in the local law or in its charter, a corporation may issue preferred stock which shall be a lien upon its property and earnings second only to an existing first mortgage.

**9. SAME.**

The holders of such stock may not use it to make up the amount of their bid on foreclosure sale of the property, after paying adjudicated claims of creditors, as this would, in effect, be dividing the property of the corporation among them to the prejudice of any creditors not parties to the suit.

**10. CHANCERY PRACTICE—INTERVENERS.**

One coming into the cause under general leave granted to the cross complainants to bring in all other preferred stockholders to unite with them, who files his petition only a few days before the closing of evidence, may not enlarge the grounds of relief, even though he offers to rest his case on the evidence already in, and a petition attempting to do so, and filed without leave, will be stricken from the files.

Some aspects of this case have been previously considered. See *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 82 Fed. 642. It now comes before the court for final hearing on the merits. The suit is a consolidation of a creditors' bill and a bill to foreclose an alleged first mortgage lien upon the railroad of the defendant the Toledo, St. Louis & Kansas City Railroad Company (hereafter called the "Railroad Company"), a consolidated corporation of Ohio, Indiana, and Illinois. The road extends from Toledo, Ohio, to East St. Louis, Ill., a distance of 450 miles. The litigation was begun by Stout & Purdy, citizens of New York, judgment creditors of the Kansas City company, who filed a creditors' bill in this court on May 13, 1893, against the company on behalf of themselves and all other creditors. Other creditors were invited by advertisement to come in under the bill and file their claims before a master, and many have done so, and among these are a committee of first mortgage bondholders, representing all creditors of their class. Similar bills were filed at the same time in Indiana and Illinois, and the same receiver was appointed to operate the railroad pending the litigation, in the three jurisdictions. In December, 1893, the then trustees under the first and only mortgage, the Continental Trust Company of New York and John M. Butler of Indiana, filed a bill in this court to foreclose the same. The receivership created under the creditors' bill was extended to the foreclosure suit, and an order was made consolidating the two suits, and giving to the consolidated cause the title of foreclosure suit. The foreclosure bill made defendants not only the company, but also several judgment creditors. It set forth the corporate organization of the company, the issue by it of \$9,000,000 of bonds which had passed into the hands of holders for value, the execution and delivery of a mortgage upon the railroad and property of the company to secure the same, the default in the payment of interest on the bonds, and the acceleration of the maturity of the bonds by the written request of a majority of the bondholders six months after default, in accordance with the terms of the mortgage. The answer of the company declined to admit the validity of the consolidation of the three constituent companies of Ohio, Illinois, and Indiana, declined to admit the validity of the bonds or the power of the company to issue them or the mortgage securing them, and denied default in the bonds or their maturity. The judgment creditors who were made defendants (Stout & Purdy, Julius Bache, and Ferdinand Canda) in their answers also denied the validity of the consolidation which began the corporate existence of the defendant, the power of the company to issue the bonds and mortgage, the fact that the bonds were held by those who gave value for them, and the default or accelerated maturity. They set up their own judgments, and averred their priority over the bonds. The answers of the other defendants did not impeach the validity of the bonds or of the company's incorporation.

After a controversy which was finally settled in the circuit court of appeals

for this circuit in *Hamlin v. Trust Co.*, 47 U. S. App. 422, 24 C. C. A. 271, and 78 Fed. 664, *Hamlin* and others, as representatives of the preferred stockholders of the company, were permitted to file a separate answer to the bill of foreclosure, and a cross bill. The answer denies the validity of the bonds, and sets out at length the ground for such denial. It avers that the bonds were issued under a contract with one S. H. Kneeland, by which, for \$9,000,000 of bonds and \$12,250,000 of stock, Kneeland agreed to pay off the liens upon the road, which was then a narrow-gauge railroad, and to rebuild the road, making it of standard gauge; that Kneeland, by reason of his influence as owner of the common stock, fraudulently procured the issue to him of the bonds and stock without having performed his contract, and without expending more than \$5,000,000, and without paying off \$700,000 of the underlying liens on the road; that the issue of bonds and stock for less than one-third their value was in violation of the laws of Ohio, Indiana, and Illinois; and that those who bought the bonds, and now hold them, knew of these facts in respect to their issue, and cannot recover, and ought not to recover, more than the amount of money's worth which the company received for them. By the cross bill the *Hamlins* ask that an account be taken of the amount actually received by the company for said bonds, averring that if such account is taken it will appear that no default in interest has taken place. They further pray that the court shall declare the right of the preferred stockholders to a second lien next after that of the first mortgage bondholders and superior to any debts, and that, after the amount due under the first mortgage has been ascertained, they may have the right to redeem. The complainant filed an answer to cross bill denying the lien of the preferred stock, and denying the allegations upon which the invalidity of the bonds is asserted by the *Hamlins*. In December, 1897, upon advertisement ordered by the court, upon the petition of the *Hamlins*, inviting other preferred stockholders to come in and become complainants in their bill, one S. Dana Rose filed an intervening petition without leave, showing that he held preferred stock, but that he could not join in all the averments of the *Hamlin* answer and cross bill. In his petition he attacked the validity of the bonds on more extended grounds. He averred that when Kneeland made his contract one Quigley, chairman of the committee of bondholders of the narrow-gauge roads and subsequently president of the consolidated company, was secretly interested with him in the profits of the contract; that the contract was voidable for fraud, and was in violation of the statutes of Ohio; and that the bonds issued in accordance with it were void. A motion was made to strike this petition from the files.

So much for the pleadings on the foreclosure side of the consolidated cause. Under the creditors' bill, also, issues as to the validity of the bonds were raised by intervening petitions of the same judgment creditors who had filed answers to the foreclosure bill. These petitions attacked the validity of more than half of the \$9,000,000 of bonds, on the ground that they were absolutely void under a section of the statutes of Ohio which declares that all bonds issued to directors at less than par shall be null and void. Rev. St. Ohio, § 3313. The petitions also averred that the entire issue of bonds was void because sold by the company for less than 75 per cent. of par, in violation of another section of the Ohio statutes.

Another controversy in this many-sided cause arises between the *Hamlins*, representing the preferred stockholders, on the one side, and the defendant company and its common stockholders on the other. By virtue of a clause in the certificates of preferred stock, the preferred stockholders claim in their cross bill a lien on the property next after the mortgage bondholders and in priority to other debts. On the appeal heard in the circuit court of appeals already alluded to (47 U. S. App. 422, 24 C. C. A. 271, and 78 Fed. 664), it was settled by the decision of that court that the lien declared in the certificates of preferred stock gave them no priority over any debts of the company, but only a priority in the division of the assets of the company after payments of its debts, as between them and the common stockholders. The company and the common stockholders both filed answers to the preferred stockholders' cross bill, and averred that the language in the certificates of preferred stock upon which the claim of a lien depended was inserted in them by fraud, and without any authority, either in the articles of incorporation or the resolutions of the directors, and had no effect to create such a lien. Evidence was taken on this issue also. It derived importance from the motion made on behalf of the preferred stockholders for the



insertion of a clause in the decree for sale permitting redemption by them, and allowing them, should they conclude to purchase the road at the judicial sale, to pay their bid, after depositing cash enough to pay off the costs and all the debts of the receivership and the company, by depositing shares of the preferred stock.

The main issues in the case are therefore: (1) Are the bonds void because issued to S. H. Kneeland under contract at a price less than 75 per cent. of par, in violation of section 3290 of the Revised Statutes of Ohio? (2) Are the bonds or any of them void because issued directly or indirectly to directors at less than par, in violation of section 3313 of the Revised Statutes of Ohio? (3) Are the bonds to be defeated because of Kneeland's alleged fraud in performing the contract, made possible, as it is charged, by his giving Quigley, the president of the company, a secret interest in the profits of the contract? (4) Is the language of the certificates of preferred stock, purporting to secure to its holders a lien on the property of the road, binding on the company and its common stockholders? If so, does it give the preferred stockholders a priority in the distribution of assets of the company, as between them and the common stockholders?

With the issues thus stated, it becomes necessary now to give a history of the construction of the railroad and the issue of the bonds. In 1882 the railroad that is the subject of this litigation was a narrow-gauge line, running from Toledo to St. Louis, and was owned by the Toledo, Cincinnati & St. Louis Railroad Company, a consolidated corporation of Illinois, Indiana, and Ohio. It was 450 miles in length. It had a total mortgage indebtedness of about \$10,000,000, and a capital stock of the par value of \$21,000,000. It was divided into two divisions, upon which the first mortgages aggregated \$5,000,000. On the 9th day of April, 1884, the holders of the first mortgage bonds upon the two divisions, by two agreements, constituted two committees, of five members each, to protect their respective interests in the purchase of the two divisions of the road then about to be sold, and to effect a reorganization of the two divisions, united in one road, upon a plan stated in the agreements. The plan embraced the issue of first mortgage bonds to the extent of \$15,000 a mile with which to rebuild and widen the gauge of the road, and the issue of \$7,000,000 of second mortgage bonds with which to take up the first mortgage bonds of the two divisions. The agreement gave the trustees very wide powers and discretion in the working out of the scheme of reorganization. In the latter part of 1885, James M. Quigley, who was chairman of the two committees, made a preliminary contract with S. H. Kneeland, by which Kneeland agreed to bid in the two divisions of the old road at the foreclosure sale, to be held in the following January, and to advance the cash which it was necessary to deposit in order to become a bidder at the sale. The preliminary agreement looked to a subsequent agreement by which Kneeland was to be given the first mortgage bonds on the narrow-gauge road, and with them to assume all the obligations of the purchaser imposed by the decree for sale, to convey the road to a newly-organized consolidated corporation of Ohio, Indiana, and Illinois, and, as contractor, to rebuild the road and widen its gauge. Kneeland made the necessary deposits, and bid in the two divisions at the sale. Upon January 23, 1886, after the sale, he made with the two bondholders' committees the two contracts under which the bonds here in controversy were subsequently issued. The agreements are in all substantial respects similar. By these contracts Kneeland on his part agreed: (1) To complete the purchase in accordance with the terms of the decree, which required the purchaser to pay off receiver's certificates and other underlying liens prior in right to the first mortgage bonds. (2) To form three corporations, of Ohio, Indiana, and Illinois, respectively, to each of which he would convey the part of the road lying in the state of its organization, and then to consolidate them into a corporation of the three states. (3) That the consolidated corporation should change the gauge of the road from narrow to standard width, lay down steel rails of not less than 60 pounds to the yard of main line, widen all embankments and cuts to the requisite width, widen, strengthen, and rebuild bridges as the same might be necessary, construct all necessary stations, tanks, houses, repair shops, and sidings, so that the said road, reaching from Toledo to East St. Louis, should "in all respects be a first-class road of standard gauge," and equip the road with all necessary cars of every description, and with requisite motive power, and use, of the \$1,000

bonds of the company to be issued, the proceeds of at least four per mile in the purchase of the equipment. (4) Kneeland agreed to complete the construction and equipment, and deliver the road to the new consolidated company, on or before the 1st of July, 1888, unless he encountered unforeseen obstacles, in which case the bondholders' committees were to have the power to extend the time for one year. (5) To pay the interest that might accrue on the newly-issued mortgage bonds pending the periods of construction. The net earnings of the company during this period were to be devoted to such betterments as seemed desirable to the company. (6) To pay all the expenses of the two committees in litigation and reorganization and their compensation.

It was further provided that, as a consideration for the performance of these obligations, the consolidated company would be required: (1) To issue \$9,000,000 of 6 per cent. bonds, or \$20,000 a mile, secured by a first mortgage. (2) To issue \$5,805,000 of nonvoting stock, in \$100 shares, having coupons attached payable semiannually, at the rate of 4 per cent. per annum if earned, but noncumulative, and convertible into common stock after five years, and before ten years, and if not converted to become a preferred 4 per cent. noncumulative nonvoting stock. (3) To issue \$11,250,000 of common stock, or \$25,000 a mile. (4) To issue the bonds, preferred stock and common stock, at once, to two trustees, one to be selected by Kneeland, and the other by the bondholders' committee, for distribution.

According to the contract, the trustees were: (1) To deliver to Kneeland \$2,000,000 in bonds and \$2,500,000 in common stock, at once. (2) Thereafter, as the work of construction and equipment progressed, to deliver the remaining bonds and common stock to Kneeland according to the value of the work done and equipment furnished, as certified by the chief engineer of the company. (3) To deliver \$1,000,000 of the preferred stock to Kneeland to aid in the purchase and payment of the underlying liens, as the satisfaction of the same should be certified by the clerk of the court. (4) To deliver \$4,805,000 in preferred stock to the holders of the old narrow-gauge first mortgage bonds, on the basis of 15 shares of \$100 each for one bond of \$1,000 on one division, and 10 shares for one bond on the other division.

It is further provided that the bondholders' committee (1) should deliver all their first mortgage narrow-gauge bonds to Kneeland to enable him to complete his contract of purchase; and (2) should litigate all claims made for liens prior to these bonds as he should request, but at his expense.

Soon after the signing of the contracts, Kneeland proceeded to organize three corporations, one of Ohio, called the "Toledo, Dupont & Western Railway Company," one of Indiana, called the "Bluffton, Kokomo & Southwestern Railroad Company," and one of Illinois, called the "Toledo, Charleston & St. Louis Railroad Company." To the first, by deed of June 12, 1886, he conveyed all of the railroad lying in Ohio in consideration of all its capital stock; to the second, by deed of June 11, 1886, he conveyed all of the railroad lying in Indiana in consideration of all its capital stock; and to the third, by deed of April 1, 1886, he conveyed all of the railroad lying in Illinois in consideration of its capital stock. At the same time he made contracts with the three companies of a similar character. It will be sufficient to state briefly his contract with the Ohio company. The recitals refer to the foreclosure proceedings of the old narrow-gauge consolidated company, the Toledo, Cincinnati & St. Louis, and Kneeland's purchase of the railroad at the foreclosure sale. Kneeland agreed to convey the Ohio part of the railroad to the Ohio company, agreed that the companies of Indiana and Illinois organized by him, to whom he would convey or had conveyed the remainder of the road, would consolidate with the Ohio company, so that a new consolidated company should become the owner of the continuous line from Toledo to East St. Louis; and agreed that the consolidated company should, without delay, broaden the gauge of the road to a standard gauge, should lay the track with steel rails weighing not less than 60 pounds to the yard, and should make said line a first-class standard-gauge railroad in all respects, and equip the same with proper rolling stock and motive power. The Ohio company on its part agreed—First, to issue all its capital stock to Kneeland; second, agreed that the consolidated company, formed as before provided, should issue, in full and complete payment for the broadening of the gauge, the reconstruction of the railroad, and its equipment, "and for the purpose of exchanging some of said stock and securities with the holders of certain

securities issued by the companies heretofore owning and controlling said railroad and property, or portions thereof, for the payment of certain debts, underlying liens, rights of way, and other corporate purposes," \$9,000,000 of bonds, \$11,250,000 of common stock, and \$5,805,000 of preferred coupon convertible stock. The three corporations were then consolidated, and the organization of the new company was effected on the 19th of June, 1886.

The articles of incorporation of the consolidated company described the preferred stock as follows: "Of said capital stock, \$5,805,000, being 58,050 shares thereof, shall be four per cent. preferred coupon convertible stock, with right to vote only after conversion." The articles of association of the consolidated company provided that the first board should consist of James M. Quigley, Isaac W. White, and Robert G. Ingersoll, of New York, together with 10 others named thereof, and that the first officers of the company should be James M. Quigley, president, and Isaac W. White, secretary and treasurer. The first meeting of the stockholders and directors was held on the 19th of June, and Quigley was elected president, and White secretary and treasurer accordingly. The board of directors then passed resolutions authorizing the issue of the bonds and stock provided in the articles of association and the contracts of January 23, 1886. There was no formal confirmation of the contracts of January 23, 1886, by the board of directors of the company, but they proceeded at once to conform to the provisions of that contract in the issue of the stock and bonds, and in their delivery to trustees. Kneeland selected Robert G. Ingersoll as his trustee, and the bondholders' committee selected Isaac W. White as their trustee, the two to hold the bonds and stock, and deliver the same to Kneeland as the contract required. On the 6th day of July, 1886, some 17 days after the organization of the consolidated company and the passage of the resolution to issue the bonds and stock, Quigley and Kneeland signed a contract, and, placing it in an envelope, delivered it to R. G. Ingersoll to hold for them, without revealing to him its contents. It was as follows:

"Memorandum of agreement between Sylvester H. Kneeland, of the first part, and James M. Quigley, of the second part: Whereas, the party of the first part, on the twenty-third of January, 1886, made certain contracts for the reconstruction, widening of the gauge, and equipping of the line of railroad from Toledo to East St. Louis, now known as the Toledo, St. Louis and Kansas City R. Co., said contracts having been made with the first mortgage bondholders' committee or the trustees, respectively, of the lines of road heretofore known as the Toledo and St. Louis Divisions of the Toledo, Cincinnati and St. Louis R. R. Co., contracts of like character and tenor having been since made with the Toledo, Charleston and St. Louis R. R. Co., the Bluffton, Kokomo and Southwestern R. R. Co., and the Toledo, Dupont and Western R. R. Co., being the companies forming by consolidation the Toledo, St. Louis and Kansas City R. R. Co., before mentioned; and whereas, the party of the first part, owing to the complicated and hazardous character of the contracts above referred to, having been unable to associate with himself therein such persons as he desired and anticipated, and now finds himself alone and in danger of failure to accomplish all he has undertaken, and for these reasons, and to better carry out the great work in hand, finds it necessary to avail himself of the extended acquaintance and great knowledge and experience possessed with respect to the railroad property by the party of the second part: Now, therefore, in consideration of the premises, and other valuable and sufficient considerations here to him moving, the party of the first part hereby associates with himself the party of the second part as full partner equally in all the contracts above mentioned. Any profit to be made thereby to be equally divided,—that is to say, each to be entitled to one-half of such profits; and the party of the first part declares he has no associate or partner in said contracts but the party of the second part. It is agreed between the parties hereto that their respective duties shall be as follows: The party of the first part to have charge of the reconstruction and financial arrangements therefor, and negotiations looking to alliance with other companies. The party of the second part to attend to the closing up of the trust created under a certain trust deed or agreement dated April 9th, 1884, to conduct and have charge of the various litigations, all references involving the purchase money fund in court, conflicting title, and all lawsuits pertaining to the line of said Toledo, St. Louis and Kansas City R. R. Co., and to manage the business other than financial of the R. R. Company. If owing to illness

or any other cause the party of the second part should be unable to perform his duties as above, there is to be deducted from his share of the profits, before a final division, the amount required to pay the persons other than legal counsel who may be employed to take his place and do his work. The party of the first part in his department to be without restriction, except that he shall not close negotiations tending to reduce the interest or profits of the party of the second part without the consent of the party of the second part. Any profits in securities or money, withdrawn before the completion of the contracts, shall be divided equally at the time.

"Witness our hands and seals this eighth (8th) day of July, A. D. 1886.

"[Signed]

J. M. Quigley. [Seal.]"

On September 8, 1887, Quigley and Kneeland dissolved their relations under this contract, and a partial settlement was had. A complete settlement, however, was not effected until July 5, 1889, and resulted in Kneeland giving to Quigley 180 bonds of the railroad company in compromise of his claims. Between the 19th of June, 1886, and the 7th of September, 1887, \$4,550,000 of the bonds were delivered by the trustees to Kneeland. On September 14, 1887, the original contract of January 23, 1886, in so far as it provided that the net earnings of the road should be devoted to the betterments during the period of construction, was amended so that the net earnings were to be set aside and used for the payment of interest on the first mortgage bonds, Kneeland agreeing to supply any deficiency in such interest until the completion of the contract. It was further provided with reference to the rolling stock that he was to apply the proceeds of four bonds per mile to the purchase of rolling stock, and that the money thus applied should equal the average of what he might receive for all bonds delivered on account of construction, provided that in no event should the amount be less than 75 per cent. of the par value of the bonds. This agreement was subsequently modified so as to provide that Kneeland should expend for rolling stock cash equal to 82½ per cent. net of the par value of four bonds per mile. Kneeland did not complete the road at the time fixed in the contract, July 1, 1888, and several extensions were granted. Controversies arose between him and certain directors of the company and between him and the old bondholders' committee as to whether or not he was performing his contract. On June 1, 1891, Kneeland and the railroad company entered into an agreement of compromise. In this agreement Kneeland admitted that he was under obligation to pay into court sufficient cash on account of the purchase of the old road to satisfy all unpaid underlying liens. He further agreed to pay the company \$367,000 in compromise of all claims against him, in consideration of which the company promised to deliver to him the bonds remaining out of the issue of the \$9,000,000, and the common stock remaining out of the issue of \$11,250,000, which it was provided in the original contract should be delivered to him. The bonds and stock were to be held by the company or to be pledged as collateral for notes by which the \$367,000 was to be raised. Of the \$367,000, \$100,000 represented the amount which it was agreed was necessary to complete the road in accordance with Kneeland's contract, and \$260,000 represented the amount which was required to pay the coupons on the bonds falling due July 1, 1891. It was further agreed that the railroad should be considered as delivered under the contract as of December 30, 1890. This compromise was agreed to, not only by the railroad company, but also by the committees of the narrow-gauge bondholders. The contract of compromise has not been fully complied with by Kneeland, but it is not necessary to state with exactness exactly what the failure of performance consists in. The contract left Kneeland still liable to pay all the underlying liens on the road which had not been paid (amounting to more than \$500,000), and submitted to arbitration the question as to the extent of his liability for failure to make the necessary water-front improvements at the company's dock in Toledo under his original contract.

The certificates of preferred stock issued by the company were of the form following:

"Toledo, St. Louis & Kansas City Railroad Company.

"No. ———. Preferred Capital Stock. 10 Shares.

"This is to certify that James M. Quigley, or bearer, is entitled to ten shares, of one hundred dollars each, of the preferred nonvoting capital stock of the

Toledo, St. Louis and Kansas City Railroad Company. This constitutes a lien upon the property and net earnings of the company next after the company's existing first mortgage. It does not entitle the holder to vote thereon. After the first day of January, 1888, it is entitled to and carries interest at the rate of four per cent. per annum, payable semiannually, represented by interest coupons attached to this certificate. Such interest is only payable out of the net earnings of the company after the payment of interest upon its existing first mortgage bonds and the cost of maintenance and operation. A statement showing the business of the company for the half of its fiscal year next preceding shall be exhibited at the office of the company in New York to the holder of this certificate, at the maturity of each interest coupon, and the net earnings applicable to such interest shall be reckoned for such period. Such interest is not to accumulate as a charge, and the coupons representing unearned interest must be surrendered and canceled on the payment in whole or in part of a subsequently maturing coupon. At any time after the first day of January, 1898, this certificate may be converted into the common capital stock of the company. If not converted then, to become a preferred four per cent. noncumulative stock. The company will create no mortgage of its main line other than its first mortgage, nor of any part thereof, except expressly subject to the prior lien of this certificate, without the consent of the holders of at least two-thirds of this stock present at a meeting, of which reasonable personal notice must be given to each registered stockholder, and by publication for at least three successive weeks in two leading daily newspapers published in the cities of New York and Boston. One-third of the entire issue of this stock present in person or by proxy shall constitute a quorum. Nor will the company increase the issue of these certificates of stock without consent obtained as above. These certificates of stock shall be transferable by delivery or by transfer on the book of the company in the city of New York, after a registration of ownership certified hereon by the transfer agent of the company.

"Countersigned:

"American Loan & Trust Company,

"By \_\_\_\_\_.

"New York, June 19, 1886.

\_\_\_\_\_, President.  
\_\_\_\_\_, Secretary.

"Shares, \$100 Each.

"The Toledo, St. Louis and Kansas City Railroad Company will pay to bearer, on the first day of January, 1898, upon the surrender of this warrant at its office or agency in the city of New York, any amount that may be due hereon, under the conditions set forth in the certificate of stock to which this is attached, not exceeding the sum of twenty dollars.

"Coupon No. 20.

No. \_\_\_\_.

"Isaac White, Secretary."

The contention of the common stockholders of the company is that the words contained in the foregoing certificate, "This stock constitutes a lien upon the property," was inserted without authority, by the president or some one acting for him, in the printing of the certificates, and that the words were authorized neither by the contract of January 23, 1886, nor by the resolutions of the board of directors. The resolution of the directors recites an agreement between the constituent companies and the consolidated company with Sylvester H. Kneeland, by virtue of which the consolidated company was to execute \$5,508,000 of fully-paid preferred coupon convertible stock, for the purpose of exchanging it with holders of certain securities issued by the constituent companies forming by consolidation of the Toledo, Cincinnati & St. Louis Railroad Company of Ohio, Indiana, and Illinois, and for such other corporate purpose as might be deemed necessary. It was therefore resolved that there should be issued \$5,805,000, par value, of the fully-paid preferred coupon convertible stock of this company in pursuance of the said contract and articles of agreement and consolidation, for the purposes therein specified; and the president and secretary were authorized to issue, under the corporate seal of the company, proper certificates for said stock, and to deliver the same to \_\_\_\_\_, trustees. At the time of the execution of the contracts of

January 23, 1886, and in order to secure the consent of the trustees of the old bondholders to that agreement, Kneeland says he made a verbal stipulation that, in consideration of the old bondholders surrendering their bonds to him, and accepting in lieu thereof preferred stock in the consolidated corporation to be formed in accordance with the terms of the contract, he would sell, to the holders of the old narrow-gauge bonds, bonds and common stock of the new corporation at the rate of \$1,000 cash for one bond and ten shares of the common stock, each bondholder to be allowed to take as many of the new bonds under this arrangement as he had of the old narrow-gauge bonds. This obligation Kneeland recognized in October, 1886, by a letter written to Ingersoll and White, trustees, and under that option \$1,362,000 par value of the bonds and 13,362 shares of stock were bought by the old bondholders. Of this amount John C. Havemeyer, who was then a director, subscribed for and received 88 bonds and 880 shares of stock; Joseph S. Stout, also a director, in his own name and in the name of his firm of Stout & Co., received 443 bonds and 4,430 shares of stock; Charles T. Harbeck, also a director, received 10 bonds and 100 shares of stock; James M. Quigley, also a director, received 261 bonds and 2,610 shares of stock; Clarence Brown, also a director, received 13 bonds and 1,300 shares of stock.

Cary & Whitridge and Henry Crawford, for complainant.

Lawrence Maxwell, Jr., for Railroad Co.

Spiegelberg & Wise, for Jules S. Bache.

W. B. Sanders, J. D. Springer, Potter & Emery, and Smith & Baker, for intervening petitioners.

TAFT, Circuit Judge. The first question to be considered is whether the issue by the defendant company of \$9,000,000 of bonds to S. H. Kneeland, under the contracts of January 23, 1886, was in violation of the Revised Statutes of Ohio, and especially section 3290 thereof.

Section 3286 provides that a railroad company in Ohio may issue bonds, convertible or otherwise, bearing a rate not exceeding 7 per cent. per annum, to an amount not exceeding two-thirds of its capital stock, and that it may secure the bonds issued for such purpose by mortgage on its property.

Section 3287 provides that a company may borrow money, at a rate not exceeding 7 per cent. per annum, for any purpose that the same may be needed in its business, and execute bonds or promissory notes therefor in sums of not less than \$100, and it may secure the payment of such bonds and notes by a pledge of its property and income; but the aggregate indebtedness authorized by this and the preceding section shall not exceed the amount of the capital stock of the company.

Section 3288 provides that the mortgage may include the personal as well as the real property of the company.

Section 3289 provides how the mortgage shall be recorded.

Section 3290, which is the particular section here involved, is as follows:

"The directors of the company may sell, negotiate, mortgage or pledge such bonds or notes, as well as any notes, bonds, scrip, or certificates for the payment of money or property which the company may have theretofore received, or shall hereafter receive, as donations, or in payment of subscriptions to the capital stock, or for other dues of the company, at such times and in such places, either within or without the state, and at such rates and for such prices at not less than seventy-five cents on the dollar, as in the opinion of the direct-

ors will best advance the interests of the company; and if such notes or bonds are thus sold at a discount without fraud, the sale shall be as valid in every respect, and the securities as binding for the respective amounts thereof, as if they were sold at their par value."

There is no express restriction in the statutes of Ohio upon the price at which such stock, common or preferred, of a railroad company, shall be sold, except when it is purchased by a director.

Were the bonds of the company sold for less than 75 per cent. of their par value? I have read with care all the evidence which has been produced in this case, aggregating, possibly, 5,000 pages of typewritten evidence, in order to determine how much in money's worth the company received for the \$9,000,000 of bonds which were issued by it to Kneeland, the contractor. Under the contract, Kneeland received \$9,000,000 of bonds, \$11,250,000 par value of common stock, and \$1,000,000 par value of the preferred stock. If we find what was actually spent in constructing the road, and in paying off the underlying liens, and in meeting the other obligations of the contract assumed by Kneeland, including that paid by him as interest on the bonds during the period of construction, and deduct therefrom the value of the common and preferred stock which he received, together with the amount received by him from the net earnings of the road during the period of construction, and the amount received by him from the sale of old material taken from the narrow gauge, we shall have in the remainder what the company received for its issue of \$9,000,000 of bonds. The evidence shows that Kneeland disbursed at Toledo through his cashier, Crowell, for construction, \$3,509,317. It was claimed that in this construction Kneeland did more than his contract required. I do not think, from an examination of the evidence and the proper construction of the contract, that this claim can be sustained. However this may be, it is clear that by the settlement of June, 1891, Kneeland waived all his claims for extras, so that the company got the benefit of this expenditure as if it were under the contract. For iron bridges, fences, and other betterments, Kneeland expended approximately \$500,000. For steel rails, he expended \$1,528,179. The interest which he was obliged to pay on the bonds, issued between July 1, 1886, and June 1, 1891, aggregated \$1,766,465. This result I have reached by actual calculation of interest upon the bonds as they were delivered to him, allowing a reasonable time for his sale of them or disposition of them by way of collateral after he received them. It includes the \$260,000 of interest which he stipulated to pay and did pay in June, 1891. Kneeland makes a general statement, unsupported by memoranda, that the net earnings paid the interest. This is wholly erroneous. He did not receive in net earnings more than \$1,220,000, and probably he received much less. At the time of the compromise, in June, 1891, it was agreed between the parties that \$100,000 would complete the road according to Kneeland's contract, and the company withheld enough of the bonds and the stock to secure this acknowledged indebtedness from Kneeland. Of the underlying liens, which aggregated \$1,100,000, and which Kneeland had agreed to pay, he

paid \$650,247. He paid out in cash for equipment \$1,314,071. His contract required him to spend  $82\frac{1}{2}$  per cent. of \$1,800,000, or \$1,485,000, and this is what counsel for the company concedes to have been spent, but I can find no evidence of more than the sum stated. These items aggregate \$9,368,279. To this must be added a reasonable contractor's profit, which, considering the risk and expense attendant upon the execution of such a contract, I cannot fix at less than ten per cent. of the foregoing expenditures, or \$936,827. The benefits received by the company, therefore, are \$10,305,106. To assist him in paying the sums thus expended, the contractor received, under the contract, from old material, a sum he estimates at \$200,000. He received no net earnings for the years ending June 30, 1887, and June 30, 1888, with which to pay interest. The net earnings for the year ending June 30, 1889, are not given in evidence, but, in view of the amount of gross earnings, which was \$764,000, and in view of the then condition of the road under construction, they certainly could not have exceeded \$200,000. The net earnings for the year ending June 30, 1890, were \$470,352, and for the year ending June 30, 1891, were \$549,962. The amount of common stock was \$11,250,000. Counsel for the company and the intervening petitioners claim that this was worth 15 per cent. of par. I think that the stock had no such value, and that Kneeland could at no time have sold all his holdings at that price. But, assuming that he could, he received in common stock money's worth to the amount of \$1,687,500. Taking the estimate of the same counsel, the money's worth of the preferred stock of the par value of \$1,000,000 received by Kneeland was 30 per cent. of par, or \$300,000. This makes a total of \$3,407,814. Deducting this from the value of the benefits received by the company, it leaves a remainder of \$6,897,292 as the consideration which the company received for \$9,000,000 of bonds, or something more than  $76\frac{2}{10}$  per cent. of par.

The foregoing, stated in tabular form, is as follows:

Paid out by Kneeland:	
Construction disbursed through Crowell.....	\$ 3,509,317
Steel rails .....	1,528,179
Iron bridges, etc.....	500,000
Allowed by Kneeland for completion of road.....	100,000
For interest on bonds down to June 1st, 1891.....	1,766,465
For equipment .....	1,314,071
For lien claims prior to mortgage.....	650,247
Profit—10% on cash paid out.....	936,827
	<hr/>
	\$10,305,106

Received by Kneeland:	
Old material (est.).....	\$ 200,000
Net earnings year ending June 30, '89.....	200,000
Net earnings year ending June 30, '90.....	470,352
Net earnings year ending June 30, '91.....	549,962
Value of common stock.....	1,687,500
Value of preferred stock.....	300,000
	<hr/>
	\$ 3,407,814

Balance consideration for \$9,000,000 bonds.....	\$ 6,897,292
—or $76\frac{2}{10}$ per cent. of par.	



This calculation has been made on the hypothesis that under the compromise of June, 1891, Kneeland enjoyed the benefit of the net earnings for the six months from January 1, 1891, to July 1, 1891. He expressly agreed in the contract of compromise to pay the interest on the bonds for that period, but it seems probable that he did not receive either the earnings or credit for them, because, by the terms of the compromise, the road was to be considered as delivered to the company and accepted by it as of December 30, 1890. If this be true, then the consideration received by the company for the \$9,000,000 of bonds, as stated above, would be increased \$279,981. There are other expenditures of Kneeland, such as compensation to the trustees and bondholders' committees, which inured to the benefit of the company, and probably ought to increase the above estimate of the value of the consideration received by the company from Kneeland for its bonds. In addition to this, Kneeland failed to complete his contract in regard to the underlying liens, which liens to the amount of at least \$450,000 remain unpaid. Now, the company did not receive this benefit, but it has a claim against Kneeland for this amount. Surely, the validity, under section 3290 of the Revised Statutes of Ohio, of a contract for the sale of bonds, and of the bonds delivered under such a contract, is not to be destroyed because the contractor in his performance may have fallen short of the requirements of his contract, if the company in good faith insisted on performance, and only failed in obtaining its right because of the insolvency of the contractor. On the whole, therefore, a careful examination of all the evidence discloses to my entire satisfaction that the company actually received under the contract more than 75 per cent. of par for its bonds, and is entitled to receive and would receive, were Kneeland able to pay his debts to the company, a considerably higher percentage than this for them.

The argument is pressed upon the court that in calculating the amount which the company received for the bonds it should divide the value of the benefits received by the company in the ratio of the par value of the bonds, the common stock, and the preferred stock received by Kneeland, and fix the consideration paid by the contractor for the bonds as that part of the total money's worth given by Kneeland to the company which bears the same ratio to the total money's worth as the par value of the bonds bears to the total par value of all the securities, including the bonds delivered to Kneeland. The total par value of the securities was \$21,250,000, and the proposition is that the court is to say that, of the benefits received by the company under the contract, it received for its bonds only  $\frac{9}{21}$  of the whole, and thus that the company got for its bonds something less than 50 per cent. of their par value. This is not a fair or equitable way in which to treat an executed contract. The sections of the statute under consideration impose no limit upon the price at which the stock of the company might be sold. But it is said that it is a rule of general corporation law that stock must not be sold at less than par. I have considered the question of the validity of the stock and bonds under this contract of January 23, 1886, in a former opinion in this case (82 Fed. 642, 656), where I

reached the conclusion that under the decision of the supreme court of the United States in *Railroad Co. v. Dow*, 120 U. S. 287, 7 Sup. Ct. 482, the contract was not illegal, so far as the stock was concerned, though the amount of value received therefor was not equal in money value to the par value of the stock. Whether the stockholders might be liable, as against creditors, to pay any sum as an assessment upon the stock, though on its face full paid, is a question not before the court. It suffices to hold that stock issued under a contract like that of the reorganization plans in *Railroad Co. v. Dow*, and in this case for material and labor of a value less than the par of the stock, is neither illegal nor void. Counsel for the company and the intervening petitioners in their brief concede that the common stock was worth but 15 per cent. of par, and the preferred stock but 30 per cent., when Kneeland received them. Why, then, give them a value in the contract which they did not have? It is clear to a demonstration that if from the value of the total consideration received by the company under the contract is deducted the value of the preferred and common stock at market rates, what remains is the amount received by the company for its bonds. This accords with the substantial verities of the transaction. The bonds were secured by a mortgage upon the entire property of the company, and, unless the bonds were well secured, neither the preferred stock nor the common stock was worth anything. It is palpable that both the company and the contractor regarded the bonds as the main source from which he was to obtain the money with which to perform his contract. To hold that, in a contract like this, the parties intended to treat the different securities of equal value is to be blind to the plainest facts.

We come now to the second question, whether \$4,445,000 of the bonds which were issued to Kneeland during the life of the contract of partnership between him and Quigley are to be held null and void, under section 3313 of the Revised Statutes of Ohio, providing that "all capital stock, bonds, notes or other securities of a company, purchased of a company by a director thereof, either directly or indirectly, for less than the par value thereof, shall be null and void." Kneeland testified that the contract of partnership between him and Quigley was really made January 23, 1886, at the time when the contract of construction was made between him and the trustees of the old bondholders, but that it was not formally reduced to writing until its date, July 6, 1886. Kneeland's statement is contradicted by the recitals of the written contract itself, in which, after mention of the contracts of January 23, 1886, occurs the following:

"Whereas, the party of the first part [Kneeland], owing to the complicated and hazardous character of the contracts above referred to, having been unable to associate with himself therein such persons as he desired and anticipated, and now finds himself alone, and in danger of failure to accomplish all he has undertaken, and for these reasons, and to better carry out the great work in hand, finds it necessary to avail himself of the extended acquaintance and great knowledge and experience possessed with respect to the railroad property by the party of the second part [Quigley]: Now, therefore, in consideration of the premises and other valuable and sufficient considerations hereto him moving, the party of the first part hereby associates with himself the party of the second part as full partner equally in all the contracts above mentioned."

It is urged by counsel, and pointed out by Kneeland, in his earnest desire to carry back the date of the contract of partnership with Quigley, that he signed the contracts of January 23, 1886, for himself and associates, as a circumstance corroborating his statement that Quigley was then associated with him. The foregoing recital, however, takes away any significance which that circumstance might otherwise have. Moreover, it appears that long after Quigley and Kneeland were separated, and when he had no partner at all, Kneeland continued to sign receipts, "S. H. Kneeland and Associates;" showing that the term "Associates," as signed by him, should be given no especial weight. The question which the court has here to decide is whether it will believe Kneeland as a witness or believe the recital of the contract signed by Kneeland and Quigley when the contract was made. The contract was a secret contract, delivered in an envelope by Kneeland and Quigley to R. G. Ingersoll, counsel for Kneeland, to be held by him for them both. There would appear to be comparatively little motive for misstating in it the fact as to the time when the partnership began. In the present litigation there is apparently a very strong motive for Kneeland to state that Quigley was interested with him from the beginning. The personal feeling of Kneeland against Quigley and the large bondholders and preferred stockholders of the road has evidently become bitter. After the road was received by the company from Kneeland, and began its operations, differences as to the policy to be pursued arose. Indeed, the controversy had arisen between the same parties before the completion of the contract. Kneeland charges the bondholders, especially J. C. Havemeyer, H. O. Armour, and J. M. Quigley, with having intentionally brought the road to a condition in which a receivership was necessary, by refusing to consent to the imposition of the second mortgage with which to raise money to buy additional rolling stock. I have read Kneeland's testimony with care, and I am bound to say that the desire which he has to defeat the bonds which he himself sold so influences him in his evidence as to make his memory not altogether trustworthy. I think it much safer to credit the statement which he and Quigley together made in July, 1886, as to the time when, and circumstances under which, this partnership agreement was made. Kneeland's attitude in this case, in attempting to defeat the bonds which he sold in the open market to innocent purchasers, does not, under the circumstances, commend him as a witness to the court. It may be said that he is not a party to this issue. He is, however, the largest common stockholder, and is a director and the president of the company. He has elected the directors who are seeking to impeach the legality of the bonds by voting the very stock which, if the bonds are void for the reason asserted, is equally void. It is on his testimony and at his instigation that the attack is made upon the validity of the bonds based on his partnership contract with Quigley. That contract was a corrupt and disgraceful one, and a party to it who would bring it to light for the purpose of defeating the bonds sold by him to innocent persons cannot complain if no more credit is given him than the

corroborating circumstances require, especially when after producing it he contradicts the express recitals in the face of the contract. The circumstances shown by the record confirm the view that the contract was made at the day of its date. Under the contract of January 23, 1886, the bonds were to be delivered to the contractor by two trustees, one to be selected by Kneeland and the other by the bondholders' committee. Kneeland selected R. G. Ingersoll, who was his attorney, and the bondholders selected White, who, Kneeland says, was a mere clerk and puppet of Quigley. With these trustees, and with a chief engineer who was an appointee of Quigley and Kneeland, rested the whole supervision of Kneeland's execution of the contract. The trustees were not selected until after the organization of the consolidated company. It is perfectly evident that Kneeland's purpose in making his contract with Quigley was to bribe him to influence White to liberality in delivering the bonds, and to prevent too great strictness in guarding the interests of the company. Quigley was the president of the company. He was the chairman of the bondholders' committees, and knew more about the work to be done and the road as it was than any one. If he could be kept quiet, there would certainly be no trouble either with White or with any of the narrow-gauge bondholders who were the real parties in interest opposed to Kneeland. The contract as drawn was loosely drawn, but it was an onerous one for the contractor if strictly construed. Its burdensome character was much more apparent to Kneeland in the summer of 1886 than it had been in the preceding January, before he knew the extent of the heavy lien claims against the old narrow-gauge road which he had obligated himself to pay. Quigley knew all about these claims, and could doubtless prove of much assistance to Kneeland in fighting and adjusting them. This situation makes it altogether likely that the contract was really made when it was signed, that is, after the organization of the company, and after it had become certain that Quigley would have in his complete control the delivery of the bonds under the contract, so far, at least, as the trustee for the company and the narrow-gauge bondholders was concerned, and after the need for the services of Quigley in adjusting, fighting, and reducing prior lien claims had become apparent to Kneeland. There is in the record the sworn testimony of Quigley that the contract was made at the day it is dated, and not before, and that he had no interest in Kneeland's contract prior to that time. Counsel for the company and intervening creditors object to the consideration of this evidence on the issues between the bondholders and the company, because it was brought out on the issue between the company and the preferred stockholders. More than this, they say that, if evidence taken on the issue between the company and the preferred stockholders is to be considered, then the evidence of R. G. Ingersoll upon the same point corroborates Kneeland. Ingersoll's statement is entirely consistent with Quigley's having no interest in Kneeland's contract until the time when the contract was reduced to writing. His memory of dates is exceedingly vague, and can have no weight at this length of time after the

transactions. It is not necessary to decide whether Quigley's and Ingersoll's evidence can be here considered, because, whether it is admissible or not, I must reach the same conclusion.

The question, therefore, is whether the contract of July 6, 1896, between Kneeland and Quigley, makes the bonds issued to Kneeland and sold by him in the market bonds purchased from the company by Quigley. It must be premised that the contract for the purchase of bonds by Kneeland from the company was a lawful one, and had been fully entered into before Quigley attempted to acquire any interest in it. The evidence also shows that, during the time before Kneeland and Quigley quarreled and severed such relation as they had, the bonds were actually delivered by the trustees to Kneeland under the construction contract, and were sold by him, and that Quigley never had any custody of them for himself and Kneeland.

The claim on behalf of the company is that section 3313 renders bonds purchased by a director at less than par nothing but waste paper, even in the hands of subsequent innocent purchasers; and this, although the interest of the director may not be known to any one except himself and the person in whose name the bonds are bought. If the statute is to be thus construed, it is so highly penal and so capable of inflicting the grossest hardships upon innocent persons that its operation ought not to be extended beyond the letter. Under a strict construction, it may well be questioned whether one who acquires an interest in a construction contract with a railroad company after it has been made and its terms have been fixed, and without the knowledge or consent of the company, can be said to be a purchaser from that company of the bonds subsequently earned by performance of the contract. He derives all his rights in the contract by assignment from the original contractor, and his title to the bonds must be traced through the same person. It is said, however, that the language of the statute is, "purchased by a director directly or indirectly." These words mean that, if the contract of purchase is originally between the director and the company, the effect of the statute shall not be evaded through the mere use of another's name by the director in making the purchase. Certainly, a purchase from one who has in good faith bought bonds from the company is not an indirect purchaser from the company, within the statute.

But it is not necessary to discuss or to decide the question whether a third person acquiring an interest in Kneeland's contract of construction by lawful agreement would become a direct or indirect purchaser of bonds from the company, because it does not arise here. Quigley, by his agreement with Kneeland, acquired no interest whatever in the bonds to be delivered by the company to Kneeland under the construction contract. The contract was absolutely void, because corrupt, vicious, and against public policy. Neither Kneeland nor the company could have held Quigley to any liability under that contract, nor could Quigley have compelled Kneeland to account to him for any profits or bonds received thereunder. It is well settled that a secret contract made by one with

an agent of another to pay the agent a commission on transactions with his principal, effected through the agent, is against public policy and void, and that the agent cannot recover commissions thus stipulated for. *Rice v. Wood*, 113 Mass. 133; *Smith v. Townsend*, 109 Mass. 500; *Railroad Co. v. Pattison*, 15 Ind. 70; *Lloyd v. Colston*, 5 Bush, 587; *Lynch v. Fallon*, 11 R. I. 311; *Everhart v. Searle*, 71 Pa. St. 256; *Scribner v. Collar*, 40 Mich. 375; *Carpener v. Hogan*, 40 Ohio St. 203; *Wald's Pol. Cont.* (2d Ed.) 244, note z. See, also, *City of Findlay v. Pertz*, 31 U. S. App. 340, 355, 13 C. C. A. 559, and 66 Fed. 427.

In *Rice v. Wood*, 113 Mass. 133, 135, the court said:

"Contracts which are opposed to open, upright, and fair dealing are opposed to public policy. A contract by which one is placed under a direct inducement to violate the confidence reposed in him by another is of this character. If the plaintiffs were guilty of injustice to the owner of the real estate, by placing themselves under an inducement to part with it at less than its full market value, they should not be allowed to collect the promised commissions on the sale of the stock, which was the consideration for which they put themselves in such a position. No one can be permitted to found rights upon his own wrong, even against another also in the wrong. A promise made to one in consideration of doing an unlawful act, as to commit an assault or to practice a fraud upon a third person, is void in law; and the law will not only avoid contracts the avowed purpose or express object of which is to do an unlawful act, but those made with a view to place, or the necessary effect of which is to place, a person under wrong influences, and offer him a temptation which may injuriously affect the rights of third persons. Nor is it necessary to show that injury to third persons has actually resulted from such a contract, for in many cases where it had occurred this would be impossible to be proved. The contract is avoided on account of its necessarily injurious tendency."

In *City of Findlay v. Pertz*, 31 U. S. App. 340, 355, 13 C. C. A. 559, and 66 Fed. 427, Judge Lurton, speaking for the circuit court of appeals of this circuit, said:

"Any agreement or understanding between one principal and the agent of another, by which such agent is to receive a commission or reward if he will use his influence with his principal to induce a contract, or enter into a contract for his principal, is pernicious and corrupt, and cannot be enforced at law. This principle is founded upon the plainest principle of reason and morality, and has been sanctioned by the courts in innumerable cases."

See, also, *Wald's Pol. Cont.* (2d Ed.) note a<sup>1</sup> by Mr. Wald, and cases cited.

Of course, it makes no difference in the application of the principle whether the reward is for inducing a contract with a principal or for relaxing the watchfulness due the principal from his agent in enforcing a contract already made.

It follows that the *Quigley-Kneeland* contract was void, and conferred on *Quigley* no interest whatever in *Kneeland's* contract with the company. All bonds delivered by the company, therefore, belonged to *Kneeland* alone, and were therefore lawfully issued to him, and the persons to whom he sold or delivered them took his lawful title to them. This is even true of the 180 bonds afterwards delivered by *Kneeland* to *Quigley* at the so-called settlement of their partnership. *Quigley* had no claim upon *Kneeland* arising out of their corrupt agreement, and what he gave to *Quigley* was therefore without consideration. But what he gave was bonds theretofore lawfully delivered to him under the construction contract. Whether *Kneeland* could recover these bonds from *Quig-*

ley, or would be prevented from doing so on the ground that they were in *pari delicto*, is not now important. It is certain that whoever is the owner of the bonds holds lawfully issued obligations of the company. Every holder of the bonds delivered to Kneeland during the pendency of the so-called partnership can trace his title to the company without using the corrupt partnership contract as the link by which the company issued the bonds. The contract between Kneeland and the company was complete before the void partnership agreement was made. Hence the rejection of that agreement as null and of no effect leaves the bonds with their origin untainted by illegality. I have said that Kneeland's construction contract was lawful. I do not mean to say that it might not at the time have been rescinded by the company for Kneeland's fraud in bribing Quigley to permit a lax execution of it. However that may be, until rescinded it was valid. After its complete execution, after a full settlement, and after the lapse of time since, certainly there could be no rescission. The illegality of the partnership agreement, and its ineffectiveness to vest any right or interest in the construction contract in Quigley, existed wholly without reference to section 3313 or its application, and hence may properly be regarded as a condition of the situation, when it is claimed that section 3313 operated to destroy the validity of the bonds delivered to Kneeland. In this view, bonds delivered to Kneeland under the valid construction contract were not purchased by Quigley, because the pretended contract from which it is said that his interest in the bonds arose could vest no interest in any one.

The next question is whether those bonds are void which were subscribed for and bought by Havemeyer, Stout, Harbeck, Quigley, and Brown when directors, under an agreement with Kneeland by which they paid \$1,000 cash for one bond and ten shares of stock. Of these bonds, Havemeyer bought 88, Stout 443, Harbeck 10, Quigley 261, and Brown 13, or 815 in all. The bonds were not bought from the company. They were bought from Kneeland. The bonds in question had been issued in accordance with the construction contract by the company to the trustees, Ingersoll and White, to be delivered to Kneeland. They were part of the first 2,000 bonds which were to be delivered to him at once. He appointed White his personal agent and trustee to receive them for him from Ingersoll and White, trustees, and to accept subscriptions for them, on the terms above stated, from all holders of narrow-gauge bonds, to the extent of their holdings of those bonds. 1,362 bonds were subscribed for, of which 815 now under consideration were part. It is said that these directors are to be regarded as indirect purchasers from the company because, as directors, they issued the bonds under the contract of January 23, 1886, at a time when they had an agreement with Kneeland by which he was to sell to them the bonds and stock to be issued to him under his contract at less than par. Kneeland says the subscription agreement was really part of the contract of January 23, 1886. The narrow-gauge bondholders had expected to receive in exchange for their bonds second mortgage bonds of the new

company. They were obliged to take preferred stock. To make up for the difference in the value between the bonds surrendered to Kneeland and the preferred stock they were to receive in exchange therefor, Kneeland offered them a bonus of common stock of the same par value as any new bonds which they would pay par for in cash. I cannot say, from reading the evidence, that the common-stock bonus allowed by Kneeland to this class of creditors on cash subscriptions for bonds at par exceeded in value the concession made by the narrow-gauge bondholders in receiving preferred stock for their old bonds. I cannot find, therefore, that the narrow-gauge bondholders who availed themselves of this subscription opened by Kneeland did not in fact give him par for his bonds. If that is true then the directors here involved in fact paid par for the bonds, and are not within the statute.

Another reason for holding that the subscription privilege did not involve a purchase of the bonds at less than par by the directors is that the obligation of the company to comply with the contracts of January 23, 1886, did not arise from any action of the directors. The act of consolidation, and the transfer of the narrow-gauge road to it by operation of law from the constituent companies, imposed on it the obligation of those contracts. The case is this then: Have-meyer, Stout, Harbeck, Quigley, and Brown, together with all other bondholders of their class, made contracts with Kneeland by which it was agreed that Kneeland should make a construction contract with a consolidated company to be formed out of three constituent companies, and as a term of those contracts Kneeland agreed that of the bonds and stock to be received by him from this construction contract he would sell a certain amount at a certain price to them. The construction contracts became binding on the consolidated corporation when formed, and afterwards the persons named became directors, and received the bonds and stock from Kneeland on the terms agreed. Though they received the bonds and stock when they were directors, they took them, not from the company, but from Kneeland, under contracts binding on all parties at the time they became directors.

The proposition that the contracts of January 23, 1886, were binding on the consolidated corporation, without action by its board of directors, is much contested by the counsel for the railroad company and the intervening creditors. The form of the contracts of January 23, 1886, and of the contracts with the constituent company, are peculiar, in that in both of them Kneeland agrees that the consolidated company shall rebuild the road, and the bondholders in the former and the constituent companies in the latter agree that the consolidated company shall issue the particular securities in payment of the same. In the former, in certain parts, it is made clear that Kneeland is himself to do the work of construction, and is to receive the bonds, certain preferred stock, and the common stock. In the latter this is stated with less definiteness, and yet it is perfectly manifest, from the similarity of the provisions, that each constituent company is adopting, so far as it may properly do, the contracts of January 23, 1886, and is accepting the conveyance of its part of the



railroad for the purpose and with the intent to carry out the plan of reorganization, and to put in force the agreements contained in those two contracts. Indeed, knowing, as the corporations must be charged with knowing, that Kneeland held the title to the railroad upon conditions of the contracts of January 23, 1886, neither constituent company could accept title to the part conveyed to it without also assuming the obligations of the contracts of January 23, 1886, so far as they affected it and the consolidated corporation of which it was to be a constituent. "When, however, the contract is made in the name and on behalf of the projected corporation, and is treated as a proposal to such corporation, to be acted upon by it when it comes into existence, then, in the absence of other controlling circumstances, acceptance of benefits under the contract justifies the inference that the corporation has accepted or adopted it." *Alger, Prom. Corp.* § 208; *Battelle v. Pavement Co.*, 37 Minn. 89, 33 N. W. 327; *Mining Co. v. Quintrell*, 91 Tenn. 693, 20 S. W. 248. But it is said that by the express provision of the contracts with the constituent companies it was Kneeland, and not the companies, who agreed that the consolidated corporation would rebuild the road and do the other things, and that the constituent companies only agreed that the consolidated company should issue the bonds; but, even so, the constituent companies necessarily consented that the reconstruction should be carried on by agreeing that it should be paid for, because, where one agrees to pay another for work, there is an implied obligation on the part of the one to permit the work to be done.

It seems to me clearly to follow that by express agreement, and, if that is not specific enough, by necessary implication, the constituent companies, in accepting title to the railroad which Kneeland held, subject to the conditions of the contracts of January 23, 1886, assumed the obligations of those contracts. The effect of the consolidation is declared by statute to be the vesting of all the property of the constituent corporations in the consolidated company, and the imposition upon it of liability for all the contracts of the constituents immediately upon the organization of the company by the election of the first board of directors. *Rev. St. Ohio*, § 3384; *Compton v. Railway Co.*, 45 Ohio St. 592, 16 N. E. 110, and 18 N. E. 380; *Railway Co. v. Ham*, 114 U. S. 595, 5 Sup. Ct. 1081. When then the first board of directors of the consolidated company was elected, and before it organized or took any action, the contracts of January 23, 1886, were binding on that company.

We thus reach the conclusion that the bonds issued by the railroad company to Kneeland are all of them valid, and that they are not affected either by section 3290 or by section 3313. The findings of fact and the propositions of law upon which this is founded have made it unnecessary to consider the points made by counsel for the bondholders, (1) that these sections do not apply, and were not intended to apply, to the bonds of consolidated railway corporations of Ohio and other states; (2) that the sections render bonds issued in violation of them not absolutely void, but voidable only, at the option of the company, and that the company is estop-

ped to avoid them now; and (3) that the bonds are negotiable, and are in the hands of innocent holders for value, and that the statutes were not intended to defeat the claims of such owners.

The only remaining question as to the bonds is whether they are to be defeated because of Kneeland's fraud in its performance by giving Quigley an interest in the contract. It is probable, as already said, that the company might have rescinded the contract with Kneeland if, during its performance, it had learned of the corrupt agreement between Kneeland and Quigley; but the relation between them after one year of construction, and three years before the completion of the road, ceased, and Kneeland was allowed to continue to the end, receiving his bonds and stock and spending large sums. Finally, in 1891, after bitter controversies had arisen, a full compromise between Kneeland and the company was effected, and all differences were settled. It does not appear that the work of Kneeland was so faulty in construction that fraud in performance can be charged, or that the company had not full information as to the character of the work done when it accepted it as a compliance with the contract. It would be too late now, therefore, even as against Kneeland, and a fortiori as against his vendees, to impeach the validity of the bonds for failure or fraud in the consideration.

The remaining question to be decided arises between the common and preferred stockholders. The latter claim a right to the distribution to them of the surplus, if any, after payment in full of the bonds and all the other debts of the company out of the proceeds of the sale of the road, in preference to the common stockholders, and they, therefore, ask that they be given in the decree for sale the right to complete any bid they may see fit to make, after depositing cash to the amount of the bonds and other debts, by depositing their preferred stock. The basis of the claim is a sentence in the certificates of preferred stock which is as follows: "This stock constitutes a lien upon the property and net earnings of the company next after the company's existing first mortgage." Counsel for the company and the common stockholders maintain—First, that there was no power in the consolidated company to give such a preference as to capital to preferred stockholders; second, that, if such power existed, it was not in fact exercised, because the language of the sentence quoted was not the language of the company; third, that, if it was, it does not give a preference, in distribution of capital as between preferred and common stockholders; and, finally, that, even if it does, it is not for this court to wind up the company and distribute its assets, but it must, on sale of the road, turn over the surplus, if any, after payment of the debts, to the company who is a party hereto, for such a liquidation of its debts and distribution of its assets and settlement of its affairs as may be provided by law. So far as the power of this company to issue preferred stock with this provision is concerned, I think it is settled for this court by the decision in *Hamlin v. Trust Co.*, 47 U. S. App. 422, 437, 24 C. C. A. 271, and 78 Fed. 664. If the question is to be reconsidered, it must be reconsidered in that

court. That court held that, in the absence of a prohibition in the local law or charter, such a preference might be given in preferred stock. No such prohibition in the local law or charter has been called to my attention. The court of appeals decision also construes the language, and declares that it does give a preference as to capital. Upon the question of fact whether this language was inserted fraudulently or without authority I have no doubt. Undoubtedly the form of the certificate was left by the directors to Kneeland, representing the common stock, and Quigley and the bondholders' committees, representing the preferred stock. Kneeland and Quigley conferred about it, and so did Quigley and his colleagues on the bondholders' committees. The certificates were issued in November, 1886, and Kneeland admits that he knew their form then. The stock was listed on the New York Stock Exchange soon after that time, at the request of the directors of the company. From that time until this litigation, not a step was taken to correct the form of the certificate. These facts prove to my mind conclusively that the form of the certificate was as agreed upon by Kneeland and Quigley, and the memories of witnesses as to what were the various forms proposed for the certificates under discussion at the time, and what was the one actually agreed upon, have not the slightest weight with me to overcome the inference to be drawn from the facts above stated.

The final objection, however, made to the request of the preferred stockholders to be allowed to complete their bid by use of the preferred stock, seems to me to be a fatal one. Such a clause in a decree is, in effect, a distribution of the assets of the company among the stockholders, and would necessarily work to the prejudice of those creditors whose claims are not to be paid under the decree for sale. Are there not or may there not be such creditors? In the foreclosure proceeding only judgment creditors are parties. Such a provision in a foreclosure decree would utterly ignore the rights of creditors whose claims are not reduced to judgment. Nor does the creditors' bill necessarily include all creditors of the company. The advertisement for creditors of the company under the creditors' bill only invited, and only could invite, those to come in who wished to participate in the distribution of the proceeds of the sale between creditors, but it did not advise them that the surplus, if any, after sale of the property and payment of claims of those who made themselves parties, was to be divided among the stockholders. Those creditors who have chosen not to come in have the right to rely on this court's paying over the surplus to the company, to whom they can look for payment. Their failure to come in under the creditors' bill, which is a proceeding quasi in rem, only excludes them from any claim against the property, but it does not bar their claims against the company on a winding up, and for a distribution of the surplus realized by the company on the sale of the property under the creditors' bill. For this reason, the application of the preferred stockholders for leave to use preferred stock to complete their bid must be denied.

The application of S. Dana Rose for leave to file an intervening petition as a preferred stockholder is denied. He sought to come

in under the leave granted the Hamlins to bring in other preferred stockholders by advertisement, to unite with them in their answer and cross bill; but he attempted to file a different pleading, and to enlarge the grounds for invalidating the bonds. He does not show that he has not bought his stock just for the purpose of becoming a party to the litigation. He delayed his application until a few days before the time for taking evidence on all issues had closed. He offered to abide by and rest his case on the evidence already taken. Under all the circumstances, he must be content to become a party to the Hamlin answer and cross bill. He is too late to introduce new issues. His application is denied, and his intervening petition, filed without leave, is stricken from the files.

In the view I have taken, it has not been necessary for me to consider whether the defenses to the bonds argued and based on sections 3290 and 3313 of the Ohio Statutes have been properly raised upon the pleadings. Whether they have been properly pleaded or not, they must fail.

A decree for sale will be entered on the foreclosure bill. One has been prepared by counsel for complainant, the Continental Trust Company. It will be entered with some slight alterations. The counsel for Stout & Purdy, the complainants in the creditors' bill, may prepare a decree for sale on the creditors' bill, and it will also be entered. The case will be referred back to the master to report his findings of fact and conclusions of law upon the amount and validity of the claims filed by creditors coming in under the advertisement on the creditors' bill, except as to the claim of the bondholders, the validity and amount of which will be fixed in the decree for sale, and except as to the judgment claim of Stout & Purdy, upon which the creditors' bill is founded. This reference to the master will not delay proceedings under the decree for sale.

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BROADIS v. BROADIS et al.

(Circuit Court, N. D. California. April 4, 1898.)

No. 12,033.

1. **FEDERAL COURTS—JURISDICTION.**

Where a suit between citizens of the same state has been brought in a federal court, by collusion or otherwise, on the ground of defendant's alienage, and a default decree entered, such proceedings are wholly without jurisdiction and void, and injunction will lie against the execution of the decree.

2. **SAME—SUPPLEMENTARY SUIT.**

A suit to restrain a decree entered in another equity suit in the same court may be sustained in a federal court, although all parties are citizens of the same state, as it is not an original suit, but purely ancillary and supplementary to the previous one; especially where the United States marshal is a party defendant. The court has inherent jurisdiction over its own process, to prevent abuse.

3. **CITIZENSHIP—MARRIAGE TO CITIZEN—NATURALIZATION OF NEGROES.**

Section 1994, Rev. St. U. S., providing that "any woman who is now or hereafter may be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen," applies to women of African blood since the act of July 14, 1870, extending the naturalization laws to persons of African birth or descent.

**4. EQUITY—JURISDICTION—RETAINING FOR COMPLETE RELIEF.**

While a court of equity, having taken jurisdiction of a case for one purpose, will, in general, retain it for all purposes, so as to do complete justice, still, where it has obtained jurisdiction only to pass upon the validity of a decree of foreclosure, it cannot go further, and pass upon the validity of the mortgages themselves, and of the title sought to be conveyed thereby.

Bart Burk and Reddy, Campbell & Metson, for complainant.  
Moses G. Cobb, for defendant Peter Dorcy.

MORROW, Circuit Judge. This is a bill in equity, brought by the complainant against Ellen Maria Broadis, his wife, Peter Dorcy, and Barry Baldwin, United States marshal for the Northern district of California, to enjoin the latter, as United States marshal, from selling certain real estate alleged to belong to the complainant as a homestead, and which the United States marshal was directed to sell by the order of this court, made and entered in the case of Peter Dorcy against Ellen Maria Broadis, No. 11,939, which order of sale was made by virtue of a certain decree of foreclosure of two certain mortgages held by Peter Dorcy from Ellen Maria Broadis, and covering the land claimed by the complainant in the present suit as a homestead. The suit is also brought to have declared null and void the judgment and decree of foreclosure referred to, and the order of sale issued thereunder, and also to have declared null and void a certain deed executed by said complainant to Ellen Maria Broadis, covering the land in question, and the two mortgages executed by Ellen Maria Broadis to Peter Dorcy, under which mortgages the decree of foreclosure in the case referred to was obtained by said Peter Dorcy against said Ellen Maria Broadis. The real estate covered by the homestead, deed, and mortgages respectively is situated in the county of Santa Cruz, state of California, and is fully described in the bill in this case. The suit may be said to be, in effect, one to vacate the judgment and decree of this court, rendered in the previous suit of Peter Dorcy against Ellen Maria Broadis, on the ground of collusion and fraud practiced on this court, and that the court had no power to take jurisdiction of that case on the ground that both parties were citizens of the state of California. The alleged collusion and fraud is alleged in the present bill to consist in the fact that it was averred falsely in the bill in that case that the defendant Ellen Maria Broadis was an alien and a subject of the queen of Great Britain and Ireland, whereas in truth and in fact she was a citizen of the United States and of the state of California. The present complainant was not made a party to the suit of Peter Dorcy against Ellen Maria Broadis. Although it appears that Ellen Maria Broadis was served with the process of subpoena in the present suit, she failed to appear, and the case is contested by Peter Dorcy alone. A preliminary injunction was granted to the complainant, restraining the United States marshal from selling the real estate under the decree of foreclosure rendered in the case referred to. Testimony has been taken on both sides, and the case will now be disposed of finally.

It appears that the complainant, James Broadis, is a citizen of the United States and of the state of California, and has been a

resident of this state since 1849; that he is a negro, having at one time been a slave; that Ellen Maria Broadis, the sole defendant in the case of Peter Dorcy against Ellen Maria Broadis, and one of the defendants made by the bill in the present suit, is his wife; that she is a woman of African descent; that he was married to her some time in 1861; that they have remained during all this time husband and wife, although it appears in evidence that she left him some time in 1889, and has not since returned to him; that on the 29th of December, 1877, the complainant was the owner in fee of certain pieces of real estate described in the bill, situated in the county of Santa Cruz, state of California, the same being the land covered by the deed and the two mortgages to be hereafter referred to; that on February 25, 1880, he made, executed, and filed for record in the recorder's office of the county of Santa Cruz a declaration of homestead upon the said lands; that the same was recorded on March 1, 1880, and that the said homestead, or the declaration thereof, has never been canceled, annulled, set aside, or abandoned, but still remains in full force and effect, and has been since said time, and now is, occupied and used by the complainant and his minor child and children as a homestead; that subsequently, on February 14, 1888, while being sick, infirm, and ignorant, and not being able to read or write, and confiding greatly in his wife, said Ellen Maria Broadis, he was induced by her to sign and acknowledge a deed of gift to her of the real estate described in the bill, and covered by said homestead declaration; that he never delivered the same to her, but left it in her possession until such time as he should request her to record the same; that the deed was made conditionally, pending his illness, and was to be recorded only in the event of his death, to save expense; that thereafter Ellen Maria Broadis left complainant's home, and came to San Francisco, and that she declined to return to complainant's home or to live with him; that subsequently, and without the consent or direction of the complainant, and in violation of the understanding and agreement had between them in respect to the delivery and recording of the deed, she filed and recorded said deed; that she borrowed considerable money, amounting in the aggregate to \$3,300, from one Peter Dorcy, a resident of San Francisco, and that, as security for said loans, she gave her two promissory notes therefor and two separate mortgages on the real estate covered by said homestead; that said mortgages were duly acknowledged, executed, filed, and recorded; that, failing to pay the amount of said notes and interest, said Peter Dorcy brought suit in this court against Ellen Maria Broadis to foreclose both of said mortgages; that the ground upon which the jurisdiction of this court in that case was invoked was because it was alleged that Ellen Maria Broadis was an alien, and a subject of the queen of Great Britain and Ireland; that said Ellen Maria Broadis was duly served with the process of subpoena issued in the said suit, but that she failed to appear, and judgment pro confesso was taken against her; that a decree foreclosing the two mortgages referred to, and directing a sale of the property, was duly made and entered; that a copy of the decree and

order of sale was delivered by the defendant Peter Dorcy to Barry Baldwin, the United States marshal, and said Baldwin, in accordance with the terms of the said decree, duly advertised said property for sale, at public auction. Thereupon the complainant brought the present suit to enjoin and prevent the sale of the property, to set aside, vacate, and annul the decree of foreclosure rendered in that case, and to have the deed and the two mortgages declared void.

It is objected, in the first place, to the consideration of the case, that this court has no jurisdiction of the suit, as all the parties are citizens of the state of California. If it were an original suit, this objection to the jurisdiction would be valid. But it is clearly not an original suit. It is a suit auxiliary and ancillary to the previous suit in this court of Peter Dorcy against Ellen Maria Broadis. It is a bill filed on the equity side of the court, to restrain a decree in another equity suit in the same court, and thereby prevent an injustice. It is therefore supplementary merely to the original suit out of which it has arisen, and can be maintained without reference to the citizenship or residence of the parties. Besides, it is brought against the United States marshal, an officer of the court, to enjoin him from executing the order of this court rendered in the case of Peter Dorcy against Ellen Maria Broadis. The case of *Krippendorf v. Hyde*, 110 U. S. 276, 4 Sup. Ct. 27, is conclusive on the questions of the ancillary nature of a suit, such as that instituted in the case at bar, and of the inherent jurisdiction of the court over its own process to prevent abuse, oppression, and injustice. See, further, *Freeman v. Howe*, 24 How. 450; *Pacific R. Co. of Missouri v. Missouri Pac. Ry. Co.*, 111 U. S. 505, 522, 4 Sup. Ct. 583; *Jones v. Andrews*, 10 Wall. 327, 333; *Covell v. Heyman*, 111 U. S. 176, 4 Sup. Ct. 355; *McDonald v. Seligman*, 81 Fed. 753, and cases there cited.

The next question is whether or not Ellen Maria Broadis was, at the time she was sued by Peter Dorcy in the case referred to, a citizen of the United States and of the state of California. If she was, it is manifest that the circuit court would be incompetent to take jurisdiction, and that its proceedings in that case were wholly null and void. This is the abuse of the process of this court, which the present bill is brought to correct and prevent. As it was averred in the bill filed in that case that she was an alien, and she failed to appear, though served with process, the court took jurisdiction of the case, upon the assumption that she was an alien. The averment of the bill in this respect was not true. That she was a citizen of the United States and of this state, at the time Peter Dorcy brought suit in this court against her, is conclusively established by the fact that she was married to James Broadis, who was a citizen of the United States, and of the state of California. It is true that there is some testimony tending to show that she was born in Canada. This is, however, contradicted by the complainant, who testified that she told him that she was born in Maine. However that may be, and assuming, for the purposes of the case, that she was born in Canada, still she was a citizen of the United States and of this state by virtue of the fact that she was married to a citizen of the United States and of this state.

In other words, the political status of her husband was impressed on her. Section 1994 of the Revised Statutes of the United States provides that "any woman who is now or may hereafter be married to a citizen of the United States, and who might herself be lawfully naturalized, shall be deemed a citizen." This doctrine was further settled by judicial construction in the case of *Kelly v. Owen*, 7 Wall. 496. It is true that that case was limited, in its effect, to white women, and did not apply to women of African descent. In the case at bar, as previously stated, both the complainant and his wife are persons of African descent. But the decision was rendered previous to the act of July 14, 1870 (16 Stat. 256), which extended the naturalization laws to aliens of African nativity and to persons of African descent. Since the extension of the naturalization laws to persons of African descent, the reasoning of the decision is equally applicable to negro women. Upon the general proposition, see *Kane v. McCarthy*, 63 N. C. 299; *Burton v. Burton*, \*40 N. Y. 359; *Webst. Citizenship*, pp. 295-300. It therefore conclusively appears that Ellen Maria Broadis was, at the time of the suit against her by Peter Dorcy, the wife of the complainant, and a citizen of the United States and of this state, and that she was not an alien, and could not be sued as such in the circuit court of the United States in this state. This court was therefore misled and imposed upon in that case, when it took jurisdiction on the ground of the alienage of the defendant Ellen Maria Broadis. It does not appear from the evidence that there was any actual collusion and fraud practiced upon the court. It seems that the complainant acted upon the advice of counsel in bringing his suit in this court, and in setting up the alienage of the defendant. But it is immaterial how the court was imposed upon, whether purposely and willfully, or through inadvertence and mistake. Suffice it to say that it now affirmatively appears in this case that the court took jurisdiction of that case when it had no power to do so. The court, therefore, never had valid jurisdiction of the case, and its proceedings were and are wholly null and void. It follows that a decree must be entered in this case, perpetually enjoining the United States marshal from selling the property foreclosed under the judgment and decree rendered in that case, and that said judgment and decree be set aside, vacated, and annulled.

It is further contended, on the part of the complainant, that the court, having done this, should proceed with the merits of the controversy, and declare void the deed and mortgages referred to. It is claimed that this court, having taken jurisdiction of a case for one purpose, will take jurisdiction for all purposes, and do full and complete justice; citing 1 Pom. Eq. Jur. (2d Ed.) §§ 181, 231-242, and the cases there cited. But I am of the opinion that this court has not the power to pass upon the validity of the deed and mortgages. Its jurisdiction is confined to passing upon the validity of the judgment and decree rendered in the previous suit of Peter Dorcy against Ellen Maria Broadis. A decree will be entered in accordance with this opinion, with costs in favor of the complainant.



## P. LORILLARD CO. v. PEPPER.

(Circuit Court of Appeals, Eighth Circuit. March 21, 1898.)

No. 900.

## 1. FRAUDULENT COMPETITION—IMITATION OF PACKAGES AND LABELS—SLIGHT CHANGE IN DEFENDANT'S LABEL.

Where defendant's label has been slightly changed shortly before suit commenced, but still remains practically the same, the complainant is not restricted to an action at law for an injury resulting from the use of the old label, but equity may consider both together.

## 2. SAME—GENERAL RESEMBLANCE OF PACKAGES.

In determining the question of fraudulent imitation of packages and labels, merely noting points of difference or similarity is not sufficient. The packages and labels must be considered as a whole.

## 3. SAME—INJUNCTION.

Complainant's label for tobacco packages consisted of the words, "P. Lorillard Co.'s Tuberose;" the words being peculiarly placed with reference to each other,—the letters composing the name of the manufacturer decreasing in size from left to right, and those composing the name of the brand increasing in like manner. Defendant's label consisted of the words, "Peppers True Smoke;" the words and letters being arranged in the same way as upon complainant's label. In the size, form, and coloring of the letters, however, as well as in the size of the label itself, it differed from complainant's label. Both packages were of the same size and shape, which characteristics were common to the trade, and both made of blue and white striped cloth, but the stripes on defendant's package were four times the width of those on complainant's. *Held*, the resemblance was not sufficient to warrant an injunction.

## 4. SAME—DECEIT OF PURCHASERS.

The court must use its own judgment as to similarity of packages and labels, and the fact that others may differ from it in opinion, or that a few isolated purchasers have been misled, does not necessarily bind it.

## 5. SAME—ADOPTION OF ENTIRELY NEW PACKAGE BY DEFENDANT.

The fact that the defendant had formerly used an entirely different style of package, and, after being advised that complainant's goods were more popular, changed to his present style, while it raises a strong suspicion of fraudulent intent, is not conclusive, if the rest of the evidence seems to negative such intent.

## Appeal from the Circuit Court of the United States for the Eastern District of Missouri.

This suit was commenced by the filing of a bill on July 29, 1895, in the circuit court of the United States for the Eastern district of Missouri, by the appellant, as plaintiff, complaining of unfair competition in trade by the defendant, the appellee, in the use for the sale of smoking tobacco of a package called the "True Smoke Package," which was alleged to be a deceptive imitation of plaintiff's package, known as the "Tuberose Package." The contention of plaintiff was that the resemblance and the general appearance of the packages were such that consumers had been, and were being, deceived thereby, and were led to purchase the defendant's tobacco, supposing it to be of plaintiff's manufacture, thus greatly injuring plaintiff's business; and the prayer was for an injunction and an accounting. After answer and proofs, the case was heard, and on November 11, 1896, a decree was entered dismissing the bill. From such decree the plaintiff appealed to this court. The record discloses that in 1892 the plaintiff sued the defendant in the same court on the same cause of action; that after answer and proofs, and on February 5, 1895, that case passed to a decree dismissing the bill; that subsequently the decree was modified so as to make it one dismissing the bill without prejudice to the plaintiff's right to bring another suit on the same cause of action. This decree of dismissal was so entered because plaintiff had failed to establish the controverted fact of its succession to the business of the firm of P. Lorillard & Co., which firm had been manufacturing and selling the tobacco in the packages described, and of which

firm it claimed to have become the successor in July, 1891. Between the entry of the decree and the modification thereof in the first suit, the defendant changed the form of the label on his package, and has ever since been selling tobacco in packages with the new label, though the fact of this change was not brought to the knowledge of the plaintiff until the taking of testimony in the present case. By agreement between the counsel, the testimony and exhibits used in the prior suit were admitted as evidence in this case, subject to all proper objections.

M. H. Phelps and Paul Bakewell (Philipp, Phelps & Sawyer, on brief), for appellant.

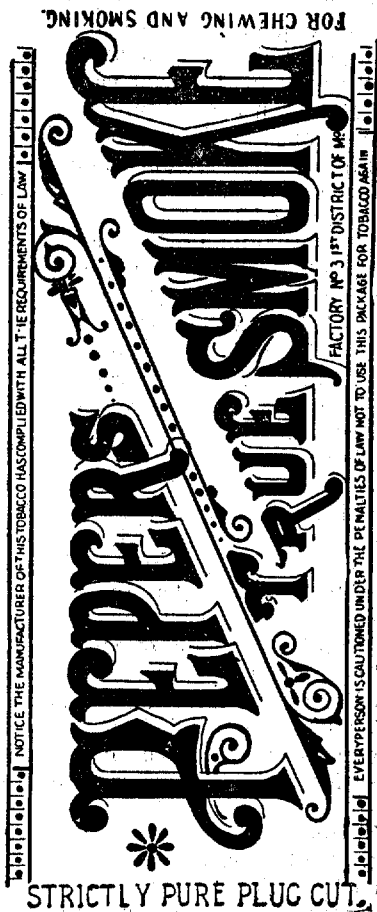
Smith P. Galt, for appellee.

Before BREWER, Circuit Justice, SANBORN, Circuit Judge, and RINER, District Judge.

BREWER, Circuit Justice, after stating the case as above, delivered the opinion of the court.

It is contended by the defendant that, inasmuch as before the beginning of this suit he had abandoned the use of the label which in the former case was claimed to be a deceptive imitation of the plaintiff's label, the inquiry must be limited to the question whether the package and label which he now uses are deceptive imitations, and that, therefore, substantially all the testimony used in the prior cause is irrelevant to the present controversy. Equity, it is said, cannot be invoked merely to award compensation for wrongs that have been done, and that, as the use of the former label had been abandoned months before the commencement of this suit, even if its use was a wrong to the plaintiff, and wrought injury, the only remedy therefor was an action at law to recover damages. On the other hand, it is contended by the plaintiff that the change in the label was in an unimportant feature, and that the one now used is substantially the same that had been used, so that it is a continuous injury which defendant has been doing and threatens to persist in. No findings were made by the circuit court, no opinion filed, and simply a formal decree of dismissal entered; so we are not advised as to the grounds upon which the court acted. It is undoubtedly true that, where the relief asked is simply an account of profits and damages, equity has no jurisdiction, and the remedy must be sought at law. *Root v. Railway Co.*, 105 U. S. 189; *Ambler v. Choteau*, 107 U. S. 586, 1 Sup. Ct. 556. But in such case the proper decree would be a dismissal without prejudice to an action at law. Here the decree was absolute, and upon the merits; so it is not an unreasonable inference that the court found, not simply that the defendant had abandoned the use of the prior label, but that its use gave plaintiff no legal ground of complaint. We think, therefore, that we are called upon to inquire whether defendant's package, with either the earlier or the later label, was in itself a deceptive imitation of plaintiff's package and label, or so used as to create that unfair and illegal competition which the law denounces, and for which it affords compensation. If the earlier label was not an unfair imitation, the later certainly was not. The change was in the direction of difference, and not in that of resemblance. So we shall address our inquiry to the former. That there are some matters of resemblance is obvious, and it is equally obvious that there are essential and marked differences, and the inquiry in these cases is not fully an-

swered by calling attention to either the several matters of resemblance or those of difference. The question is whether, taking the defendant's package and label as a whole, it so far copies or resembles the plaintiff's package and label that a person of ordinary intelligence would be misled into buying the one, supposing that he was buying the other. And in such a case, as said by Lord Russell in *Liebig's Extract of Meat Co. v. Chemists' Co-operative Soc.*, decided by the British court of appeals November 20, 1896, and reported in the Reports of Patent Design and Trade-Mark Cases (volume 13, pp. 736, 738), "one must be guided very largely by the judgment one forms from the use of one's own eyesight." Elaborate descriptions of the points of resemblance or those of difference are, taken by themselves alone, always unsatisfactory. The eye, at a glance, takes in the whole of one exhibit and the whole of another; and the comparison thus made of the two is the surest, and the only satisfactory, way of satisfying the judgment as to the existence of the alleged deceptive imitation. Here are the two labels, omitting the coloring:



Now, whatever minor points of resemblance may be pointed out between these two labels, it seems to us that the differences are so pronounced that there is no reasonable ground to apprehend that any man of ordinary intelligence would be misled. The two principal ways by which an article is distinguished in trade are—First, the name of the manufacturer; second, the descriptive name. It is said that the plaintiff had acquired a reputation which attached to all of its manufactures, and that Lorillard's tobacco, particularly in the district where the competition arose between plaintiff and defendant, was generally known, and known as a superior article. Concede this, and it appears in the most marked way upon the defendant's label that it is not Lorillard's tobacco that he is selling. The name "Peper" is in the largest letters, and the most conspicuous place. No one who was looking for Lorillard's tobacco could for a moment be deceived into the belief that this was that tobacco. There is no similarity between the names. Neither the number of syllables nor the number of letters are the same, and there is only one letter in the two names alike. The other principal mode of identification is the name under which the article passes, and here the difference between the two names (though perhaps not so pronounced) is still marked and obvious. "Tubero" and "True Smoke," when spoken, do not sound alike, do not suggest the same idea; and while, considering the number of letters, and the letters themselves, there is more of similarity than between the names of the manufacturers, yet the contrast between the two is apparent at a glance. So that in the two important features—those by which a purchaser identifies that which he wishes to purchase—the differences are so radical and obvious that it is difficult to perceive how any one could be misled. Beyond these significant matters it may be noticed that the plaintiff's label is a narrow one,  $1\frac{1}{2}$  inches in width, circling around the center of the package; the defendant's, a broad one,  $2\frac{3}{4}$  inches wide, and covering nearly the whole length of the package. While in each the letters composing the name of the manufacturer diminish in size from the first to the last, and those of the article in like manner increase, yet the rapidity of diminution and increase is quite different. The letters in each are colored, but the coloring is not applied in the same way; and, so far as color is a noticeable feature, the mode in which it is distributed operates clearly to distinguish them. Thus, in "Lorillard" the "L" is red, while the succeeding letters are blue, the entire word being shaded with gilt; and the letters are what is known among printers as "plain." On the other hand, "Peper" is of thin red letters, tipped with blue, and having a penciled blue line around each, giving it the appearance of a block letter. "Tubero" is in red letters, the top of each being tipped part way in blue, while the letters of "True Smoke" are blue, shaded with gold, and having a red penciled line around each, making, as in the case of "Peper," block letters. So far as regards the packages, while each is cylindrical, and each holds a quarter of a pound, such packages are in common use, and put out by many manufacturers. It is urged that they are both made of blue and white striped cloth, with the stripes running vertically on the package. But in the plaintiff's package the stripes are broad, each being about

a quarter of an inch in width, while in the defendant's they are not over one-sixteenth of an inch. So that on the plaintiff's package there are only 15 colored stripes, while on the defendant's there are 50. The difference is such that the eye will take it in at a moment's glance. Summing it all up, while there are certain minor points of resemblance which have been forcibly urged upon our attention by the counsel for plaintiff, yet, looking at the two packages with their labels,—taking the tout ensemble,—it appears to us clear that they are so essentially different that no one of ordinary intelligence, desiring to buy the one kind of tobacco, would be misled into buying a package of the other. We shall not stop to review the testimony which is offered upon the question whether the resemblances between the two packages and labels were calculated to mislead, or whether in fact they did operate to mislead. It is enough to say that there was testimony on both sides of these questions, and perhaps, looking at the matter of testimony alone, it might be difficult to say on which was the preponderance; but such testimony, giving it all the weight that it is entitled to, does not disturb the conclusions which we have reached from an inspection of the packages and labels themselves. We cannot surrender our own judgment in this matter because others may be of a different opinion, or because it happens, in isolated instances, that some purchaser was so careless as not to detect the differences. It may well be that, where many sales were made, some individuals, not particularly attentive, may have purchased the defendant's, supposing they were purchasing the plaintiff's, package. Such things will happen in the ordinary course of business, no matter how great the differences; and the fact that they do happen, while it is not to be ignored, is not to outweigh the evidence which comes from a personal inspection of the packages and labels.

Passing beyond that which appeals to the eye, the plaintiff calls our attention to testimony which discloses, as it insists, the following facts: That it had introduced this tobacco among the Scandinavians of the Northwest, to whom it was very acceptable, and among whom it had acquired a large sale; that the defendant at first went into that field selling a tobacco called "Navy Clippings," put up in sacks of white cloth, rectangular rather than cylindrical in form, and containing each a quarter of a pound; that this tobacco did not commend itself, and the defendant was unable to do much business among those people; that he was advised by his agents that plaintiff's tobacco was very popular, that it would be well for him to make a package similar in form and design, and that then he might hope for more success; that thereupon, for the purpose of misleading, he adopted the package and label in controversy; and that since then he has been enabled to do a large business among those people, while the plaintiff's sales have in consequence greatly diminished. This, it is insisted, shows that in fact the defendant's package and label were mere deceptive imitations of the plaintiff's, designed as such, and successful as such, and that, therefore, there is presented a case of unfair competition, entitling the plaintiff to relief. There is some foundation in the testimony for this contention, and it is that which relieves the plaintiff from the unpleasant criticism of having instituted wanton and reckless litigation.

tion. We are not astonished at the action of the Trade-Mark Association, to which the plaintiff belongs, and which is carrying the burden of this litigation,—conduct which defendant's counsel animadverted upon quite severely in his argument. When plaintiff first presented its case to the association, its executive committee, on a mere comparison of the packages and labels, advised that there was no such resemblance as justified an appeal to the courts, or the assumption by the association of the expense of the litigation; but afterwards the committee's attention was called, not merely to the points of resemblance between the respective packages and labels, but also to certain affidavits as to the matters above referred to, and thereupon it reversed its ruling, and held that the suit ought to be prosecuted, and that the association should assume the burden and expense. Counsel urged that this change of ruling was owing to the personal appeals of the representatives of the plaintiff; that it was a mere matter of favoritism to one of the principal members of the association,—and contended that it was evidence of a design on the part of the principal manufacturers of tobacco to act together as one, and by vexatious and expensive litigation crush out all competition by small manufacturers. If the object of the association was as contended, and if the evidence satisfied us that this assumption of the burden and expense was simply a matter of favoritism, and in execution of such a purpose, we should indorse fully his language of denunciation. But, from our examination of the testimony, we are constrained to say that it cannot be held that the executive committee of that association, hearing but the one side, acted wantonly, and with the single view of driving defendant out of the market. On the contrary, the testimony presented by the plaintiff would suggest to reasonable and fair-minded men the propriety of an investigation. And yet, while we say this, we are of the opinion that the testimony, as a whole, does not fully sustain the contention of the plaintiff, or warrant the conclusion which it draws therefrom. It is true that the plaintiff was doing a prosperous business among the Scandinavians of the Northwest, and that the defendant, when it sought to introduce its "Navy Clippings," did not make a success. It is true that one of his agents did write, suggesting an imitation of plaintiff's package. It is true that thereafter defendant put out this package, that his sales increased, and that plaintiff's decreased. And these things, of course, suggest that deceptive imitation which is unfair competition. But, as against this, it must be noticed that the form of the package and the colored stripes were not new in defendant's business; so in these respects he was not simply imitating the plaintiff. Both the form and color of the stripes were in frequent use among manufacturers, and the plaintiff had no special rights in respect to either. It has doubtless been found by experience that a cylindrical package is more convenient for slipping into and taking out of a pocket, and therefore they who use tobacco prefer packages in that form. And, as between a white and a striped package, the variety of color appeals to the eye, and, other things being equal, the purchaser is apt to take the latter. But these are matters of convenience and attraction in common use, and which any manufacturer is at liberty to adopt, and in adopting which he tres-

passes not the slightest upon the rights of others. While one of his agents did write to the defendant, suggesting an imitation of plaintiff's package, yet the defendant forbade any such imitation; and, when the agent who had so written saw the defendant's package, he commented in language quite emphatic upon the idea of its presenting any similarity. The diminution in the plaintiff's sales, and the increase of defendant's, are easily accounted for. The defendant sold to dealers at a less price than the plaintiff,—something like six cents a pound to jobbers. It is not strange, therefore, that they preferred to deal in his, rather than the plaintiff's, goods; for, the retail price being the same, on every package the dealer made a trifle more by selling defendant's than plaintiff's. It is not at all improbable (indeed, it is suggested by the testimony) that not infrequently the dealers sought to press defendant's package on the purchaser in lieu of plaintiff's. But a competition which rests on the matter of difference in price is not a competition which the courts can declare unfair, or can restrain. It is a competition which must be met in some other way than by a lawsuit. So, while we are not disposed to question the good faith of the plaintiff in this suit, or of the executive committee of the association in the change of ruling, we think that the testimony as a whole cannot be said to disclose any unfair competition, and nothing more than ordinary and proper business competition between manufacturers and sellers. Our conclusion, therefore, is that there was no error in the decision of the circuit court, and its decree is affirmed.

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UNITED STATES v. SOUTHERN PAC. R. CO. et al.  
(Circuit Court, S. D. California. April 25, 1898.)

No. 600.

PUBLIC LANDS—RAILROAD GRANTS—CONFIRMING TITLE OF BONA FIDE PURCHASERS.

Act March 2, 1896 (29 Stat. 42), supplementing Act March 3, 1887 (24 Stat. 556), confirmed the title of bona fide purchasers of land patented under railroad grants, though such patents were issued after the commencement of suit by the United States to forfeit the grants, where made in pursuance of contracts previously entered into by the railroad company in good faith.

This was a suit in equity by the United States against the Southern Pacific Railroad Company, D. O. Mills and Gerrit L. Lansing, trustees, and the Central Trust Company of New York.

The United States Attorney and Joseph H. Call, Special Asst. U. S. Atty.

W. F. Herrin and Wm. Singer, Jr., for defendants.

ROSS, Circuit Judge. The main purpose of the bill in this suit is to obtain a decree quieting, as against the Southern Pacific Railroad Company and its mortgagees, the complainant's alleged title to all of the odd-numbered sections of land in California within the indemnity as well as the primary limits of the grant made by congress to the Atlantic & Pacific Railroad Company, of date July 27, 1866 (14 Stat.

292), with the exception of certain specified subdivisions involved in previous litigation between the parties. The defendants assert title to and rights in the lands under and by virtue of the grants made by congress to the Southern Pacific Railroad Company by the same act (July 27, 1866), as well as by the joint resolution of congress of June 28, 1870 (16 Stat. 382), and by the act of March 3, 1871 (16 Stat. 573). These grants were the subjects of full consideration in cases heretofore brought in this court, and finally determined on appeal by the supreme court of the United States. *U. S. v. Southern Pac. R. Co.*, 146 U. S. 570, 13 Sup. Ct. 152; *U. S. v. Colton Marble & Lime Co.*, 146 U. S. 615, 13 Sup. Ct. 163; *U. S. v. Southern Pac. R. Co.*, Id.; and *Southern Pac. R. Co. v. U. S.*, 168 U. S. 1, 18 Sup. Ct. 18. In my opinion, those decisions of the supreme court determined that the Southern Pacific Company, by its grants, acquired no interest or right in or to any of the odd-numbered sections of land embraced within the granted or indemnity limits of the Atlantic & Pacific Railroad Company, and mortgaged none to its co-defendants. I am of opinion, further, that by the act of congress of March 2, 1896 (29 Stat. 42), supplementing that of March 3, 1887 (24 Stat. 556), such of the lands described in the bill as have been patented by the authorities of the United States to, and were sold by, the defendant railroad company, for value and in good faith, were thereby confirmed to such purchasers, whether such patents were issued prior to the institution of this suit or subsequent thereto for lands for which a contract of sale had been entered into in good faith and for value between the railroad company and the purchaser. For such lands no suit can be maintained by the government to disturb the title of the purchaser, for the reason that congress, by the legislation referred to, has confirmed it. *Winona & St. P. R. Co. v. U. S.*, 165 U. S. 463, 483, 17 Sup. Ct. 368, 381. The reasons for these conclusions will be found fully stated in the opinions in the cases cited, and it is deemed unnecessary to now do more than to refer to them. I do not understand that there is any dispute between the parties as to the lands for which patents have been issued, nor, as to the patents that were issued after the commencement of the suit, that it is disputed that they were for lands purchased of the railroad company in good faith, and for value, before the commencement of the suit. A decree will be entered canceling such of the patents as were issued to the Southern Pacific Railroad Company for lands included in the bill, and not sold by it to a purchaser in good faith and for value, and quieting the title of the complainant, as against the defendants, as to all such lands, and as to all unpatented odd-numbered sections included in the bill situated within 30 miles on either side of the Atlantic & Pacific Railroad as indicated by the map filed by it in 1872 in the general land office, and further decreeing that the complainant take nothing as to such of the said lands as have been patented and were sold by the defendant company to purchasers in good faith and for value.



## TUTTLE v. CLAFLIN et al.

(Circuit Court, S. D. New York. March 29, 1898.)

## 1. ATTORNEY AND CLIENT—LIEN FOR COMPENSATION—AUTHORITY TO RETAIN.

Where an assignee for benefit of creditors, who was engaged in prosecuting a suit for infringement of a patent belonging to the estate, contracted with a third person, who was suing the same party for infringement on another patent, to unite their interests for their mutual benefit, and authorized such third person to carry on or settle the litigation at his own expense and divide the net amount recovered equally between them, *held*, that the latter had authority to employ a solicitor and counsel who should be entitled to a lien for their fees on the fund recovered by their efforts.

## 2. SAME—SOLICITOR AND COUNSEL.

Whether a claim for counsel fees is made directly or indirectly through the solicitor is immaterial, since a fund recovered by their efforts is subject to the payment of the fair and reasonable value of their services, before it can be turned over to the parties entitled.

## 3. SAME—AMOUNT OF FEE.

\$13,285 *held* to be a reasonable fee for counsel who expended portions of their time for 322 days, aggregating at least 163 full days' labor, in the prosecution of a patent infringement suit.

## 4. SAME—LIEN—ENFORCEMENT.

Services of counsel in an equity suit, resulting in a money decree in favor of a trust estate, are secured by a lien on the decree, and will be enforced by the court which rendered it, and which is familiar with all the facts showing the value of the services.

This was a proceeding in the above-entitled cause to enforce a lien for fees, in favor of the solicitor and counsel for complainant, on the fund recovered by their services. See 19 Fed. 599; 62 Fed. 453; 13 C. C. A. 281, 66 Fed. 7; 22 C. C. A. 138, 76 Fed. 227; 27 C. C. A. 255, 82 Fed. 744. The cause is heard on motion to confirm the master's report. The master found and reported as follows:

The action was brought for infringement of certain letters patent, and for the recovery of profits realized by the defendants from such infringement. It proceeded to final hearing, and resulted in a decree in favor of the complainant, entered on April 3, 1884, whereby it was referred to a master, to take and state the usual account of profits and damages. Proceedings upon this accounting were begun on April 10, 1884, and remained in progress until the filing of the master's report on August 26, 1893. As a result of this accounting, and after a long and vigorously contested litigation, there was finally paid into court, to the credit of this cause, the fund upon which a lien is claimed by the petitioners, amounting to \$43,513.76, with interest thereon at the rate of 1½ per cent. per annum from April 19, 1897, the date of the deposit. The complainant's original solicitor was one Charles B. Stoughton. The claimant Milliken was substituted as solicitor of record on the 10th of April, 1884, and the petitioner Benjamin F. Lee was retained as counsel in or about the month of March, 1890, while the proceedings before the master were in progress. Each of the gentlemen named remained connected with the case until its termination. The claim of Mr. Milliken is \$3,500, and that of Mr. Lee, as originally presented in a bill rendered by him to the complainant and his solicitor at the close of the case, is \$12,350, less credits of \$1,850, or \$10,500. Objections are made to these claims—First, on the ground that the charges for services are excessive in amount; and, second, that the claims have no priority or lien upon the fund. The last-named objection will be first considered. The facts pertinent thereto are as follows:

The patent involved in this suit was owned by the Elm City Company, a corporation organized under the laws of the state of Connecticut. On March 9, 1876, said corporation, being insolvent, made a voluntary assignment for

the benefit of its creditors to Theodore A. Tuttle, of the city of New Haven, by virtue of which said patent passed to the assignee, together with the other assets of the corporation. Two years later, on August 1, 1878, this action was commenced. On June 16, 1883, the complainant, Tuttle, and one Charles B. Stoughton, who was then his solicitor, entered into an agreement with one George H. Wooster as follows:

"Whereas, letters patent of the United States were granted to Crosby and Kellogg, and by them assigned to the Elm City Co., dated the 2d day of December, 1862 (No. 37,033), and the same are now owned and controlled by Theodore A. Tuttle, trustee of the Elm City Co., and Charles B. Stoughton, attorney, etc.; and whereas, certain other letters patent were granted to Jno. A. Pipo on the 29th day of January, 1863, and were reissued on the 29th day of July, 1875, to George H. Wooster (number 6,565), and are now owned by the said Wooster; and whereas, suits have been brought against H. B. Claflin & Co., of the city of New York, under each of said patents, for infringement of the same; and whereas, the said Tuttle and the said Wooster consider that it is for the mutual benefit of each other to unite their interests in the prosecution of the said suits, and in the settlement of the same: Now, therefore, it is agreed by and between the said Tuttle and the said Wooster that they will each, at his own expense, push said suits to a final termination, and that the gross proceeds obtained by, from, or under said suits shall be paid over to said Wooster, and shall by him be equally divided; that is to say, one-half to the said Tuttle, trustee, and one-half to the said Wooster. It is further agreed by the said Tuttle that the before-mentioned Geo. H. Wooster shall be, and is hereby, empowered to proceed with both of the said suits, if he shall at any time elect so to do, at his (Wooster's) own expense, and that the said Wooster shall alone be empowered to settle said suits, or either of them, and that neither of said suits shall be settled by any one else; and said Tuttle, or his attorney, C. B. Stoughton, shall approve, in writing, the terms of any settlement, in either case, before the same is concluded. In witness whereof, the parties hereto have hereunto set their hands and seals this 16th day of June, A. D. 1883.

Elm City Company.

"Theo. A. Tuttle, Trustee. [L. S.]

"Chas. B. Stoughton. [L. S.]

"George H. Wooster. [L. S.]

"Witness: Louis Jackson."

On February 28, 1888, two further agreements were made between Tuttle and Wooster, as follows:

"Memorandum of agreement made and entered into this twenty-seventh day of February, one thousand eight hundred and eighty-eight, by and between Theodore A. Tuttle, individually and as trustee of Elm City Company, and George H. Wooster: Whereas, on or about the 16th day of June, 1883, the said Theodore A. Tuttle, as trustee, and Charles B. Stoughton and George H. Wooster made and executed an agreement of that date, a copy of which is hereunto annexed, and said agreement, among other things, provided that said George H. Wooster shall 'alone be empowered to settle said suits [referring to the suits in said agreement described], or either of them, and that neither of said suits shall be settled by any one else, and said Tuttle, or his attorney, C. B. Stoughton, shall approve, in writing, the terms of any settlement, in either case, before the same is concluded'; and whereas, such provision of said agreement is not sufficiently definite and certain, and is liable to be misunderstood: Now, this indenture witnesseth that it is intended by said agreement aforesaid to provide, and it is hereby agreed that the same does provide, as follows: The said George H. Wooster shall have the sole and exclusive right and power, and he hereby is empowered, solely and exclusively, without any right of any person whatever, or of the said Theodore A. Tuttle, individually or as trustee of the Elm City Company, or of the said C. B. Stoughton, in any way to interfere with said settlement, to settle, adjust, and continue or discontinue said suits, or any of them, upon such terms and conditions as to him, the said George H. Wooster, may seem proper and just. And the said Tuttle hereby promises and agrees that he, or the said C. B. Stoughton, his attorney, shall execute such papers and instruments as

shall be necessary to make such settlement as may be required by him, the said George H. Wooster, or as may be required to ratify and approve of such settlement. And the said Theodore A. Tuttle, as such trustee as aforesaid and individually, does hereby make, constitute, and appoint him, the said George H. Wooster, of the city, county, and state of New York, his true, sufficient, and lawful attorney, for him, and in his name, as such trustee or otherwise, to settle, compromise, prosecute, or discontinue said suits, or either of them, and to do and perform all necessary acts in and about the same, and to execute all necessary conveyances and instruments in writing, and to employ proper attorneys and counselors at law to represent the complainant in said suit, or either of them, with full power to do everything whatsoever requisite and necessary to be done in the premises as fully as he, the said Theodore A. Tuttle, could do if personally present; the said Theodore A. Tuttle hereby ratifying and confirming all that his said attorney, the said George H. Wooster, shall lawfully do, or cause to be done, by virtue hereof. In witness whereof, the parties hereto have hereunto set their hands and seals the day and year first above written.

"[Signed]

Theo. A. Tuttle,  
 "Trustee Elm City Company. [Seal.]  
 "Theo. A. Tuttle. [Seal.]  
 "George H. Wooster. [Seal.]

"In presence of W. T. B. Milliken."

"Memorandum of agreement made this twenty-seventh day of February, one thousand eight hundred and eighty-eight, by and between Theodore A. Tuttle, individually and as trustee, &c., of Elm City Company, of New Haven, Connecticut, and George H. Wooster, of the city, county, and state of New York: Whereas, the said parties and Charles B. Stoughton, by a certain agreement, dated the 16th day of June, 1883, agreed, among other things, that said George H. Wooster should, at his own option, prosecute certain actions therein mentioned at his own expense, and since the making of said agreement said Wooster has elected to prosecute said actions, or one of them, and has commenced and carried on said actions, and the prosecution thereof: Now, this agreement witnesseth, that the said George H. Wooster hereby promises and agrees to and with the said Tuttle to indemnify and hold him harmless of and from all costs and expenses arising or growing out of the prosecution of said actions: provided his sole and exclusive control thereof is not in any wise interfered with by the said Tuttle, or with his consent or authority; it being understood that said Wooster is to be reimbursed for such expenditures as he may make, or for which he may be or become liable under the terms of this agreement, for the said prosecutions, out of the proceeds of said actions, and to be deducted therefrom before the division thereof as provided in said agreement of June 16th, 1883.

"George H. Wooster.

"Theodore A. Tuttle,

"Trustee Elm City Company."

The circumstances leading to the execution of these agreements are stated in an affidavit made by the complainant, Tuttle, during the progress of the suit, as follows:

"\* \* \* On November 15, 1878, an interlocutory injunction was granted by Judge Blatchford against the defendants. It was supposed at that time that this litigation would be attended by but trifling expense or delay. The patent was of undoubted validity, and the court had adjudged it to be infringed. C. B. Stoughton made claims for legal services in connection with this patent, No. 37,033; and he claimed a lien upon any funds that might arise from the settlement of this suit, or from any recovery had therein; and I had a verbal understanding or arrangement with him that when H. B. Claffin & Co. settled this suit, which we thought they inevitably would within a short time, I would pay him his compensation out of the amount paid to me by them. We were disappointed in our expectation that H. B. Claffin & Co. would settle, and thereupon it became necessary to make some provision for the prosecution of the cause. I had no money to advance for the purpose of carrying on the suit. Mr. Stoughton was a competent lawyer,

skilled in the law of patents. The Pipo reissue, on which Mr. Wooster had also sued the defendants, was sustained on final hearing by Judge Blatchford, in *Wooster v. Blake*, on April 27, 1881, as I am informed will appear by reference to 8 Fed. 429. Negotiations were opened with Mr. Wooster on the basis of having Mr. Wooster advance from time to time the requisite disbursements to carry on the suit, and to have Mr. Stoughton furnish his legal services, relying for his compensation upon his lien upon the proceeds of any settlement or final judgment or decree. This arrangement was consummated and embodied in the agreement on page 99 of the record, dated June 16, 1883. Before this case had progressed very far, Mr. Stoughton fell into great pecuniary and other difficulties; and he left New York, and disappeared from view altogether."

Mr. Lee was retained personally by Mr. Wooster in 1890, as before stated; and, so far as the record discloses, he had no personal transactions with Mr. Tuttle, of any importance, at all events, until several years later. Payments were made to him by Mr. Wooster on account of his services and disbursements. Mr. Wooster had also paid, and continued to pay, other expenses incidental to the suit; his disbursements altogether amounting, as it was claimed by him, to about \$5,500. It does not appear that any of the expenses were paid by Mr. Tuttle. Mr. Milliken, also, was personally retained by Mr. Wooster. He testified that shortly after such retainer he had an interview with the complainant, in New Haven, and was informed that he had no funds, and that there were no collectible assets in his hands, and that the solicitor would be obliged to look alone to the funds which might be recovered in the action for his compensation; adding that his (Tuttle's) arrangement with Mr. Wooster would provide for the necessary disbursements in the prosecution of the action. It does not appear that Mr. Milliken ever formally retained Mr. Lee as his counsel, but he fully recognized the latter's employment by Mr. Wooster; and Mr. Lee was in frequent consultation with him from the beginning of his connection with the case, and the relations between them were of the sort ordinarily existing between the solicitor of record and counsel. Mr. Lee became aware as early as December, 1894, of the existence of the contracts of June 16, and the first of the contracts dated February 28, 1888. The third agreement was not brought to his notice until some time in 1897, after practically all the services rendered by him had been performed. Neither Mr. Tuttle, the complainant, nor Mr. Wooster, who employed the solicitor and counsel, has raised any question as to the reasonableness of the claims made by Messrs. Lee and Milliken, nor as to the propriety of constituting their charges a primary lien upon the fund. Such objections as have been presented to me are urged mainly on behalf of the Union Trust Company and others, creditors of the insolvent corporation of which complainant was trustee. They claim that the contracts made with Wooster were improvident, and that, since their interests have been neglected by the trustee, they have a right to appear for their own protection. The grounds of their objections, briefly stated, are these: It is claimed, first, that Mr. Tuttle, as trustee of an insolvent estate, had no power to create any lien thereon; that petitioners contracted with him, or his agent, Wooster (who could have no greater powers than his principal), with full knowledge of the trust relation, and must have contemplated the fact that their fees, so far as they were to come out of the trust estate, were subject to the approval of the probate court of New Haven, upon a settlement of the trustee's accounts. It is admitted that Tuttle, as trustee, would be entitled, on such settlement, to a reasonable allowance for solicitors' and counsel fees; but it is claimed that no allowance, either to the trustee or his solicitors, can be made in this court, unless by virtue of a specific lien, the existence of which is denied. It is claimed, moreover, that the trustee's contracts with Wooster are unauthorized, as he had no power to delegate to Wooster any authority to bind the trust fund, and that the petitioner's rights are founded solely on the agreement of Wooster to pay, or become personally liable for, the whole expense of the litigation.

In view of the state of affairs shown to have existed under the contracts above recited, these objections seem to me without force. I consider that the authority of Mr. Wooster to employ counsel, and subject the fund to a claim in their favor, had a substantial foundation, in his own direct, personal

interest in the subject-matter of the litigation, derived from the contract of June 16, 1883, and the subsequent acts of the parties thereunder. It did not depend solely upon such powers as were conferred upon him by the later contracts of 1888 to act as the agent or attorney of Tuttle. The contract of June 16, 1883, recites that suits were pending against H. B. Claflin under each of the patents owned by the respective parties, and that they considered it "for the mutual benefit of each other to unite their interests in the prosecution of the said suits, and in the settlement of the same." It was agreed that the gross proceeds obtained from the suits should be paid over to Wooster, and by him divided equally between Tuttle, as trustee, and himself. The prosecution of the suit on the Pipo patent, in which Wooster was complainant, was subsequently abandoned, and the parties thereafter confined their attention to the suit brought in the name of Tuttle. This appears by the affidavit of Tuttle, above quoted from; and the fact is also referred to in the second of the agreements made on February 27, 1888, which recites that since the making of the contract of June 16, 1883, "said Wooster has elected to prosecute said actions, or one of them, and has commenced and carried on said actions." It thus appears that Tuttle and Wooster entered into a virtual pooling arrangement, as regards these two suits, by the terms of which either or both of them, as might be deemed best, should be prosecuted for their joint benefit. Whether both were prosecuted made no practical difference in the rights of the parties. Each party had a half interest in the recovery, through whatever channel it came. They had agreed, as the contract said, "to unite their interests," and to divide the proceeds. Although each, in the first instance, agreed to pay his own expenses, as matter of fact Wooster provided all the necessary funds to carry on the litigation. The suit, therefore, although prosecuted in the name of Tuttle, was in fact prosecuted by Wooster, and was for his own benefit, as well as for that of Tuttle and any others who might be interested. He was an equitable assignee of a portion of whatever sum might ultimately be recovered. *Fairbanks v. Sargent*, 117 N. Y. 320, 328, 22 N. E. 1039. Although the fact did not appear upon the record, his position was analogous to that of one of a class, as of bondholders, creditors, and the like, who prosecutes a suit on behalf of himself and all others similarly interested.

It is urged by counsel for the objecting creditors that these contracts were "beyond the power of the trustee to make, and conveyed no power against the trustee, or his cestuis que trustent," and are "unauthorized, unlawful, and improvident to the last degree." These criticisms were directed chiefly to those provisions giving Wooster entire control of the litigation, authorizing him to employ counsel, and vesting him with sole discretion as to the settlement of the case. I do not understand that it is claimed that it was beyond the power of the trustee to agree, as was provided by the contract of June 16, 1883, that the parties should unite their interests in the prosecution of their respective suits, and that each one should have a half interest in the claim being prosecuted by the other. However this may be, I am satisfied that such an objection, if relied upon, is not available in this proceeding. Whether or not the agreement was in this respect valid in its inception, the parties proceeded to act upon it, and Mr. Wooster expended a substantial sum on the faith of it. As between him and the trustee, the latter would be estopped from questioning the existence of Wooster's vested rights in the litigation, and this estoppel extends to those claiming under him. The very fact that they now appear in court, claiming a right to the proceeds of the litigation prosecuted by Wooster, involves a recognition of his right to prosecute. Mr. Wooster, then, in obtaining the fund now in court, is to be regarded as having acted on behalf of himself and all others in like situation having an interest in the subject-matter. It is well settled that in cases of this sort the person who secured the fund for the common benefit is entitled to be reimbursed his legal expenses from the fund; and the amount of such expenses may constitute a lien upon the fund, and should be deducted therefrom before any distribution is made among the parties entitled to receive it. *Gregory v. Pike*, 15 C. C. A. 33, 38, 67 Fed. 837; *Central R. & B. Co. v. Pettus*, 113 U. S. 116, 123, 5 Sup. Ct. 387; *Trustees v. Greenough*, 105 U. S. 527.

The objection that the question of counsel fees can properly be determined

only by the court in Connecticut is not well taken. It must be remembered that the claim of the petitioners is not against the entire assets of the trust estate in the hands of Tuttle. It is sought here merely to make the specific fund now in this jurisdiction bear the expense by which it was procured. There is no doubt of the power of a court of equity, where a fund is within its control, to protect the rights of all persons properly having claims upon it, before permitting the fund to be taken from its jurisdiction. When, as in this case, the claim is in respect of counsel fees, it would certainly be most appropriately passed upon in the court where the action was tried, and the members of which have had the details of the litigation under their personal observation.

For reasons already stated, there is no force in the further objection urged on behalf of the objecting creditors, that whatever is paid to the petitioners should be paid them by Mr. Tuttle, as trustee, after the amount thereof has been allowed to him as an expense or disbursement. For the purposes of the present proceeding, Mr. Wooster is to be regarded as occupying the position of a quasi trustee; representing, as he does, not only himself, but Mr. Tuttle, and any others who may have interests in the fund. It is well settled, and, I believe, is not disputed here, that, where an allowance may properly be made to a trustee for counsel fees, such allowance may appropriately be made to the solicitors themselves.

It has been suggested, further, that no lien can be allowed in favor of the petitioners, Messrs. Lee, for the reason that they are not solicitors of record, and that no lien can be recognized in favor of counsel. While this is true in a limited sense, the objection, on the facts of the present case, is one of form, rather than of substance. The claim of Messrs. Lee & Lee is not disputed by Mr. Wooster, by whom they were employed, nor is it questioned by the solicitor of record. On the contrary, he unites with them in this proceeding. It is accordingly immaterial whether an allowance is made directly to them, or whether an allowance is made to Mr. Milliken for a gross amount, and the amount of Messrs. Lee & Lee's charges declared to be a lien on this allowance.

It next remains to consider the amount to be awarded to the petitioners. Evidence was offered by Messrs. Lee & Lee to show that the services rendered by them were worth, upon a quantum meruit, the sum of \$13,235. Although it was stated on their behalf in the first instance that they would abide by the bill originally rendered by them, for the sum of \$12,350, this concession was afterwards withdrawn, in consequence of the introduction in evidence by the counsel for the complainant of a certain contract made between Mr. B. F. Lee and Mr. Wooster, under date of December 29, 1894. After this contract was produced, the petitioners gave notice that they should waive no rights in the premises, and should ask for an award for the full amount to which they were entitled, whether under a contract, quantum meruit, or otherwise. The contract was entered into some time after a decision had been made by Judge Cox, setting aside the report of the master in favor of the complainant. 62 Fed. 453. After reciting the entry of a final decree on this decision, and the fact that Mr. Wooster was dissatisfied with the results of the suit, and at his instance an appeal had been taken from the final decree, it provided that the party of the second part (Mr. B. F. Lee) "hereby agrees to act as counsel for the appellant in the prosecution of said appeal, and to use all reasonable and proper efforts to secure a reversal of said final decree." It is claimed by the petitioners that, under the terms of this contract, there is due them for services, properly to be considered as within the scope of the above-quoted provision, the sum of \$7,640, computed according to the percentage named in the agreement. In addition to this, they claim further compensation for services outside of the contract, amounting to \$6,927; making an aggregate of \$14,567, exclusive of any amounts heretofore received by them on account. The objecting creditors, on the other hand, claim that all the services rendered by the petitioners, aside from what was done in connection with an application for a writ of certiorari to the supreme court, were actually rendered under the contract, and, according to the percentage therein named, amount only to \$7,143. Neither party to the controversy has claimed that the amount of the petitioners' compensation is to be controlled by the contract.

The petitioners did not elect to rely exclusively upon the contract, nor was any motion to compel them so to do made by the other side. Under these circumstances, as both parties concede that the value of at least a part of the services must be determined outside of the contract, I have thought it best to disregard that instrument altogether, and fix the counsel fees on the basis of a quantum meruit.

It is unnecessary to set forth the details of the various services as testified to before me, the court being fully familiar with the history of the litigation. The nature of the questions involved in its various stages will sufficiently appear on examination of the various reported decisions in the action, as follows: 62 Fed. 453; 13 C. C. A. 281, 66 Fed. 7; 22 C. C. A. 138, 76 Fed. 227; 77 O. G. 973; 78 O. G. 839; 166 U. S. 721, 17 Sup. Ct. 992.

The petitioners have testified with great detail as to the nature and extent of their work; and I have carefully gone over the record, and the various briefs and memoranda used by counsel in the case. The evidence shows that the litigation occupied the time of the Messrs. Lee, individually, for substantial portions of three hundred and twenty-two (322) days, sufficient to aggregate at least one hundred and sixty-three (163) full days of labor. This is exclusive of services rendered by junior members of the bar employed in their office, and those of clerks and other assistants. These services have been apportioned between the various stages of the litigation, and itemized values placed upon them by the petitioners, which amount in the aggregate to \$13,369. No evidence was offered by the objecting creditors, except that of the counsel for the defendants H. B. Claffin & Co. He testified, in substance, that from his knowledge of the time which he himself was compelled to employ in conducting the defense, and taking the highest rate that can reasonably be charged for work of the description here involved, the sum of \$7,500 would be a proper compensation; admitting, however, upon cross-examination, that, if it should be proved to his satisfaction that more time had been required, his estimate would be larger. Several of the specific charges made by the petitioners in the apportionment of their services have been criticised by the objecting creditors, and it may perhaps be admitted that, standing alone, and considered in the abstract, certain of the amounts named may appear unreasonable or inconsistent. This fact, however, does not affect my opinion as to the value of the services taken as a whole. In cases of this kind, it is difficult to prepare any itemized statement which in one or the other of its features may not be open to question. In my judgment, the only fair way to arrive at the value of legal services in a protracted litigation of this character is to consider the matter as a whole; taking into account all the elements which it has been held are properly to be considered, as, for instance, the professional standing of counsel, the results achieved by him for his client, the importance of the questions involved, the amount of time actually spent, and the extent to which the labor incident to the case occupied the attention of his office at different periods. In this view, I am satisfied that the services rendered by the Messrs. Lee are fairly and reasonably worth the sum of \$13,000. From this should be deducted payments already made, amounting to \$1,850, leaving a balance due of \$11,150, to which should be added \$284.90 for disbursements, as to which no question has been raised. With regard to the claim of Mr. Milliken for \$3,500, no evidence was offered by the contesting creditors, but it is claimed in the brief submitted on their behalf that the allowance should not exceed \$2,500. Mr. Milliken appeared before me, and testified at some length regarding the character of the services rendered by him; and on this testimony, and in the absence of any evidence to the contrary, I am satisfied that he is reasonably entitled to the amount claimed. It appears that a claim is made on behalf of one Nelson A. Lewis to a portion of the fund; and it is stated on his behalf that he had his own counsel in readiness at all times to protect his interests, and that he never authorized the retainer, or continued employment, of the petitioners herein. Accordingly, it is urged that his interest in the fund cannot be subjected to any lien on behalf of counsel whom they had not recognized. This claim I do not regard as having a sufficient foundation, in view of my conclusion above expressed, that the action is to be regarded as having been conducted by Mr. Wooster on behalf of himself and all others interested

in the fund, and that such other parties are in duty bound, under the rules prevailing in the courts of equity, to contribute their proportionate share of the expenses incurred in creating the fund. Whatever may be the rights of Mr. Lewis, they are subject to the payment in the first instance of all proper charges against the fund. I accordingly find and report that the claim of William T. B. Milliken, Esq., should be, and is hereby, fixed and allowed at the sum of \$3,500, and the claim of Messrs. Lee & Lee at the sum of \$11,434.90 (these amounts to be exclusive of such sum, if any, as may be payable to them by way of costs or allowance upon this proceeding); that the claims thus allowed are liens upon all the moneys deposited in court to the credit of this suit, and are paramount to the claims of each and every party to this suit, and to all claims of all parties who have appeared in this proceeding; that, at the time of the retainer of the petitioner Benjamin F. Lee, the said Benjamin F. Lee and the petitioner William H. L. Lee were co-partners doing business as attorneys and counselors at law under the firm name and style of Lee & Lee, and that since then they have been, and now are, such co-partners; that in this suit the petitioner Benjamin F. Lee solely represented the complainant of record, as well as in court, in the United States circuit court of appeals for the Second circuit, and also in the supreme court of the United States.

William H. L. Lee and Howard Thayer Kingsbury, for petitioners.  
Lee & Lee and W. T. B. Milliken, pro se.

W. W. Niles, for exceptant Lewis.

John K. Beach, for exceptants Union Trust Co. and others.

LACOMBE, Circuit Judge. For convenience of reference, the title of the action is retained, although it has long since determined. The master's report has so fully covered the matters referred to him that it seems unnecessary to go into any extended review. No one is contending, as the exceptants seem to think, that there is some lien in favor of solicitors and counsel against the "trust estate." Services rendered by them in a suit in equity, however, have ended in a judgment which has been paid; and upon that judgment and its fruits the solicitor has a lien for the fair and reasonable value of his services, including disbursements for counsel. Whether the claim of counsel is direct or indirectly through the solicitor is an immaterial detail. It is only the amount left after payment of the reasonable fees and disbursements of solicitor, including the fair and reasonable fees of counsel, which is available for complainant trustee or those having claims upon the trust estate. The fund being in this court, and the lien attached to it, this court will itself determine the amount of those charges. It is the appropriate tribunal to do so.

The suit which produced the fund was tried in this court. It is familiar, as no other court can be, with the exact measure of the work done. It knows the conditions under which professional work of this kind is performed in this city, and with the rate of compensation it commands. Under these circumstances, the proposition that the entire fund shall be transferred to the probate court of another state, whose information upon all these points must necessarily be second hand, and will presumably be scanty, and that solicitor and counsel be sent to a foreign jurisdiction to present their claims, is not calculated to commend itself to the court which holds the fund. In view of the extent and character of the work done, and the measure of success ultimately obtained, I do not find the master's allowances ex-



cessive,—a conclusion which I have reached not so much from the testimony taken before him as from a familiarity with the case, acquired by the extended examination of the record which was necessary to a final disposal of the appeal. The exceptions are overruled, and master's report confirmed. Master's fees fixed at \$750 and disbursements.

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LUCAS v. COE.

(Circuit Court, N. D. New York. May 11, 1898.)

1. ATTACK OF INSOLVENT NATIONAL BANK—TRUSTEE—LIABILITY FOR ASSESSMENTS.

A trustee, though not appointed by a will or an order of a court or judge, is not personally liable for assessments against stock of an insolvent national bank owned by this *cestui que trust*, but standing in his name, where he has been guilty of no fraud, concealment, or negligence.

2. SAME—FIXING LIABILITY—REAL AND APPARENT OWNER.

In fixing the liability for assessments against stock of an insolvent national bank, the effort of the court should be to ascertain who is the actual owner, and to hold him, releasing the apparent owner, if he has done nothing to deceive or mislead.

Fred W. Noyes, for plaintiff.

R. J. Fish, for defendant.

COXE, District Judge. The plaintiff is the receiver of the Marine National Bank of Duluth, and brings this suit to recover of the defendant an assessment of 78 per centum upon the par value of eight shares of the capital stock of the bank alleged to be owned by the defendant. The capital stock of the bank was originally \$250,000. In 1894 it was reduced to \$200,000.

On October 6, 1890, the defendant, as trustee of E. Emmons Coe Hamlin, who was an infant of tender years and a grandson of the defendant, subscribed for five shares of the capital stock of the bank and received a certificate running to "E. Emmons Coe, as trustee for E. Emmons Coe Hamlin." When the stock was reduced this certificate was returned to the bank and a new one for four shares substituted running to the defendant "as trustee" merely. The officers of the bank were advised that he held this stock as trustee precisely as in the surrendered certificate. The omission of the words "for E. Emmons Coe Hamlin" was their work and not the work of the defendant. Being done by them without his knowledge, consent or suggestion it did not change the legal status of the parties. On the same day that he subscribed for the stock as trustee he subscribed for five shares on his own account and received a certificate for five shares and, subsequently, a new certificate for four shares, running to him individually. In July, 1894, before the bank became insolvent, the defendant surrendered this certificate and received a new one in his name "as trustee," the name of the beneficiary not being mentioned in the certificate. The consideration for this transfer was \$250 paid to the defendant by F. M. Hamlin, the father of E. Emmons Coe Hamlin, who purchased the stock for his infant son.

No question is raised as to the appointment of the plaintiff, the insolvency of the bank or the validity of the assessment. It is not pretended by the plaintiff that these transactions were fraudulent or made with intent to avoid liability on the part of the defendant. The defense is that the defendant was trustee of E. Emmons Coe Hamlin, the actual owner of the shares, and that he is, therefore, exempt from liability, under section 5152 of the Revised Statutes which provides that:

"Persons holding stock as executors, administrators, guardians or trustees, shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in such trust funds would be, if living and competent to act and hold the stock in his own name."

If, then, the defendant was the trustee for his grandson at the time the assessment was made it follows that he cannot be held personally liable. Some one was the legal owner of these shares; some one is liable to assessment. In the absence of all evidence of fraud or concealment, the true situation being fully understood on both sides, it is plain that he would be liable whose property paid for the stock and who was entitled to receive the dividends and proceeds in case the stock was sold. "One who may profit by the gains of an enterprise should bear its losses, rather than that they should fall on strangers; and the statute imposing a liability on the shareholders of national banks undoubtedly rests on this." *Beal v. Bank*, 15 C. C. A. 128, 67 Fed. 816.

The fact that the defendant is responsible and the *cestui que trust* presumably irresponsible is a matter of no moment. There is nothing requiring a shareholder in a national bank to be solvent and these shares may be held alike by the millionaire and the pauper. The question for the receiver in making an assessment is, who owns the shares, not who is best able to pay?

But it is argued that the section quoted refers only to a trustee appointed by a will or by the order of a court or judge. The statute does not so say and there can be no question that the relation of trustee and *cestui que trust* may exist without such formal action.

In *Mabie v. Bailey*, 95 N. Y. 206, it was held that a deposit of a sum of money in a bank by A. "in trust for" B., who was an infant, constituted a trust which was irrevocable so far as the trustee was concerned. *Martin v. Funk*, 75 N. Y. 134; *Minor v. Rogers*, 40 Conn. 512; *Hamer v. Sidway*, 124 N. Y. 538, 27 N. E. 256.

In the case at bar the father of the infant had in his possession a fund of \$500, which had been contributed by various relations, the defendant among the rest. The father did not own this fund; he held it in trust for his infant son. When he handed it to the defendant and requested him to invest it for the infant in the same securities in which he invested his individual property there can be no doubt that the defendant held the fund, and the shares subsequently purchased, in trust for the infant. The shares were not the defendant's shares; this is manifest. The dividends were not his; if the shares had appreciated in value the surplus would

not have belonged to him. Upon what theory of right should he be held responsible for the statutory liability, it being conceded that the officers of the bank had full knowledge of all the facts? If this were an action by the cestui que trust against the trustee for the negligent or wrongful disposition of the trust fund an entirely different principle would be involved. The effort of the court in these cases should be to ascertain who is the actual owner of the shares and to hold him, releasing the apparent owner in all cases where he has done nothing to mislead or deceive the bank. In arriving at the true ownership the court is permitted to look beyond the books and papers and establish the truth by extrinsic evidence.

In *Yardley v. Wilgus*, 56 Fed. 965, the court assessed the actual owner although the stock appeared on the books of the bank in the name of another with nothing to show that it was held for the owner.

In *Pauly v. Trust Co.*, 165 U. S. 606, 17 Sup. Ct. 465, the supreme court refused to enforce the receiver's assessment against one who held the shares "as pledgee," and in *Anderson v. Warehouse Co.*, 111 U. S. 479, 4 Sup. Ct. 525, it was held that a pledgee might take the shares in the name of an irresponsible trustee for the express and avowed purpose of escaping individual liability thereon.

As to the first transaction the plaintiff seems to have entertained the opinion, in accordance with the foregoing views, that the defendant was not liable. On the 20th of July he writes to the defendant:

"E. Emmons Coe Hamlin, or you as trustee for him, or his estate, or his guardian, is liable for the assessment on the other four shares of stock standing in your name as trustee. It seems that you originally took five shares of stock for yourself as trustee for E. Emmons Coe Hamlin, that you subsequently, when called upon to surrender one-fifth of the said stock, did so and received a new certificate running to yourself merely as trustee, but the officers of the bank were, of course, advised that you held this block of stock as trustee for E. Emmons Coe Hamlin."

He then requested the defendant to send the amount of the assessment upon the other four shares.

Regarding the July transaction the case would be very different if there were the slightest evidence that the transfer to the defendant as trustee was made with intent to avoid responsibility on his part, but there is not. The proof shows that the transaction was a bona fide one throughout and that the defendant notified the bank officials who his beneficiary was. The failure to insert his name in the certificate was their fault and not the fault of the defendant. This being so the two transactions are, in principle, alike.

The authorities cited by the plaintiff proceed largely upon the theory that where a party, by his own act, appears upon the books of the bank as the individual owner of stock he should not be permitted to relieve himself from liability by proof that he holds the stock in a representative capacity. The defendant here has been guilty of no concealment and no negligence and the court sees no reason why he should be compelled to pay a personal liability upon stock which stood in his name as trustee simply for the con-

venience of another, the transaction being such that he could reap no advantage and exercise over the stock no supervision, or control, except to receive and pay over the dividends to his grandson. The complaint is dismissed.

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ATLANTIC TRUST CO. v. WOODBRIDGE CANAL & IRRIGATION CO.  
et al. (THOMPSON et al., Interveners).

(Circuit Court, N. D. California. August 9, 1897.)

No. 11,950.

1. **TRUST DEED—SUSPENSION OF POWER OF ALIENATION.**

A mortgage or deed of trust to secure bonds of a corporation does not suspend the absolute power of alienation of the property covered, and is not in contravention of Civ. Code Cal. § 715, which inhibits the suspension of the power of alienation for a longer period than the continuance of the lives of persons in being at the creation of the limitation.

2. **IRRIGATION COMPANY—CLAIMS FOR SERVICES AND MATERIALS—PRIORITY OVER MORTGAGE.**

Claims against an irrigation company for work and material furnished in the operation of the company's business, and which were essential to its operation and to the preservation of its property, are preferred, on the appointment of a receiver, over a prior mortgage of the company's property.

3. **SAME.**

Claims against an irrigation company for services and material furnished in the construction of an extension which was not necessary to preserve the property of the company, or to keep it in operation, are not entitled to preference over a prior mortgage of the company's property.

4. **MECHANIC'S LIEN—ATTORNEY'S FEES.**

Where those whose claims for services and materials are given preference over a mortgage upon equitable grounds also base a claim of preference on the mechanic's lien law, such latter claim will not be considered, and compensation for attorney's fees, and expenses of proceedings to record the lien, will not be allowed.

5. **IRRIGATION COMPANY—CLAIMS FOR SERVICES—PRIORITIES.**

Claims for services rendered in the construction of an addition to an irrigation system, which was never completed or in operation, will not be preferred over a prior mortgage on the property of the irrigation company.

6. **PLEDGED BONDS—SALE AT AUCTION.**

Where the bonds of an irrigation company, pledged to secure claims against the company, are sold at public auction, and bought in by the pledgees, the latter are entitled to be paid the full value of the bonds, and not merely the amount for which they were pledged.

7. **TIME CHECKS—LIMITATION OF ACTIONS.**

Time checks given for services are evidences in writing of a liability, and claims founded thereon are not barred by Code Civ. Proc. Cal. § 339, subd. 1, which provides that an action upon a contract obligation or liability not founded upon an instrument in writing shall be commenced within two years.

8. **WATER RIGHTS.**

Water rights in an irrigation company, which are appurtenant to specific land, will be allowed, against the receiver of the company.

Scrivner & Schell and John B. Hall, for complainant.

Budd & Thompson and W. M. Cannon, for J. C. Thompson.

W. M. Cannon and Paul C. Morf, for Wm. Alloway, A. H. Cowell,

E. Franklin, and others.

E. P. Cole, for Wm. C. Pidge, Buell & Co., and others.

O'Brien, O'Brien & O'Brien, for F. G. McClelland.

Cannon & Freeman and E. R. Thompson, for J. N. Castle.

MORROW, Circuit Judge. This case now comes up on a motion by the complainant, the Atlantic Trust Company, for a final decree of foreclosure, and an order of sale of the property of the Woodbridge Canal & Irrigation Company, covered by a certain mortgage or deed of trust executed by the defendant corporation to the complainant on July 17, 1891, to secure the payment of an issue of 100 bonds by said complainant to the Woodbridge Canal & Irrigation Company. The bill was filed October 3, 1894, and a receiver was appointed by the court on the same day. An amended bill was filed on December 16, 1895. On March 5, 1896, a rule was entered taking the bill *pro confesso* as to the defendant corporation. Evidence has been introduced showing that the defendant corporation defaulted in the payment of the bonds, both principal and interest. Six months' interest was due on September 1, 1894. Several interventions have been filed for preferential claims. Some of these have already been disposed of, and others have been partially considered. The important question is whether these claims are to be preferred to the mortgage lien or claims of the bondholders, and in what order they are to be marshaled. Before taking up the claims covered by such of the interventions as have not already been disposed of, it will be necessary to notice an objection which was urged at the hearing by counsel for certain interveners, to the effect that the trust deed is void. It is contended that the "deed of trust," as that instrument is entitled, is void as being in contravention with certain provisions of the Civil Code of the state of California, which inhibit the suspension of the power of alienation, by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition. Civ. Code, § 715. See, also, sections 716, 749, 771, of the Civil Code. Subdivision 1 of section 857, Civ. Code, provides that express trusts may be created to sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust. It is argued that the power to sell does not include the power to hold, and that, as in this case the power is to hold until the principal and interest become due, this is a virtual suspension of the power of alienation. It is sufficient reply to say that the mortgage or deed of trust involved in this case does not purport, either expressly or by implication, to suspend the absolute power of alienation of the property covered by the mortgage or deed of trust. Nor is the legal effect of the instrument such as to suspend the absolute power of alienation. It therefore cannot be said to contravene any laws of the state of California in this regard.

I now take up the several petitions in intervention. That of J. C. Thompson, who petitioned the court for the specific performance of certain contracts or scrip for water rights, has already been passed upon and rejected. See opinion filed March 15, 1897 (79 Fed. 501). I held that the specific performance of the contracts or scrip for water rights held by the petitioner J. C. Thompson would not be enforced, for the reasons, among others: (1) That the scrip was not superior to the mortgage lien; (2) that there was no land ap-

purtenant to the water rights claimed by the petitioner, in accordance with section 552 of the Civil Code; (3) that the scrip held by the petitioner, under which he claimed his water rights, was too indeterminate to be enforced by specific performance.

I next consider the claims for preference of William Alloway and many others, appearing for themselves, and as assignees for a large number of persons; said claims being for services rendered and materials furnished to the Woodbridge Canal & Irrigation Company. One petition is by A. H. Cowell, on behalf of himself, and as assignee for many others. In order to expedite proceedings, a stipulation of facts has been entered into by counsel, reserving the question as to whether or not, under the facts as stipulated, such claims can be preferred over the mortgage lien or claims of the bondholders. This stipulation of facts, entitled, "Stipulation of Facts on Cowell Petition and Other Petitioners for Preference," includes the claims of petitioners other than that of Cowell, and of those whom he represents as assignee, and it will therefore be necessary to ascertain who these other petitioners are. Originally, the following named, William Alloway, Salisbury & Vickory, John Lane, Fred Grohe, Theodore Caldwell, N. Densmore, James A. Griffin, George Faass, W. H. Williams, James Blakeley, E. Franklin, Samuel Estes, Edgar Wyant, Joseph J. Hinckley, H. H. Saunders, and J. N. Hinckley, joined in a petition for preference, which they entitled "Bill of Complaint in Intervention," filed December 10, 1894. To this intervention demurrers were interposed, and on December 6, 1895, these were sustained as to some of the petitioners, and overruled as to others. Thereupon the following named, William Alloway, James Blakeley, Theodore Caldwell, George Faass, N. Densmore, W. H. Williams, Salisbury & Vickory (as partners), J. Lane, James A. Griffin, and Fred Grohe, each filed separate petitions for preference. It is their claims which have been included in the stipulation of facts relating to the Cowell petition, and they will be governed, therefore, by the same set of facts. The other remaining interveners, viz. E. Franklin, Samuel Estes, Edgar Wyant, Joseph J. Hinckley, H. H. Saunders, and J. N. Hinckley, joined together again, and filed what they have entitled a "Reformed Bill of Complaint in Intervention." With respect to their claims, a separate and different stipulation of facts has been entered into, as other considerations govern their claims. Their claims will therefore be considered separately from the other claims, although there are some general propositions of law which will apply equally to all of these claims for preference. With respect to the separate petitions filed by William Alloway and the others above specified, it is proper to state that another demurrer was interposed to their petitions, which was considered and determined by my predecessor, Judge McKenna. See opinion filed January 4, 1897 (79 Fed. 39). It was held by him that, so far as the services or materials were for the purposes of construction, they were not entitled to preference over the mortgage lien (*Railroad Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546); that, so far as they were for repairs and improvements, they could not be given preference, as there was no

allegation in the petition of diversion of income, or in fact of the receipt of any income; that, so far as they were for operating expenses,—keeping the works a going concern,—they were entitled to preference over the mortgage lien. This establishes the law of the case with reference to the nature of the claim which will be entitled to preference over the mortgage lien. The demurrer was overruled, and time given to answer, and subsequently the stipulation of facts referred to was filed. This stipulation describes the system of canals which the Woodbridge Canal & Irrigation Company was operating. It is stipulated that the company caused the work to be done and the services to be rendered, and that the same were performed, and that it bought and used the materials, goods, wares, and merchandise mentioned and set forth in the petitions of the several interveners, commencing about the month of November, 1893, and continuing up to about the month of October, 1894. It is further stipulated that the services rendered and materials furnished are of the value set out in the petition, and specified in the stipulation, and that no part of the same has ever been paid. The services rendered and materials furnished are divided by the stipulation into three general classes, viz.:

“(1) Expenses of operating the concern, and expenses claimed by petitioners to be necessary in keeping the system a going concern; (2) expense for work, services, materials, and supplies in connection with said extension work; (3) work, etc., on Upper Location.”

All the services rendered and materials furnished under the first head should be allowed and be given preference, it being expressly stipulated that they were “essential to the preservation of said property, and necessary to keep said canals in proper working condition”; and it will be so ordered.

The services rendered and materials furnished, coming under the second head, are fraught with considerable difficulty. The stipulation shows that during the period before mentioned, viz. commencing from the month of November, 1893, and continuing up to about the month of October, 1894, the company extended its main canal and built main laterals and main branches, amounting in all to 14½ miles of canal, all of which, by the terms of said deed of trust, became subject to its provisions, although the deed of trust had been executed and delivered a long time prior to the inception and commencement of said extension work, or of any of said work, and prior to the time when any of said services were rendered, or materials, goods, wares, and merchandise were sold and delivered. The extension work is described in the stipulation. It is further stipulated that the services rendered and materials supplied in connection with said extension work were actual and necessary expenses for said work, but the question is expressly reserved:

“Whether or not said addition or extension work was essential to the preservation of said property, or was necessary to keep said system or irrigation works a going concern, or to make them a paying concern; the complainant insisting that said extension and addition work was not essential, either for the preservation of, or to keep in active operation, the canals and ditches existing when said extension and addition work was commenced.”

It is difficult to understand, from the facts as they are stated in the stipulation, how this extension work was necessary to the preservation of the canals and ditches existing when the extension work was commenced. The showing is not strong enough to justify allowing these expenses on that ground. The next inquiry is, were they essential to keep the canal system a going concern? The stipulation of facts, in my opinion, does not set out facts sufficient to justify me in holding that this extension work was necessary to keep the entire or whole canal system a going concern. The deed of trust was recorded August 10, 1891, in San Joaquin county, state of California. The extension work was completed on or about May 5, 1894, but the stipulation shows:

That the "canal and ditches were not then in condition for actual use, for want of siphon connections at crossings of sloughs and highways therewith, and the extension of the east branch, from the Peters land to the Calaveras river, was in actual use and operation from the time of its completion to October 3, 1894; that prior to the extension of said main canal, and prior to the construction of said lateral canals and ditches, the business or irrigation system of the defendant the Woodbridge Canal & Irrigation Company was not a paying concern, for the reason and from the fact that the company's sales of water and water rights, and rentals from consumers of its water, through the then existing canals and ditches, were not sufficient to make said irrigation company a paying concern."

If it is to be inferred from this last stipulation that subsequent to the extension of said main canal, and subsequent to the construction of said lateral canals and ditches, the business or irrigation system of the Woodbridge Canal & Irrigation Company was placed upon a paying basis, it may be that the claims for these extension services and materials might be deemed to possess an equity superior to that of the bondholders, particularly in view of the subsequent broad stipulation "that all of said work performed, services rendered, and materials and other supplies furnished contributed largely to the advantage of the bondholders of the defendant corporation." But the question would seem to be disposed of by the decision of the supreme court in *Thompson v. Railroad Co.*, 132 U. S. 68, 10 Sup. Ct. 29. In that case it was attempted, as in the case at bar, to have certain expenses for construction of some portion of a railroad made preferred claims to that of the bondholders under a prior mortgage. The principal facts are these, as stated in the opinion of the court:

"This suit was brought by holders of obligations of the Indiana, Cincinnati & Lafayette Railroad Company, and on behalf of other holders similarly situated, to enforce an alleged lien claimed by them upon earnings of a section of the road of the White Water Valley Railroad Company against the claim of priority of bondholders secured by an earlier mortgage. The White Water Valley Railroad Company was organized as a corporation in 1865, under the laws of Indiana, with authority to locate, construct, and operate a line of railway from Hagerstown, in Wayne county, of that state, to the town of Harrison, Dearborn county, on the boundary line between Indiana and Ohio. To raise the necessary means to construct the railway, the company issued its coupon bonds to the amount of \$1,000,000, in sums of \$1,000 each. They were dated August 1, 1865, and were to mature August 1, 1890, and draw interest at the rate of 8 per cent. per annum, payable semiannually. To secure the payment of the principal and interest of these bonds, the company executed to trustees, by way of mortgage, a deed, bearing date on that day, of its railroad, and all



the right of way and land occupied thereby, with the superstructure, and all property, materials, rights, and privileges then or thereafter appertaining to the road, and the benefit of all contracts with other railroad companies, then existing or thereafter to be made, and all property, rights, and interests under the same; the deed contained the usual covenants to execute suitable conveyances for the further assurance of property subsequently acquired, and intended to be included in the instrument. The company soon afterwards commenced the construction of the road, and by the 4th of November, 1867, completed that part of it which lies between the towns of Harrison and Cambridge City, leaving the distance from the latter place to Hagerstown—between seven and eight miles—unconstructed. It was then without the requisite means to equip the part of the road completed, or to undertake the construction of the remaining portion of the road. In this condition it entered into a contract of perpetual lease with the Indianapolis, Cincinnati & Lafayette Railroad Company (a corporation then in existence), in consideration of which the latter company agreed to furnish all the necessary equipments, material, and laborers to operate the line of the road then completed, and to construct and put in good and safe running order for the accommodation of the public that part of the line then uncompleted (that is, the section between Cambridge City and Hagerstown), and to pay to the lessor annually the sum of \$140,000, in four quarterly payments, of \$35,000 each."

The lessee proceeded and constructed the remaining portion of the road between Cambridge City and Hagerstown, and also furnished the necessary equipment to put the whole road in operation; in other words, the lessee made the road a going concern, and, having furnished the material and means for that work, issued its bonds to two persons named Smith and Lord who did the work. The supreme court, in passing upon a claim for preference for construction, said:

"The claims of the complainants, whatever validity and force may be given to them as liens upon the earnings of the section of road from Cambridge City to Hagerstown, between the parties agreeing to such liens, are entirely subordinate to the rights of the bondholders under the mortgage of the White Water Valley Railroad Company, executed for their benefit to trustees on the 1st of August, 1865. That mortgage was made before the claims of the complainants had any existence."

This decision would seem to dispose effectually of the claims for preference for the construction of the extension canal system involved in this case. See, further, *Dunham v. Railroad Co.*, 1 Wall. 254; *Kneeland v. Trust Co.*, 136 U. S. 97, 10 Sup. Ct. 950; 5 *Thomp. Corp.* p. 5647, § 7122; 19 *Am. & Eng. Enc. Law*, 761. As the matter now stands, I do not regard the stipulation of facts sufficient to justify me in holding that the claims for this extension work are superior to the mortgage lien or claims of the bondholders.

As to the claims coming under the third head, viz. "Work, etc., on Upper Location," I have no difficulty in finding, from the stipulation of facts, that the equity is inferior to that of the bondholders. They will therefore not be given preference.

The stipulation shows further that some of the persons who rendered services, etc., claim a lien under the mechanic's lien law of this state (section 1183 et seq., Code Civ. Proc.); and certain compensation for attorney's fees and costs of the proceeding to record and perfect the lien are asked to be allowed out of the proceeds of sale. It is significant that those of the interveners comprehended in this stipulation of facts, who originally claimed such a

lien, have made no such claim in the separate petitions subsequently filed by them. But, aside from this, whatever rights these interveners may have under the mechanic's lien law of this state, and whether or not this court will recognize and enforce such liens, is quite immaterial; for the allowance of expenses for services, etc., and giving them preference over the claims of the bondholders, is based upon the equitable ground that the nature of the services, etc., rendered, gives them an equity superior to that possessed by the bondholders. It will therefore be unnecessary to consider what rights some of these interveners may have under the mechanic's lien law, and the compensation for attorney's fees and expenses of proceedings to record the lien will not be allowed.

I now take up the claims of the other group of interveners, who joined together in what they term the "Reformed Bill of Complaint in Intervention." As stated, a separate stipulation of facts has been filed with respect to their claims. Their names are as follows: E. Franklin, Samuel Estes, Edgar Wyant, Joseph J. Hinckley, H. H. Saunders, and J. N. Hinckley. I find, as appears by the stipulation of facts, that the services rendered by these interveners relate to certain property acquired by the defendant corporation February 8, 1894, in the county of Calaveras, state of California, called and known by the name of the "Upper Location," and previously referred to in connection with the petition in intervention of William Alloway and others. The services rendered appear to have been for the construction of a proposed line of canals and ditches extending from the system of the Woodbridge Canal & Irrigation Company. This proposed addition was never completed or in operation, and, being purely for construction, under the ruling of Judge McKenna, previously referred to, cannot be allowed as a preferred claim over the claims of the bondholders. *Thompson v. Railroad Co.*, 132 U. S. 68, 10 Sup. Ct. 29; *Railroad Co. v. Hamilton*, 134 U. S. 296, 10 Sup. Ct. 546.

I next take up the claim of William C. Pidge for a preferred claim for certain services rendered between October 13, 1893, and October 1, 1894, as a civil engineer, and as assignee for certain other persons who claim to have rendered services. This claim now comes up on a motion by complainant to vacate the default entered by Pidge against it. It seems that Pidge's claim has been presented heretofore to my predecessor, Judge McKenna, and his claim allowed. The records of the court show that on June 24, 1895, Judge McKenna, in open court, ordered that the claim of Pidge be preferred. Subsequently, on December 16, 1895, an order was made that counsel for the complainant, the Atlantic Trust Company, might file a demurrer to the reformed bill of complaint in intervention, and to all petitions for preferred claims, except that of Pidge. For some reason or other, which is not very clear, no judgment was ever entered upon the order of court preferring Pidge's claim. I see no reason now why the order of Judge McKenna, preferring Pidge's claim, should not be adhered to; and his claim, in the sum of \$1,801.37, will be allowed, and made a preferred claim, and it is so ordered.

The petition of Buell & Co. et al., interveners, has already been considered. In an opinion rendered by me on April 5, 1897 (79 Fed. 842), I held that these interveners were entitled to have 26 bonds held by them allowed out of the proceeds to be derived from the sale of the defendant corporation's property, with the other bonds, after the deduction of preferential claims. These bonds had been pledged to the interveners as security for certain materials furnished to the defendant corporation. I held that the interveners were entitled to be paid the amount pledged on the bonds. It is now claimed, however, that with respect to the bonds held by Buell & Co., one of the interveners, the full face value of the bonds should be allowed to them, as they were sold at public auction, in accordance with the terms of the bonds, and were bought in by Buell & Co. Without entering into a discussion of the question, it may be said that Buell & Co., having bought in the bonds held by them as pledge security, are entitled, under the decision of the supreme court in *Wade v. Railroad Co.*, 149 U. S. 327, 13 Sup. Ct. 892, to the full face value of the bonds. See, also, *Farmers' Loan & Trust Co. v. Toledo & S. H. R. Co.*, 4 C. C. A. 561, 54 Fed. 759, 774; *Wheelwright v. Transportation Co.*, 56 Fed. 164. Therefore, so far as the bonds held by Buell & Co., and bought in by them, are concerned, they are entitled to be paid their par value of \$1,000 each, provided the residue of the proceeds of sale, after the payment of preferential claims, is sufficient to pay in full all of the bonds now presented. If not, then they are entitled to be paid pro rata with the other bonds, and it is so ordered. The bonds held by the other interveners comprehended in Buell & Co.'s petition will simply be allowed the amount pledged.

I next take up the petition of F. G. McClelland, on behalf of himself and as assignee for others, claiming the aggregate sum of \$922.12 for services rendered in keeping the canals in a proper state of repair. A separate stipulation of facts was filed with respect to these claims, in which it is stipulated:

"That the said labor, and the whole thereof, was used and employed, and was necessarily used and employed, on and between the said 1st day of April, 1894, and the said 3d day of October, 1894, by said corporation defendant, on, upon, and about the old canal of said corporation, and its appurtenances, for the purpose of keeping the ditches of said corporation defendant in full operation and repair; and said labor was not employed by said defendant corporation in the original construction of any of the works pertaining to, or belonging to, its said property." It is further stipulated that "said labor, and the whole thereof, was necessary to keep the said canals in a proper state of repair, and in working order, to deliver water to the customers of the said corporation."

The stipulation further sets out that the claims are evidenced by time checks, in writing, issued by said corporation defendant, the form of which is set out in the stipulation. The petition is demurred to by the complainant on the ground, chiefly, that the claims contained in this petition are barred by subdivision 1 of section 339, Code Civ. Proc., which provides, substantially, that an action upon a contract, obligation, or liability not founded upon an instrument of writing shall be commenced within two years.

The stipulation of facts shows that the corporation defendant became indebted to the petitioner and the others named in the petition from and after the 1st day of April, 1894, to and including the 3d day of October, 1894. If the limitation of two years is applicable to the claims presented, it is obvious that they are barred. But if, on the other hand, the time checks be regarded as evidencing a liability on the part of the defendant corporation to pay, then the right of the petitioner to sue is not barred until four years have elapsed; for section 337 of the Code of Civil Procedure provides, substantially, that an action upon any contract, obligation, or liability founded upon an instrument in writing executed in this state must be commenced within four years. It has been held that a receipt or acknowledgment, in writing, for money, showing upon its face a liability to account, is not barred by the statute of limitations until four years have expired. *Ashley v. Vischer*, 24 Cal. 322. An account with the words "Audited and approved, and certified to be correct," has been held to be within the four-years limitation. *Sannickson v. Brown*, 5 Cal. 57. I am therefore of the opinion that the claims contained in this petition are not barred by any statute of limitations, or by laches, inasmuch as the claims are evidenced by the time checks, which contain an admission of the company's liability, signed by its superintendent, and that, in view of the stipulation of facts entered into between the respective counsel as to the necessary nature of the services, they should be allowed in the sum agreed upon, viz. \$922.12, and be made a preferred claim in that amount; and it is so ordered.

I next consider the petition of J. N. Castle for a water right. It comes up on an order to show cause why the petition of Castle should not be granted, and a demurrer by Buell & Co. to the petition. The rights of this petitioner, upon which he bases his application for a water right, differ from those set up in the petition of J. C. Thompson, who sought to obtain specific performance of certain scrip for alleged water rights. There it appeared affirmatively, among other matters, that the water rights claimed were not appurtenant to any land. See opinion, 79 Fed. 501. From the present petition it clearly appears that the permanent water right claimed is appurtenant to certain land which is specifically described in the petition. I see no reason why the prayer of the petition should not be granted, and the receiver will convey to the petitioner J. N. Castle the water right claimed; and it is so ordered.

This, I believe, concludes the consideration of the several petitions presented by the numerous petitioners in this litigation. I have assumed that the several stipulations of facts state correctly the amounts due. If they do not, counsel for the respective parties, when the decree is drawn up, can have an opportunity to see to it that the correct figures are set out. It appears that the complainant has presented exceptions to the receiver's report. The receiver has filed three reports up to date. The first was filed December 29, 1894; the second, January 31, 1895; and the third, August 14, 1896. It will be time enough to consider such objec-

tions as the complainant may have to these reports when the property has been sold, and the proceeds of sale have been returned into court. The reports indicate, at least approximately, the amounts spent and owing by the receiver in handling and preserving the property. I shall grant the motion for a final decree in favor of the complainant, and the application for an order of sale will be allowed; and it is so ordered.

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GAGE v. RIVERSIDE TRUST CO., Limited, et al.

(Circuit Court, S. D. California. April 18, 1898.)

No. 636.

1. STATUTE OF LIMITATIONS—SURRENDER OF PLEDGE—ADMISSIONS.

A pledgor cannot compel the surrender to him of securities pledged, without paying the indebtedness, on the ground that the statute of limitations has run against it; and, further, he will be estopped from setting up the statute where, in his complaint in an action between the parties, he has admitted and alleged the indebtedness.

2. RESTRAINING ACTION IN FOREIGN COUNTRY—RES.

The court which first acquired jurisdiction of a cause and of the parties thereto will hold and maintain it, in order to end and settle the controversy; and, although the courts of one country are without authority to stay proceedings in the courts of another, they may, where the parties are residents of their countries, enjoin them from proceeding further, even where the res of the controversy may be in the foreign territory.

3. SAME.

Where an action has been commenced and is at issue in this country, between its citizens, and while the plaintiff is temporarily in England an action is commenced against him there by the defendants, involving questions that can be adjudicated under the pleadings in the action commenced here, an injunction will be granted restraining the defendants from proceeding further in the foreign action.

Collier & Evans and W. J. Hunsaker, for complainant.

Fox, Kellogg & Gray, for defendants.

ROSS, Circuit Judge. This suit was originally commenced in the superior court of Riverside county, Cal., on the 17th day of August, 1894. Before the issuance of summons in the cause, or the appearance of either of the defendants thereto, to wit, on the 19th day of November, 1894, the plaintiff filed his amended complaint against the same defendants, namely, the Riverside Trust Company, Limited, a corporation, the Northern Counties Investment Trust, Limited, a corporation, and three fictitious persons,—John Doe, Richard Roe, and Jane Doe. The suit grows out of two certain agreements,—the first made December 13, 1889, between the plaintiff, Gage, and one Wilson Crewdson, of England, and the other of September 23, 1891, between the plaintiff, Gage, and the Northern Counties Investment Trust, Limited,—both of which agreements are annexed to, and made a part of, the amended complaint, and contain a specific description of the property involved in the suit. At the time of the execution of the agreement of December 13, 1889, the county of Riverside, Cal., had not been created. The lands, waters, and water rights constituting

the subject-matter of that agreement were then within the boundaries of San Bernardino county, Cal.

In and by the amended complaint the plaintiff alleges that the defendant the Riverside Trust Company, Limited (hereinafter referred to as the "Trust Company"), was duly incorporated and organized under the laws of the kingdom of Great Britain and Ireland, and has an office and an agent in the city of Riverside, county of Riverside, state of California, where it is conducting an extensive business, and is the owner and holder of a large amount of real property; that the defendant the Northern Counties Investment Trust, Limited (hereinafter referred to as the "Investment Company"), is a corporation organized and existing under the laws of the kingdom of Great Britain and Ireland, and is conducting business in the state of California; that the defendants John Doe, Richard Roe, and Jane Doe, whose true names are to the plaintiff unknown, claim to have some interest in the property constituting the subject of the suit, which interest, if any, the plaintiff alleges, is inferior and subject to his claim. It is alleged that on or about the 13th day of December, 1889, the plaintiff was the owner, possessed of, and entitled to the property already referred to, and which is specifically described in the complaint, at which time the projectors of the Trust Company had in progress the formation of that corporation, for and on behalf of which Crewdson entered into the contract with the plaintiff; that pursuant to that agreement, and in accordance with its terms, the plaintiff did on or about March 11, 1890, convey, by good and sufficient deed, all the property mentioned, to the defendant Trust Company, and did in every other respect comply with his part of that agreement; that pursuant thereto 900 B shares of the stock of the company were allotted and set apart to Crewdson and one Waterhouse for and on account of the plaintiff, and that the plaintiff, subject to the conditions afterwards stated, is now the owner of and entitled to those shares, save and except 18 thereof sold and transferred by the plaintiff to the defendant Investment Company; that upon the organization of the Trust Company the plaintiff subscribed and paid for, and there were issued to him, 600 A shares of the stock of the Trust Company, each of which was of the face value of £50; that by the terms of the articles of incorporation of the Trust Company, and of the agreement of December 13, 1889, said 600 A shares of stock were preferred shares, and there was guarantied on the same by the Trust Company an accumulated dividend of 6 per cent. per annum upon the amount paid up by the holders of such shares; that there was paid up on said 600 A shares by this plaintiff 50 per cent. of the face value thereof (that is to say, £25 on each of said 600 A shares), and that by the terms of the said agreement the Trust Company further agreed to pay to the plaintiff, in consideration of the conveyance of the property mentioned, the sum of £38,000, and interest at 6 per cent. per annum, compounded annually, if not so paid; that by the terms of the organization of the Trust Company, and of the agreement of December 13, 1889, said 900 B shares of the stock of the Trust Company, after making payment of 6 per cent. per annum upon the amount paid up upon all of the said A shares of stock actually issued, and after the payment to the plaintiff of the sum of

£38,000 as provided for, entitled the plaintiff at the end of each year to three-fifths of all the net profits of the Trust Company accruing out of, and resulting from, the business carried on under and by virtue of its articles of incorporation, and of the agreement of December 13, 1889; that the sum of £38,000 was to bear interest at the rate of 6 per cent. per annum from January 1, 1890, payable annually, and that if the same was earned, and was not so paid annually, it was to be compounded at the rate of 6 per cent. per annum, with yearly rests, until the same should be fully paid and satisfied; that the sum of £38,000 was to be paid to the plaintiff by the Trust Company in the following manner, to wit: That, by the terms of the articles of incorporation of the Trust Company, that company was engaged in developing, improving, and selling land and water, and other property, and by the terms of the contract of December 13, 1889, it was agreed that at the end of each year, and after payment of the current and management expenses of carrying on the business, and the payment of interest on borrowed money, and dividends upon all of the A shares of stock outstanding, and any dividends which might have accumulated on the same, and which had not been paid at maturity, the surplus profits of the Trust Company should be paid to the plaintiff, towards the liquidation of the said sum of £38,000, and interest thereon which might have accrued, and which might have remained unpaid, and that three-fifths of any profit over and above such payments should be paid to plaintiff on his 900 B shares of stock of the Trust Company; that no greater sum than £2,000 has ever been paid to the plaintiff upon the said £38,000, which said sum of £2,000 was paid on or about the ——— day of August, 1891, and that no interest has ever been paid on said sum of £38,000, except interest to March 31, 1891. It is alleged that the whole amount of said £38,000, except the payments last mentioned, remains due and unpaid, together with interest thereon at the rate provided for from March 31, 1891, compounded, with yearly rests.

It is alleged that during the period elapsing between January 1, 1890, and March 31, 1891, there was left of profit, after the payment of all current and management expenses, and interest on borrowed money, and all dividends or accumulated dividends due on March 31, 1891, in the hands of the Trust Company, which had accumulated during that period, the sum of \$250,000; that an adjustment of the business transacted by the Trust Company was made on March 31, 1891, and an account taken and stated, from which there appeared to be, and were, in the hands of the defendant Trust Company, funds, properly applicable to the payment of said £38,000 and interest upon the claim and demand of the plaintiff, amply sufficient to have liquidated and paid the same in full, by reason of which the same became due and payable, together with all interest accumulated thereon, which payment the defendant Trust Company refused, and still refuses, to make, although often requested so to do; that said sum is so due the plaintiff for and in consideration and as part of the purchase money so agreed to be paid to the plaintiff in consideration of the conveyance of the property to the defendant Trust Company, to secure which the plaintiff had on March 31, 1891, and ever since has had, a vendor's lien

upon all of the said property. It is alleged that by reason of the failure and refusal of the defendant Trust Company to pay the plaintiff the said sum of £38,000 in accordance with the contract of December 13, 1889, it became and was necessary for the plaintiff, in order to meet certain obligations of his, to secure a loan of £18,000, which he did on or about September 23, 1891, from the defendant Investment Company; that, at the date of the plaintiff's application to the Investment Company for such loan, he had reason to believe that the Investment Company would deal fairly and justly with the plaintiff, and would in good faith collect from, and require the defendant Trust Company to pay, for the purpose of liquidating any money borrowed from it by the plaintiff, the sum of £38,000 then due the plaintiff from the Trust Company; that on the said 23d day of September, 1891, the plaintiff entered into a contract in writing with the Investment Company, which upon its face recited that it was to be read as supplemental to the aforesaid agreement of December 13, 1889, and by which the plaintiff assigned and transferred to the Investment Company his interest in and under the contract of December 13, 1889, together with the A and B shares of stock therein and hereinbefore specified, as security for the loan to the plaintiff of £18,000, with interest as therein stated, all of which have ever since been so held by the Investment Company. It is alleged that the Trust and Investment Companies have, since that transfer by the plaintiff to the Investment Company, conspired together to cheat and defraud the plaintiff out of his entire claim of £38,000, and out of his A and B shares of stock in the Trust Company, and are now, and have been for a long time, engaged and co-operating together for the purpose of preventing the plaintiff from realizing anything therefrom; that the president of the Investment Company is a large stockholder in the Trust Company, and has been so for a long time past; that he is now, and has been during all the time mentioned in the complaint, the chairman of the Investment Company, and at the same time has been one of the directors of the Trust Company, and so continues; that the Investment Company is a large stockholder in the Trust Company, owning and holding 360 of its A shares; that since the conveyance by the plaintiff to the Trust Company of the property described in that contract the said Trust Company has executed and issued certain obligations, known and styled by it as "debentures," amounting in all to about \$550,000, a large number of which have been purchased, and are now owned, and have been owned for a long time, by the stockholders of the Trust Company; that a large number of them are now, and have been for a long time, owned by the Investment Company, and that about \$85,000 of said debentures have been disposed of by the Investment Company to various parties, and guarantied by it prior to such disposal, and that the same are now secured by such guaranty, and that a large proportion of such debentures were so issued, negotiated, and held prior to the date of the said transfer by the plaintiff to the Investment Company of his A and B shares of the stock of the Trust Company, and of his claim and lien against that company; that for the purpose



of rendering the debentures held by the stockholders of the Trust Company and by the Investment Company more valuable, and for the further purpose of making good the contract of the Trust Company as evidenced by said debentures held by parties disinterested in either of the said companies, but guarantied by the Investment Company as aforesaid, and of relieving the Investment Company from liability as such guarantor, the defendant companies have conspired together, and are now conspiring, to defraud the plaintiff out of his entire interest in his claim against the Trust Company, and to forfeit, without legal right, and to appropriate to their own use, his A and B shares of the stock of the Trust Company, and, to that end, have denied all interest or claim of the plaintiff in and to any of the said property, and have refused in any manner to recognize his interest therein, or in any manner to endeavor to protect the same.

It is alleged that on the 31st day of March, 1891, the Trust Company made a statement of its affairs, and of its financial condition and profits for the time elapsing between January 1, 1890, and March 31, 1891, which showed that during that period the Trust Company had sold 936 acres of its lands, at an average price of \$400 per acre, and 17.9 inches of water at an average price of \$750 per inch, amounting in all to the sum of \$386,000, which property, according to said statement, cost the Trust Company only \$142,000, and that it likewise appeared therefrom that the expense of management and interest and dividends amounted to less than \$40,000, leaving in the hands of the Trust Company, as net profit, over \$250,000, out of which there became immediately due and payable to the plaintiff sufficient to satisfy his rights under the contract of December 13, 1889; that the Trust Company, after preparing and approving and submitting said statement of account at its annual meeting, colluded and conspired with the Investment Company to cheat and defraud the plaintiff, in pursuance of which purpose they have so changed and altered the said statement of accounts as to endeavor to make the same show that no profits of any kind were made during the aforesaid period which would become due to the plaintiff from the Trust Company; that each and every of the said collusive and fraudulent acts were performed while the Investment Company, as trustee of the plaintiff, was holding for collection the plaintiff's claim against the Trust Company, and while it was the duty of the Investment Company to require the Trust Company to pay the said profits, so determined and stated, upon the claim of the plaintiff; that by the aforesaid statement of accounts made and approved by the Trust Company on March 31, 1891, it was shown that there was in the hands of that company, profits to which the plaintiff was entitled under the contract of December 13, 1889, the sum of £11,364. 8s. 2d., which profits the plaintiff alleges were really far greater than thus stated, but that since the making of such statement the defendant companies, for the purpose of preventing the plaintiff from realizing anything upon his interests so transferred to the Investment Company as aforesaid, conspired to, and did, so alter and change the aforesaid state-

ment of accounts of the Trust Company as to cancel and erase from the books of that company, and from its statement, the said balance of £11,364. 8s. 2d., and have agreed that the same shall not be paid by the Trust Company, or collected by the Investment Company, and that the same shall not in any manner apply upon the claim of the plaintiff, notwithstanding the said amount has at all times since the said transfer by the plaintiff of his contract and shares of stock to the Investment Company been in the possession of the Trust Company, and due and payable to the plaintiff, and to the Investment Company as his trustee. It is alleged that the Investment Company has not in any manner proceeded, by foreclosure or otherwise, to subject the interest of the plaintiff in the contract and shares of stock transferred to it as security to the payment of its claim, but refuses absolutely to call upon or to require the Trust Company to pay any portion of the amount due the plaintiff, and refuses to join with the plaintiff in any suit or proceeding to collect the same, for which reason the plaintiff has been compelled to make the Investment Company a party defendant to this suit. It is alleged that the plaintiff, prior to the institution of the suit, demanded, in writing, of the Investment Company, that it proceed to collect the said sum due from the Trust Company to the plaintiff under the aforesaid contract of December 13, 1889, which demand was refused; that the defendants, and each of them, wrongfully deny that the plaintiff has any interest in the contract of December 13, 1889, or its proceeds, or to the said shares of stock; that the reasonable value of the said A and B shares, and of the plaintiff's interest, held by the Investment Company, is the sum of \$1,000,000, all of which property was given and is held in trust by the Investment Company as collateral security as aforesaid.

The prayer is for an accounting between the plaintiff and defendants; that the amount due from the plaintiff to the Investment Company be ascertained and determined, and payment thereof provided for in such manner as shall be found equitable; that the amount due the plaintiff on account of said sum of £38,000 be ascertained and adjudged due as purchase money, in part, of the land and property referred to; that the plaintiff be decreed a vendor's lien on the said land for the amount found due to him, and that the interest of the Trust Company in such property be sold to pay the plaintiff's claim, and the shares of stock be adjudged to the plaintiff; and that the plaintiff have judgment for the sum of \$750,000 damages against the defendant companies, and for such other and further relief as equity demands.

Upon the petition of the defendant companies the cause was removed from the state court to this court, and here, severing from their co-defendants sued by fictitious names, they answered jointly on the 27th day of May, 1895. By their answer they allege that the Trust Company has the absolute, fee-simple title to all of the property conveyed by the plaintiff's deed to it, except such portions as have been since sold by the Trust Company to bona fide purchasers, and deny that upon any portion of the property there exists, or ever has existed, any vendor's or other lien in favor of the plain-

tiff. They deny that the complaint correctly sets forth the terms or conditions of the contract of December 13, 1889, and allege that the terms, conditions, provisions, and stipulations under which the £38,000 and three-fifths of the profits were to be paid to the plaintiff, and the A and B shares issued to him, were as follows, and not otherwise:

"Third. The consideration for such transfer and assurance shall be: (1) Payment on or before the said 25th day of January next by the Trust Company to the vendor, or his nominee or nominees, of the sum of 168,000 pounds upon the said lands, canal, water rights, and property being effectually vested in the Trust Company, or its nominee or nominees, free from incumbrances; a good title having been previously shown thereto, to the satisfaction of the American and English legal advisers of the Trust Company: provided, always, that if a less sum than 160,000 pounds shall, as on the date of these presents, prove to be charged on the said premises by way of mortgage, or of lien for unpaid purchase money, or under a contract for purchase, including interest, then the difference between the sums so charged and the sum of 160,000 pounds shall be deducted from the said sum of 168,000 pounds so payable as aforesaid, and shall be added to, and shall be paid in the same manner as, the sum of 38,000 pounds payable to the vendor as hereinafter provided. (2) The allotment to the said Wilson Crewdson, as nominee of the vendor, of 100 B shares, of one pound each, numbered consecutively from one to one hundred, and the allotment to said Wilson Crewdson and to Theodore Waterhouse, of New Court, Lincoln's Inn, as nominees of the vendor, of 900 B shares, of one pound each, numbered consecutively from 101 to 1,000; all such shares to be credited as fully paid up, and registered accordingly, and to be held respectively by the said Wilson Crewdson and Theodore Waterhouse in manner hereinafter mentioned. (3) The reservation of 800 A shares for allotment to the vendor, and to be taken when issued in satisfaction, pro tanto, of the payment referred to in the next paragraph: provided, always, that the directors of the Trust Company shall be at liberty at any time to require the vendor to take up the same shares, or any portion thereof, and to pay up thereupon as much capital as shall for the time being be called upon the A shares then already issued, and to retain and apply on account of such shares any moneys which would otherwise be payable to the vendor under subsection 4 of this clause. (4) The payment of the further sum of 38,000 pounds and interest in the manner and upon the terms and conditions hereinafter mentioned, that is to say: (a) The said sum of 38,000 pounds, and any additions thereto as above mentioned, or so much thereof as shall for the time being remain unpaid, shall carry interest at the rate of six per cent. per annum from the 1st day of January, 1890. Such interest shall be credited to the vendor *pari passu* with the payment of the cumulative six per cent. dividend on the A shares. And, when and so soon as any such interest shall be credited to the vendor, it shall carry compound interest at the rate of 6 per cent. per annum, with yearly rests, until it shall be paid or satisfied. (b) At the end of each year after payment of all current and management expenses, and interest on borrowed money, and dividends (including arrears, if any, of cumulative dividends) at the rate of 6 per cent. on the capital for the time being paid up on the A shares, the surplus profits of the year shall be paid to the vendor, in or towards the liquidation of the said sum of 38,000 pounds and any additions as aforesaid, and interest thereon as aforesaid, until the same shall be fully paid and satisfied. (c) The vendor will at any time, and from time to time, upon receiving notice from the company, take up the whole or any part of the said 800 A shares, as the company may require, and shall forthwith pay up upon them as much as shall then be called up upon each of the other A shares then already issued, and any of such shares not taken up and paid for by the vendor within sixty days from the sending of such notice may be issued and allotted by the company in such manner and to such person as they think fit. (d) The directors shall have power at any time, and from time to time, to satisfy the whole or any part of the said sum of 38,000 pounds, and any additions thereto as aforesaid, and interest, in the first place, by issuing to the vendor, at par

value, A shares of the company, so far as there shall be any such unissued, and upon each of such shares so much capital shall be deemed to be paid up as shall be then paid or called up upon any of the A shares then already issued; and, in the second place, so far as there shall not be any A shares of the company unissued, by payments in cash. (e) On any sale of the company's undertaking, or on a winding up after paying all debts, and returning the amount paid up on the A shares, with all dividends due upon the same, any balance then unpaid of the said sum of 38,000 pounds, and any addition and interest as aforesaid, shall be a first charge on the surplus assets, if any."

The answer denies that no greater sum than £2,000 has been paid to the plaintiff upon said £38,000, but avers that in or about the month of August, 1891, the Trust Company paid to the plaintiff, under the conditions and provisions of the agreement of December 13, 1889, £2,115.16 on account of the principal, and £2,884.4 on account of interest. The answer denies that anything was due the plaintiff under the contract at the time of the commencement of the suit, or has since become due. It denies all of the allegations of the complaint in respect to collusion and fraud between the defendant companies, denies that the president of the Investment Company is, or has ever been, in his own right, a holder of shares of the Trust Company, and avers that the shares held by him therein are and were for the benefit of the Investment Company, for which reason only he became a director of the Trust Company. With respect to the statement of accounts alleged in the complaint, the answer alleges that it was not made until the month of July, 1891, and was not submitted to the Trust Company until August 5th of that year, and it denies that it properly appeared from that statement that any amount of profit had been made by the Trust Company during the period referred to in the complaint. The answer admits that it did appear from that statement that 936 acres of the company's lands had been sold, at an average price of \$400 per acre, and 17.9 inches of water, at an average price of \$750 per inch; but it alleges that, though those sales had been made, and by said account an apparent profit of £18,489. 1s. 3d. was shown, the truth is that nearly all of such sales had been made upon credit, and that at that time but small payments had been made thereon, and that from that date to this but small amounts, in the aggregate, have been collected thereon; that, within eight days after the presentation of the statement of accounts to the shareholders of the Trust Company, its directors discovered that the report was incorrect; that no profits over and above the expense of management, interest, accumulated dividends, and payments allowed by the agreement of December 13, 1889, to be made before any application of surplus profits to the £38,000 to be paid to the plaintiff, had in fact been realized, and that no such surplus profits existed on March 31, 1891, or have since existed, and that the Trust Company did not have on March 31, 1891, the sum of \$250,000, or any other sum, in net profits; and that no sum of money at the commencement of this suit was due or payable, or is now due or payable, to the plaintiff, or to any other person, under the contract of December 13, 1889, on account of said £38,000, or interest thereon. The answer alleges that the directors of the Trust Company

promptly issued a supplemental report to the shareholders of the company, correcting the account prepared in July, 1891, and so submitted to the shareholders in August of that year, and that such correction was true, and made in good faith, and for no other purpose than to truly and properly present the exact facts in relation to the accounts of the Trust Company, all of which facts were known to the plaintiff. The defendant companies, by their answer, deny that the plaintiff has any interest in the contract or shares of stock, or in the properties therein described, transferred by him to the Investment Company, and allege that after his said assignment, and in the month of June, 1893, the plaintiff, for valuable consideration, assigned and granted to the Investment Company all his right, title, and interest in and to the said contract and shares, and the properties therein described, to the Investment Company, since which time he has had no interest whatever therein. The answer of the defendant companies further alleges that in and by a supplemental written agreement to that of December 13, 1889, to wit, an agreement entered into on the 18th day of December, 1889, between the plaintiff, Crewdson, and the Trust Company, the Trust Company was subrogated to all the rights of Crewdson under the contract of December 13, 1889, and Crewdson discharged from all liability thereunder, except as to the last stipulation in clause 20 thereof. The answer also pleads in defense of the suit the statute of limitations of the state of California, and further avers that in September, 1891, the Trust Company demanded of the plaintiff that he take up the said 800 A shares reserved for him by the agreement of December 13, 1889, and pay for the same as therein provided, which the plaintiff refused and neglected to do. The answer also avers that the payment of £38,000 and interest to the plaintiff provided for by the contract of December 13, 1889, was made contingent upon surplus profits arising to the Trust Company from sales by it of the property conveyed to it by the plaintiff, untrammelled and unaffected by any alleged claims of his upon those properties, by reason of which the plaintiff waived all vendor's or other liens thereon, and, further, that by his alleged vendor's lien he has further violated the terms and conditions of the contract of December 13, 1889. Other particulars are specified, in which the answer alleges the plaintiff waived all liens upon the properties conveyed by him to the Trust Company, and in which he is alleged to have failed to comply with his part of the contract of December 13, 1889. The answer avers full compliance upon the part of the Trust Company with its part of the contract, and specifically denies that it has realized any profits properly payable to the plaintiff thereunder, other than the payments alleged to have been made. It further avers that:

"If, under all the facts, it shall be found by final ultimate judgment (or affirmance thereof on appeal) herein that any sum is due and payable on account of the said balance of said £38,000 and interest from said Riverside Trust Company, Limited, the same should be decreed to be payable in said A shares, according to subsection 3 of paragraph 3, and subdivision d of subsection 4 of said paragraph 3 of said Exhibit A, for that and this defendant the Riverside Trust Company, Limited, hereby elects to so pay such sum,

if any such sum shall by such final judgment or affirmance thereof herein be found so due and payable, and in such case, but only in such case, prays that the same be so made payable, for that under said Exhibit A it has the right of such election and option."

On December 20, 1897, the complainant filed herein a petition, referring to, and making part thereof, the amended bill of complaint, and the answer of the defendant companies, with the exhibits annexed thereto, and in which it is, among other things, alleged that by stipulation of the respective parties to the suit, and under orders of this court based upon such stipulation, the time for taking the testimony in the cause has been extended from time to time; that, long prior to the filing of the said bill of complaint by the plaintiff, the defendant companies, and each of them, denied to the plaintiff that he had any right, title, interest, or equity of redemption whatsoever in or to said A and B shares of stock, or any thereof, or in or to the said contract for the sum of £38,000, each and every of which claims on the part of the defendant companies, the petitioner alleges, were wrongful and false; that at no time had the plaintiff surrendered, or been in any manner divested by any proceeding or agreement of his interest in the A and B shares of stock, or any thereof, or of his interest, rights, and equities under and by virtue of the contract of December 13, 1889; that the plaintiff never at any time subsequent to his mortgage to the Investment Company assigned or transferred to that company his equity of redemption, or any further right, title, or interest in or to the A and B shares of stock, or in or under the contract of December 13, 1889; that, by reason of the pleadings of the respective parties in this cause, all the matters of accounting, rights, equities, and interests between the plaintiff and the defendant companies under and by virtue of the contracts of December 13, 1889, and September 23, 1891, were in litigation and pending, with all of said parties personally in court, for adjudication, on the 21st day of July, 1897, and have ever since continued to be pending in this court; that during the summer of 1897 the petitioner had business in the city of London, England, and that while temporarily there, to wit, in July, 1897, the defendant Investment Company caused to be filed in the high court of justice, chancery division, before Justice North, a "statement of claim," as designated by the practice in that court, against this petitioner, on which he caused to be issued on the 16th day of July, 1897, a writ of summons of said court, directed to this petitioner, requiring and commanding him that within eight days after the service of that writ, inclusive of the day of said service, he cause to be entered in that proceeding his appearance; that the petitioner, upon service of the said writ, employed, for the purpose of preventing default against him, Messrs. Lyne & Holman, of the city of London, as his solicitors, and that afterwards, to wit, on the 4th day of August, 1897, there was delivered, pursuant to the practice of that court, to the petitioner's said solicitors, the statement of plaintiffs' claim, as made and filed in the said high court of justice; that subsequently the said statement of claim, as to the third and sixth

paragraphs, was amended, and that the said claim, as amended, was delivered to the petitioner's solicitors on the 20th day of August, 1897, copies of each of which statements of claim, together with a copy of the said summons, are annexed to, and made a part of, the petition. The petition further alleges that the said high court of justice is a court of record in the city of London, having chancery jurisdiction; that said statement of claim so filed in said court contains the allegations of the claim of the Investment Company against the petitioner, and sets out in detail an alleged cause of action against the petitioner herein in favor of the Investment Company, and that by the rules of practice and proceedings in said high court of justice the petitioner herein is required, pursuant to the said summons, to answer the same, and to submit to an adjudication of the matters and things set out and claimed in said statement of claim, the adjudication of which is within the jurisdiction of the said high court of justice. The petition alleges that each and every of the issues involved in said statement of claim is wholly with reference to the said A and B shares of stock in controversy in this suit between the petitioner herein, as complainant, and the defendant companies, and with reference to the said contracts of December 13, 1889, and September 23, 1891; that each and every of the matters and things presented in said statement of claim so filed in the high court of justice are involved, pending, and being litigated, and were involved, pending, and being litigated, in this court, long prior to the commencement of said proceeding in said high court of justice of England, and that this court then had and still has full and complete jurisdiction of all said matters and issues, and of the parties interested in said contracts, and in said A and B shares of stock, and is fully competent to administer and determine each and every of said matters between the petitioner herein and the defendant companies in this suit; that Frederick Priestman, Isaac Smith, and John Henry Wade are made parties plaintiff in said proceeding in said high court of justice of England, as well as the Investment Company; that said Priestman, Smith, and Wade have no interest whatever in the subject-matter of said litigation, except that they are alleged in said statement of claim to be trustees for the Investment Company of 600 of the A shares of stock of the petitioner herein, and have no personal interest in that action, or in the result thereof; that ever since about June, 1893, the defendant companies, and each of them, have claimed and alleged that the petitioner herein has no interest whatever in the said contract of December 13, 1889, or in said A and B shares of stock, and in their answer filed in this suit so alleged and declared; that since about June, 1893, the Trust Company has declined to give to the petitioner herein any information in regard to the business and state of accounts of said corporation due to a stockholder and party interested therein, and has declined to permit the petitioner to examine its books of account, or to advise himself in any manner in respect to its affairs, and has given as a reason for such refusal that this plaintiff has no longer any interest in said contract of December 13, 1889, or in

said A and B shares, or any of them, by reason of which denials and assertions the petitioner was compelled to, and did, begin the present suit. The petition alleges that the business of the Trust Company is almost entirely carried on and prosecuted in the county of Riverside, state of California, and consists of the business of selling real estate, developing water, improving property, planting and caring for and cultivating orange orchards, all of which is done and carried on upon and in connection with the lands conveyed by the petitioner to the Trust Company under and pursuant to the provisions of the contract of December 13, 1889; that the office of the Trust Company, through which such business is conducted, is, and has been at all times since March 31, 1890, located in the city of Riverside, where its books of account have been kept, and that all the data necessary for fully stating the accounts between the respective parties are in that office, and that the witnesses by whom the petitioner, as plaintiff in this suit, will be required to make proof of the state of accounts, and establish the values of the properties of the Trust Company, and by whom it will be necessary to fix such values for the purpose of stating the accounts, and of estimating the profits as between the complainant and the Trust Company, and of stating and determining the accounts between the complainant and the Investment Company, reside at or in the vicinity of Riverside, Cal., and not within the jurisdiction of the said high court of justice of England; that, by reason of the wrongful acts of the defendant companies as set out in his bill of complaint, and by reason of the long-continued and persistent denials of all equity and interest on his part in the contract of December 13, 1889, and in the said A and B shares of stock, the petitioner's credit has been destroyed, his ability to provide funds for the prosecution of his rights has been greatly impaired, and that while he can continue this litigation where the witnesses reside, and where the property and interests and accounts are located and kept, he is unable to make such defense as is necessary in the English court in order to preserve his equities and rights; that, by reason of the facts alleged, said proceeding so commenced in the said high court of justice of England is vexatious, and wholly unnecessary to a full and complete adjudication of the rights of the parties, and will be attended by great and unnecessary expense, which the petitioner is unable to meet; that, unless the defendant Investment Company is restrained and enjoined from proceeding in said action, the said suit will be prosecuted to decree in the said high court of justice against the petitioner while the petitioner is litigating the same matters in this prior suit.

Upon the filing of the petition the court entered an order directing the defendant Investment Company to show cause at a specified time why it should not be enjoined, pending the determination of this suit, from prosecuting the suit so commenced by it in the high court of justice of England, and in the meantime restraining the said Investment Company from so doing. In response to the order to show cause there was filed on behalf of the defendant Investment Company an affidavit of its solicitor, in which it is, among other things, averred



that this suit does not involve the issue, or any of the issues, involved in that commenced in the high court of justice of England; that that suit was for the foreclosure of the mortgage executed by Gage to the Investment Company, all of which mortgaged property was at the time of the execution of the mortgage, and since has been, located in England, and is not now, and never has been, within the jurisdiction of this court; that the parties in the two suits are different; and that by his bill of complaint in this suit Gage does not seek, and never has sought, to have either the said A and B shares, or any of the rights conferred upon him by the agreement of December 13, 1889, and by him mortgaged to the Investment Company, sold in order to pay that mortgage. The affidavit filed on behalf of the Investment Company also puts in issue the averments of the petition to the effect that the plaintiff, Gage, has never surrendered his equity of redemption in the mortgaged property, and sets out certain correspondence, by letter and wire, between Gage and the Investment Company, from which it is claimed that such surrender is shown. In respect to the correspondence, it is sufficient now to say that, while it shows great leniency on the part of the creditor company towards its debtor, Gage, and repeated failures on his part to make good his many promises of payment, the communications fall far short of showing a consummated agreement by which Gage surrendered to the Investment Company his equities in the mortgaged property. And, as has been seen, the suit in the high court of justice of England was brought for the purpose of foreclosing the mortgage executed by Gage to the Investment Company, the commencement and prosecution of which presupposes the existence in the mortgagor of equities, the termination of which was the object of that suit. It is urged on behalf of the Investment Company that the same purpose is not within the scope of the pleadings filed in this suit. It is true that, in his bill of complaint, Gage does not ask that the A and B shares of the stock of the Trust Company, and the other rights acquired by him under the contract of December 13, 1889, and mortgaged by him to the Investment Company, be sold to pay his indebtedness to that company; but he does set up the mortgage to the Investment Company, as well as his contract with the Trust Company, and does allege that indebtedness, as well as his rights under the contract of December 13, 1889, and asks for an accounting with both the Trust Company and the Investment Company, and that his indebtedness to the Investment Company be ascertained and determined, and payment thereof provided for by the decree of this court, and for such other decree as equity demands. The contract of mortgage or pledge between the complainant, Gage, and the defendant Investment Company, contains, among other provisions, the following:

"In consideration of the premises, the mortgagor doth hereby irrevocably empower, during the continuance of this security, the company, and their assigns or officers or agents, to be the attorney or attorneys of the mortgagor, in his name or otherwise to demand, sue for, recover, receive, and give receipts for all or any moneys becoming due or receivable in respect of any of the mortgaged premises, and to execute and do all such transfers and things as are hereby covenanted to be executed and done by the mortgagor, and to give effectual discharges to the Riverside Trust Company for all moneys or shares

payable or redeliverable to the mortgagor under the terms of the said agreement; and it is hereby agreed and declared that it shall be lawful for the company to settle, arrange, compromise, and submit to arbitration any accounts, claims, questions, or disputes whatsoever which may arise with the Riverside Trust Company in connection with the said agreement, or any person or persons, company or companies whatsoever in relation to the premises, and to execute releases and other discharges in relation thereto, and to commence, prosecute, defend, compromise, submit to arbitration, and abandon any actions, suits, or proceedings whatsoever in any wise relating thereto, and, for or in relation to any of the purposes aforesaid, to execute and do all such assurances, contracts, instruments, and things as may be or appear necessary or proper, with full power to use the name of the mortgagor for the purpose of exercising any of the powers aforesaid or otherwise in relation to the premises."

Certainly, in view of this stipulation, the claim on the part of the Investment Company, that it was under no obligation to demand, and, if necessary, sue for, whatever, if any, moneys became due from the Trust Company to Gage, cannot be sustained. The bill in this suit alleges, as has been seen, that prior to its institution more money had become due to Gage from the Trust Company under the contract of December 13, 1889, than is sufficient to discharge his indebtedness to the Investment Company. Issue was taken by both the Trust Company and Investment Company upon that allegation, and is one of the issues to be tried in this suit. Conceding that the proof, when taken, may show the facts to be with the defendant companies in respect to that matter, the Investment Company's mortgage remains alleged in the amended bill and admitted in the answer, and the complainant's indebtedness to the Investment Company remains alleged in the amended bill and admitted in the answer (although issue is therein taken as to its exact amount), as well as the prayer on the part of the complainant that the complainant's said indebtedness to the Investment Company be ascertained and determined, and payment thereof provided for by the decree of this court, and for such further decree as equity demands. Under these allegations and this prayer, I see no difficulty in the way of a decree being entered in this suit, if the facts should justify it, fixing and determining the amount of the indebtedness from Gage to the Investment Company, and providing for its payment by the sale of the property mortgaged by him as security for such payment. In view of the claim of the Investment Company, as shown by the averments not only of the amended bill in this suit, but of the answer of both the Trust Company and the Investment Company as well, to the effect that long prior to the bringing of this suit, and necessarily long prior to the bringing of the subsequent suit in the high court of justice of England, the Investment Company denied any right or equity on the part of Gage in or to any of the mortgaged property, and asserted that he had theretofore surrendered and conveyed to it all of his rights and equities therein, it is not surprising that neither of the pleadings in this suit in terms asked for the foreclosure of the mortgage from Gage to the Investment Company. The complainant could hardly be expected to do more, after setting up his alleged rights as against the claim of the Investment Company, than to ask that his indebtedness under the mortgage, which he alleged and set out, be ascertained and determined, and payment thereof provided for, and the securities be adjudged to be returned to him. And as

the Investment Company admitted, as well as asserted, by its answer to the bill, that the complainant, prior to the institution of his suit, had surrendered and conveyed to the Investment Company all of his rights and equities in the mortgaged property, the assertion by it of a right to foreclose that mortgage could hardly be expected in the same pleading. If, however, the Investment Company had in this suit assumed the position taken by it in bringing the subsequent suit in the high court of justice of England, that there were subsisting equities on the part of Gage in the mortgaged property which it desired to cut off and end by a foreclosure, no reason is perceived why it could not have done so in this suit by a cross bill, nor any reason why it may not yet do so. But, as already stated, I have no doubt that without such a cross bill the scope of the pleadings in the present suit is sufficient to warrant the entry of a decree for the foreclosure of that mortgage, in the event the proof be such as to justify it, even though it be also shown that the complainant has no cause of action against the Trust Company. It is not important that the shares of stock, and the written contract by which the complainant mortgaged or pledged them, together with his rights and interests in and under the contract of December 13, 1889, to the Investment Company, are, and ever since the execution of the mortgage have been, in England. Those papers are but evidences of rights in and growing out of the property that is situated, and always has been situated, in California, and within the jurisdiction of this court. Besides:

"Where the necessary parties are before a court of equity, it is immaterial that the res of the controversy, whether it be real or personal property, is beyond the territorial jurisdiction of the tribunal. It has the power to compel the defendant to do all things necessary, according to the *lex loci rei sitæ*, which he could do voluntarily to give full effect to the decree against him. Without regard to the situation of the subject-matter, such courts consider the equities between the parties, and decree in personam according to those equities, and enforce obedience to their decrees by process in personam." *Phelps v. McDonald*, 99 U. S. 298, 308; *Cole v. Cunningham*, 133 U. S. 119, 10 Sup. Ct. 269.

The suggestion that the granting of the injunction asked for may enable the statute of limitations to run against the Investment Company's rights under the mortgage is without force, for several reasons. In the first place, it is not now sought to compel the defendant Investment Company to dismiss its suit in the high court of justice of England, but only to enjoin it from prosecuting that suit during the pendency of this prior suit. In the second place, as it is a fact conceded by the pleadings on all sides that the pledged or mortgaged property is held by the Investment Company as security for money loaned by it to the complainant, that company could not be compelled to surrender the security without full payment of its debt, even though the statute of limitations had fully run in the complainant's favor. *Whitmore v. Savings Union*, 50 Cal. 150; *Grant v. Burr*, 54 Cal. 300; *Spect v. Spect*, 88 Cal. 437, 26 Pac. 203. In the third place, the complainant would be estopped by the allegations and prayer of his bill of complaint from setting up the statute of limitations in bar of his admitted and alleged indebtedness. *Railroad Co. v. Howard*, 13 How. 335, 336; *Bowen v. Stribling* (S. C.) 24 S. E. 986; 2 Herm. Estop. & Res. Adj. 912. The power of a court of chancery, in a proper case, to restrain

persons within its jurisdiction from prosecuting suits in other courts, foreign or domestic, is well settled. In *Lord Portarlington v. Souby*, 3 Mylne & K. 104, 106, Lord Chancellor Brougham reviews the history of the jurisdiction to restrain parties from commencing or prosecuting actions in foreign countries, and concludes:

"Nothing can be more unfounded than the doubts of the jurisdiction. That is grounded, like all other jurisdiction of the court, not upon any pretension to the exercise of judicial and administrative rights abroad, but on the circumstance of the person of the party on whom this order is made being within the power of the court." *Earl of Oxford's Case*, 1 Ch. R. 1, 2 *White & T. Lead. Cas. Eq.* 1316.

Mr. Justice Story states the principle thus:

"But, although the courts of one country have no authority to stay proceedings in the courts of another, they have an undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are resident within the territorial limits of another country, the courts of equity in the latter may act in personam upon those parties, and direct them, by injunction, to proceed no further in such suit. In such a case these courts act upon acknowledged principles of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties, and decree in personam according to those equities, and enforce obedience to their decrees by process in personam. \* \* \* It is now held that, whenever the parties are resident within a country, the courts of that country have full authority to act upon them personally, with respect to the subject of suits in a foreign country, as the ends of justice may require, and, with that view, to order them to take, or omit to take, any steps and proceedings in any other court of justice, whether in the same country, or in any foreign country." *Story, Eq. Jur.* §§ 899, 900.

See, also, *Dehon v. Foster*, 4 Allen, 550; *Massie v. Watts*, 6 Cranch, 158; *Cole v. Cunningham*, 133 U. S. 118, 10 Sup. Ct. 269; *Phelps v. McDonald*, 99 U. S. 298; *Beach*, Mod. Eq. Prac. §§ 763, 764.

The proposition that the court which first acquires jurisdiction of a cause and of the parties thereto will hold and maintain it, in order to settle and end the controversy, does not admit of question. From the views expressed, it results that the injunction asked for should be granted, and it is so ordered.

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#### FIRST NAT. BANK OF PLATTSMOUTH, NEB., v. WOODRUM et al.

(Circuit Court, S. D. Iowa, W. D. July 19, 1897.)

No. 325.

#### DEED—CONSTRUCTION—TRANSFER OF DOWER ESTATE.

Defendant (who was of very advanced age), as dowress, owned a life estate in the undivided one-third of three 80-acre tracts of land; the fee to all the tracts, subject to such dower interest, being in her son. Plaintiff bank (a creditor of the son for \$2,000), by paying the claim of another creditor, who had bought in the son's interest in the land for \$3,500, became owner of the son's title. Plaintiff sold two of the tracts for \$4,000; obtaining a deed thereto from defendant, which recited as the consideration "the full enjoyment and possession and profits" of the remaining tract, on which defendant resided, and the market value of which was \$2,000. *Held*, the testimony being in conflict, and construing the deed in the light of the situation and circumstances of the parties, that it was not the intention to give

defendant the full title to such tract, but merely the entire use of it during the continuance of her dower estate, in lieu of her former right to one-third of the income from the three tracts.

This was a bill in chancery filed by the First National Bank of Plattsmouth, Neb., against Neaty Woodrum and others, to set aside certain conveyances made by said respondent to her co-respondents. Heard on the pleadings and proofs.

Samuel W. Chapman and Finley Burke, for plaintiff.

W. E. Mitchel and Emmet Tinley, for defendants.

WOOLSON, District Judge. The pleadings in this suit present much of agreement, and but little of disagreement, as to the facts whose existence determines the decree to be herein entered. The proof narrows yet further this contention. Substantially, the matter in dispute is to be determined by the construction to be given to phraseology contained in a deed from defendant Neaty Woodrum to the plaintiff bank. The proof establishes the following facts:

At the commencement of this action the plaintiff bank was a corporation organized under the laws of the United States, with its place of business in the state of Nebraska, while the defendants were all citizens of the state of Iowa. About 1856 Washington Woodrum received from the United States letters patent for certain land, which included three 80-acre tracts in Fremont county, Iowa. One of these three 80-acre tracts comprises the disputed premises in suit at bar. In 1859 said Washington Woodrum died intestate; leaving surviving him his widow, the defendant Neaty Woodrum, and nine sons and daughters, among whom were defendants Wilson Woodrum and Allen S. Woodrum. The remaining defendant, Eunice A. Woodrum, is the wife of defendant Wilson Woodrum. His death left said real estate in fee to said sons and daughters,—charged, however, with the dower estate (a life interest) of the widow. Wilson Woodrum subsequently bought, and received conveyances to, said lands, from all his brothers and sisters; so that, subject to his mother's (the widow) life interest, Wilson Woodrum was the owner in fee of said three 80-acre tracts. From time to time the plaintiff bank loaned money to Wilson Woodrum, who was then quite largely engaged in stock dealing and shipping. In February, 1886, Wilson Woodrum was indebted to plaintiff bank something over \$2,000, and he was surety on a note held by the bank for about \$400. Woodrum had become indebted to Brown, Metleman & Co., of Sidney, Iowa, for about \$3,500. This Sidney firm had obtained judgment for their debt against Woodrum in an action aided by attachment, and had bid in at sheriff's sale, on execution under their said judgment, certain land, including the three 80-acre tracts above referred to. The plaintiff bank on February 24, 1886, paid to the Sidney firm \$3,500, and became the owners of Wilson Woodrum's interest in said tracts; that is, they became the owners in fee simple of said three tracts,—the same, however, being charged with the dower (life interest) of said widow Neaty Woodrum. In October, 1887, the bank found opportunity to sell two of these tracts, provided it could convey the full

title to the same. Thereupon negotiations were had with said widow, Neaty Woodrum, which resulted in her executing to said bank on October 28, 1887, her deed for said two of the three 80-acre tracts. The vital question herein is the construction of said deed. So far as the same is material herein, said deed is as follows, omitting the formal or immaterial (to this suit) portions:

"Know all men by these presents, that Neaty Woodrum, widow of Washington Woodrum, \* \* \* in consideration of the sum of one dollar, and the full enjoyment and possession and profits of the east half of the southeast quarter of Sec. 34, Town. 70, range 43, Fremont county, Iowa, do hereby quitclaim and convey unto the First National Bank of Plattsmouth \* \* \* [here follows description of the other two eighty-acre tracts]; the object and purport of this conveyance being to release all claims of dower, homestead, or other right of Neaty Woodrum, widow of Washington, deceased, of, in, and to the above-described land. In witness whereof, I have set my hand this 28th day of Oct., 1887.

"In presence of W. R. Paul.

her  
Neaty X Woodrum."  
mark.

At date of execution of this deed, said Neaty Woodrum was entitled to, and was receiving, her one-third interest in all of said three tracts. The dwelling house in which she lived was situated upon the 80-acre tract first above described in her said deed, which is the 80-acre tract not included in the terms of conveyance to the bank in said deed. On December 19, 1894, said Neaty Woodrum executed two deeds of conveyance for said last above stated 80-acre tract; the north 40 acres being thereby conveyed to defendant Allen S. Woodrum, and the south 40 acres thereof to defendant Eunice A. Woodrum, who is the wife of defendant Wilson Woodrum. These deeds are identical in terms, except as to description of land conveyed. In each deed the consideration is "the sum of one dollar in hand paid," and each deed contains this reservation in favor of the grantor, viz.: "The same to remain under the control and subject to her support during her lifetime." These two deeds contain the covenant of general warranty usually given in Iowa for a deed with full warranty. At the time these three 80-acre tracts were conveyed to plaintiff bank by the Sidney firm, they were worth about \$6,000. When the two 80-acre tracts were deeded to the bank by the above deed from Neaty Woodrum, they were worth about \$25 per acre, which was the price obtained by the bank for the tracts sold. The proof is clear that, when the bank took the land from the Sidney firm, they believed the land to be worth (if freed of the dower interest) about the amount of money they had in it; that is, the debt owed the bank from Wilson Woodrum, and the money paid by the bank to the Sidney firm, represented substantially the entire value at that time of the three tracts, had these been free from the dower incumbrance. The inducement to the bank to take the land and pay off the claim held by the Sidney firm is shown in the testimony of the cashier (at that time) of the bank, and of the bank's attorney; viz. that, at the advanced age of the widow, her dower claim would not last very long, and that "their only prospect of obtaining their claim would be to take the assignment [of the Sidney firm], and then take their chances on

the appreciation of the land to get out." As to this there seems no contention. The answers filed assert that the 80-acre tract in dispute was the property, in fee simple, of the widow, Neaty Woodrum, coming to her from a parol sale to her of that tract by her son Wilson after he had obtained quitclaims from his brothers and sisters (she at the time taking possession thereof under such sale, etc.), prior to the deed from sheriff's sale under execution issued on the judgment in favor of the Sidney firm. But the proof fails to sustain this alleged sale, etc., to her.

The plaintiff bank contends (and the evidence introduced by it, if competent, and unless successfully overthrown, abundantly sustains the contention) that at the time defendant Neaty Woodrum conveyed to them the two 80-acre tracts the agreement between her and the bank authorities was that, instead of having a dower interest in the three tracts, she should release her dower in two tracts, and be permitted to have the use, rents, profits, etc., of the one tract. In other words, the dower one-third interest or use for life, amounting to an undivided one-third interest in 240 acres, would be substantially the same as the entire use of an 80-acre tract for life. Thus the bank could at once realize on the purchase price of two tracts, and their right to realize on the other 80 would alone be deferred until the death of the widow. Defendants' contention is that, in consideration of the widow's so releasing the two tracts as that the bank could at once realize therefrom, the bank agreed with the widow that they would surrender to her their entire interest in the remaining 80 acres, so that she should thereby become the full owner thereof. Looking at the transaction as crystallized in writing, the latter contention seems not sustained. Ordinarily, one would anticipate that some writing would pass from the bank to the widow, if defendant's contention is the correct statement of what was then intended. The bank held a deed which included the remaining 80-acre tract. Such deed was on the record. That the record might present fully the transaction, and evidence the bank's conveyance to her of their ownership (subject only to her dower) of this 80-acre tract, the suggestion would be natural—would ordinarily occur to any one who was a party to it—that some paper from the bank, affirmatively evidencing this conveyance from the bank, should pass from the bank to the widow, while, if the bank's contention is correct (that the life use to the widow of the entire eighty was intended), the transaction might naturally be evidenced by the deed of the widow, and the bank's acceptance thereof. Again, looking at the transaction from the standpoint of the bank's money interest in the land: It had in the tract about \$6,000 of money paid out. It was to receive from the purchaser of the two tracts \$25 per acre, or about \$4,000. It owned the entire 240 acres, subject to the dower interest. The widow was a lady of greatly advanced age. No evidence is introduced showing why the bank should be expected to accept \$4,000 (resulting from the sale of the two 80's when released of the dower interest), and thereby submit to the loss of the remaining \$2,000, while there stood in the way of its realizing this \$2,000 only the probably not

many years of the widow's remaining life. The testimony of the officials of the bank and its counsel clearly supports the contention of the bank, while the testimony of the aged lady and of defendant Eunice Woodrum, tending to the contrary, is not clear, and is in many points directly contradicted, and is unsatisfactory. Turning to the phraseology of the deed from defendant Neaty Woodrum to the bank, I am compelled, from its phraseology, construed in the light of attendant circumstances, to find against the contention of defendants. This phraseology is not clear or satisfactory. It states as a part of the consideration received by the grantor, "the full enjoyment and possession and profits" of the disputed 80 acres. No term of years is stated. No limitation is named. Theretofore she had lived thereon, and had received "enjoyment and profits" of one-third interest therein. Henceforth she was to receive "full enjoyment and profits," as well as "possession." "If there be ambiguity in the contract, resort may be had to the situation of the parties, and the circumstances under which it was entered into, for the purpose, not of changing the writing, but of furnishing light by which to ascertain its actual significance." *Runkle v. Burnham*, 153 U. S. 216, 224, 14 Sup. Ct. 837; *Walker v. Brown*, 165 U. S. 654, 668, 17 Sup. Ct. 453. Having in mind the circumstances under which the Neaty Woodrum deed was executed, and the situation of the parties at the time of its execution, I am clearly of the opinion that the contention of defendants is without support in the deed, and that said deed gave to defendant Neaty Woodrum "full enjoyment, possession, and profits" of said 80-acre tract, to wit, the E.  $\frac{1}{2}$  of the S. E.  $\frac{1}{4}$  of section 34, township 70, range 43, Fremont county, Iowa, for her lifetime only, and that its effect was and is to release to said Neaty Woodrum the interest owned and held by said bank in said 80 acres for and during the period of her natural life, and concurrently with the duration of the dower interest therein theretofore held by her. The conveyances from Neaty Woodrum to Allen S. Woodrum and Eunice A. Woodrum, in so far as they purport to convey title in fee of portions of said 80 acres, are without foundation therefor in said grantor. The only record title held by Neaty Woodrum at the date when she executed said deeds to her said grantees is contained in the said deed from her to said bank, which, as we have seen, is not a fee-simple title, but merely an interest for life.

As to the averments of the bill herein that Neaty Woodrum was of such impaired mental condition as to render her incapable, at the time of her deeds to Allen S. and Eunice A., of executing such conveyances, the proof does not sustain the same.

The equities herein are found with plaintiff, which is entitled to recover the costs herein. Counsel for plaintiff will prepare a decree accordingly, and submit the same to counsel for defendants. To all of which defendants except.



## FIRST NAT. BANK OF PLATTSMOUTH, NEB., v. WOODRUM et al.

(Circuit Court, S. D. Iowa, W. D. March 31, 1898.)

No. 325.

## 1. PETITION FOR REHEARING—EQUITY RULE—DURATION OF TERM OF COURT.

Where the practice obtains of keeping the term open for business until the statutory time for opening the next term, a petition for rehearing filed before the term at which the decree was rendered has been adjourned sine die is not too late, under Equity Rule 88, which provides that "no rehearing shall be granted after the term at which the final decree of the court shall have been entered," etc.

## 2. QUIETING TITLE—ALLEGATIONS AND PRAYER OF BILL—RELIEF.

In an action to set aside conveyances made by W. to her co-defendants, and to quiet plaintiff's title, the bill, inter alia, alleged that, in consideration of plaintiff giving W. the entire use of the real estate in controversy during her life, she had executed a conveyance to plaintiff. In the deeds attacked, copies of which were filed with the bill, she had reserved her life estate. The prayer was that W. be decreed to have only a life estate, and that plaintiff's title be quieted and confirmed, and for general relief. *Held*, that the decree in favor of plaintiff quieting his title should preserve to W. her life estate.

Samuel M. Chapman and Finley Burke, for plaintiff.

John Y. Stone and Emmet Tinley, for defendant Neaty Woodrum.

WOOLSON, District Judge. The bill originally filed in this action contained, as its prayer—First, for process of subpoena; second, the setting aside and declaring null and void two certain conveyances fully set out in bill, from defendant Neaty Woodrum to her co-defendants, Allen S. Woodrum and Eunice A. Woodrum; and, third, "that Neaty Woodrum may be decreed to have and possess only a dower or life estate in said real estate in controversy, \* \* \* and that your orator's title to said real estate may be fully quieted and confirmed in your orator, and that your orator may have such other and further relief in the premises as the nature and circumstances of the case may require, and shall seem meet to this honorable court." Under pleadings subsequently filed, the claim was presented by the defendants that, by transactions between said Neaty Woodrum and the plaintiff bank, the former had become the owner in fee simple of the real estate in controversy, and was authorized to convey such title in her said two conveyances, which were attacked by the bill. In her answer, Mrs. Neaty Woodrum prayed that the court recognize and protect her life estate, which in her two said conveyances she had reserved. Upon July 19, 1897, a decision was handed down, in substance finding that the said two conveyances from Neaty Woodrum should be set aside, and that said transactions between her and plaintiff bank did not vest in her fee-simple title to said real estate. In the decree herein, of October 11, 1897, based on said decision, said two conveyances were set aside. But the decree went further, and gave to the plaintiff bank full title in fee simple to said real estate, apparently upon the theory that, by her said alienation and abandonment of said real estate, her life estate had been waived and terminated. The present petition for rehearing was filed on behalf of Neaty Woodrum only. It relates only to that portion of the decree which awards

the plaintiff bank full title, and terminates her life estate in said real estate. Counsel for both parties have been heard with regard to this petition, and have assented and agreed in open court that the pending matter may now be fully determined, and that if the court find, under the rules governing the case, and the pleadings and evidence submitted on the original hearing, that Mrs. Woodrum should have had her life estate preserved to her, the decree heretofore filed herein shall be modified accordingly, and without further hearing.

1. Plaintiff insists that the petition for rehearing is not filed in time, and cannot now be heard. Such petition was filed March 3, 1898. By equity rule 88 it is provided that "no rehearing shall be granted after the term at which the final decree of the court shall have been entered and recorded, if an appeal lies to the supreme court." This rule has been repeatedly enforced by the supreme court. *Roemer v. Simon*, 91 U. S. 149; *Bank v. Sheffey*, 140 U. S. 445, 11 Sup. Ct. 755. In his admirable compilation upon equity practice in the United States courts, Judge Shiras states (page 87, 2d Ed.): "As an appeal in all cases, either to the supreme court or a circuit court of appeals, is now provided for, it would seem to follow that in all cases the application for a rehearing must be made during the term at which the final decree is entered." For many years, beginning prior to the incumbency of the present district judge, the practice has obtained in this district of keeping the term open for business until the statutory time has arrived for opening the next term. This practice has been found of great convenience in expediting the business of the district. An examination of the records of this court discloses the fact that, when the present petition for rehearing was filed, the term at which the decree was "entered and recorded" had not yet adjourned sine die. No injustice, therefore, is done to the rule nor to the parties by holding that the petition for rehearing was filed in time.

2. A careful examination of the bill in suit shows that plaintiff has not alleged that it was the owner of, nor entitled to be decreed to possess, the full title to said real estate. Referring to the transactions between the plaintiff bank and Neaty Woodrum, the bill avers that "it was then well understood and agreed between your orator and said widow that her interest in said [real estate in controversy] was a life interest only; and that it was in consideration of your orator agreeing to give the said widow the entire use of said [real estate in controversy] during her lifetime that she executed and delivered to your orator the conveyance as hereinbefore set forth and alleged." So that, if the allegations of the bill are to determine the present question, the life estate of Mrs. Woodrum should be preserved. While the prayer of the bill asks "that your orator's title to said real estate may be fully quieted and confirmed in your orator," yet the title thus to be quieted can only be the title averred in the bill to be in plaintiff. Thus tested, the same result will follow. That the general prayer for relief cannot broaden the relief as disclosed by the pleadings is too well settled to need citation of authorities. Judge Shiras well states this matter (*Shiras, Eq. Prac. [2d Ed.] p. 34*): "Under the latter [prayer for general relief] there can be properly granted only relief conformable to the case made in the bill, and therefore care should

be taken to include within the special prayer all the relief to which the complainant may be entitled under the facts of the case." Whether tested, therefore, by the averments or the prayer contained in the bill, plaintiff is not entitled to a decree terminating the life estate of said widow.

Argument was had on the present hearing to the effect that Mrs. Woodrum was not entitled to the preservation of her life estate, because she had fraudulently attempted alienation of the fee-simple title to the real estate, and had abandoned the possession of the property. While some statements of the bill point in the direction just named, there appears no clear or distinct averment of such facts, nor is relief specifically prayed for thereon. The conveyances attacked by the bill are made part of the pleadings, and these show that in each of such conveyances Mrs. Woodrum specifically reserves her life estate. Her alleged abandonment is denied in the pleadings, and the evidence sustains this denial. So that, if the alleged alienation or abandonment could terminate such life estate,—which is not necessary to be now considered,—the evidence introduced would not sustain this claim. I am of opinion, therefore, that, under the above-stated assent and agreement when the petition for rehearing was submitted, there should be such modification of the decree heretofore entered herein as shall preserve to Mrs. Neaty Woodrum her life estate in said real estate. Counsel for Mrs. Woodrum will draft such modification, and submit same to counsel for plaintiff. In all other respects the original decree will stand as entered.

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BAKER v. OLD NAT. BANK OF PROVIDENCE, R. I., et al.

(Circuit Court, D. Rhode Island. May 5, 1898.)

1. LIABILITY OF PLEDGEE OF BANK STOCK.

A pledgee of national bank stock is not liable as a stockholder for assessments, except by estoppel.

2. PLEDGE OF BANK STOCK—ESTOPPEL.

Where shares of an insolvent bank are registered on the books, "F. A. Cranston, Cashier Old National Bank, Providence, R. I.," the latter bank, in a suit by the receiver to hold it liable as a shareholder for assessments, is not estopped by the registry from setting up the fact that it holds the stock merely as a pledgee.

3. SAME.

And the cashier, individually, is not estopped from avoiding liability on the same ground.

Edwards & Angell and A. S. Norton, for complainant.

Herbert Almy and James M. Gilrain, for respondents.

BROWN, District Judge. The complainant, as receiver of the Merchants' National Bank of Seattle, seeks to recover assessments made by the comptroller of the currency upon shareholders of said bank. Certain shares were registered in said bank as follows: "F. A. Cranston, Cashier Old National Bank, Providence, R. I." These shares had been transferred by Abram Barker as collateral security for a loan to Barker by the defendant the Old National Bank of

Providence, R. I.; Barker continuing to exercise all rights of pledgor. The interest of the Old National Bank in said shares being merely that of pledgee, it is not liable as a shareholder for assessments, unless by estoppel. *Pauly v. Trust Co.*, 165 U. S. 606, 619, 17 Sup. Ct. 465; *Anderson v. Warehouse Co.*, 111 U. S. 479-483, 4 Sup. Ct. 525; *Beal v. Bank*, 15 C. C. A. 128, 67 Fed. 816. Unless, by permitting the shares to stand upon the registry in the above form, the bank has held itself out as owner, so that, upon principles of fair dealing, it is estopped, as against creditors, from asserting that it was not in fact owner, there is no ground for holding the defendant bank liable. As the complainant contends, the present controversy is in effect between creditors and shareholders, and is a question of "holding forth." The contention that an entry in this form would convey to an inquiring creditor the impression that the bank was the actual owner of said shares seems to me unsound. Whether we apply the test suggested by the complainant, the impression made upon the mind of the average man of business experience, or the test of the impression upon the legal mind, a conclusion drawn from either test, that the defendant bank was the actual owner of the shares, seems an unwarrantable inference. On the contrary, though the name of the bank appended to the name of the cashier might be held to import that the Old National Bank was interested in some way, yet, by the face of the entry, the inquiring creditor is apprised that for some reason the bank does not desire to appear as the record owner. The bill itself alleges that the shares were so registered "because said the Old National Bank of Providence, Rhode Island, was unwilling to stand in its corporate name as a registered shareholder, and said shares were registered as aforesaid to avoid the liability imposed upon shareholders by the acts of congress." It is settled by *Anderson v. Warehouse Co.*, 111 U. S. 479-485, 4 Sup. Ct. 525, that the defendant bank had a right, as pledgee, to avoid making itself liable as shareholder by causing the collateral to be transferred to a third person for its benefit. We should keep in mind that a transfer by way of pledge does not deprive the creditors of a bank of their right to resort to the actual owner of the stock. See *Hubbell v. Houghton* (decided by Judge Putnam in this circuit, April 26, 1898) 86 Fed. 547. It also should be observed that such notice as is afforded by the words "collateral," "in escrow," "trustee," or "agent," prevents an estoppel. *Bank v. Harmon*, 25 C. C. A. 214, 79 Fed. 891; *Wells v. Larrabee*, 36 Fed. 866; *Burgess v. Seligman*, 107 U. S. 27, 2 Sup. Ct. 10; *Thurber v. Bank*, 52 Fed. 513. The complainant's case rests, therefore, not upon the substantial grounds of actual contractual or statutory obligations of the defendant bank to the creditors of the Merchants' National Bank of Seattle, but upon an application of the doctrine of estoppel, and, as it would seem, upon a somewhat technical and arbitrary application of the doctrine.

The presumption that the creditors represented by this receiver have relied upon this registry, and have been prejudiced or influenced thereby, is surely somewhat strained. Ordinarily, an estop-

pel can be invoked only by one who can show an actual reliance upon the statement.

In *Burgess v. Seligman*, 107 U. S. 20, 2 Sup. Ct. 10, it was said:

"If the law declares that the stock held as collateral security shall not make the holder liable, surely it must be competent to show that it is so held. Ah! when this fact is once established, there is an end of the application of estoppel, unless it can be invoked by some party who has been specially misled by the conduct of the defendants."

In that case the statute expressly provided for the nonliability of holders of stock as collateral security. In the present case we have a statute which, according to the views of the supreme court in *Pauly v. Trust Co.*, 165 U. S. 606, 17 Sup. Ct. 465, is in effect the same. It may be true that, upon a suit by a receiver in behalf of general creditors, it is impractical to go beyond the registry, or to make inquiry of each creditor as to his actual reliance upon the registry. If practical considerations require in the present case that we should supply by a presumption a necessary element of estoppel, to wit, actual reliance upon the statement, we should at least insist that the registry upon which the presumption is based should be clear and unambiguous. The complainant should not be permitted to build his case upon the successive assumptions—First, that the creditor knew of the registry; and, second, that, of two constructions thereof, he relied upon that most favorable to himself. On the contrary, unless the record has *prima facie* but one meaning, we should hold the creditor to the duty of actual inquiry. He is not even presumptively entitled to rely upon an ambiguous registry. *Prima facie* uncertainty is equivalent to notice and raises the duty of inquiry. So far as the case against the bank is concerned, I am of the opinion that the registry might well be considered an express statement that the defendant bank was not the actual owner of the stock, and, if not, that at least it is ambiguous, and does not estop the bank from showing the character of its actual interest in the shares. This appearing to be merely that of a pledgee, the bank is not liable. The quotation from *Anderson v. Warehouse Co.*, 111 U. S. 479–485, 4 Sup. Ct. 525, does not, in my opinion, warrant the inference of complainant's counsel that the registry of stock in the name of Henry, president, was regarded by the supreme court as sufficient to hold the corporation as a shareholder. The opinion expressly states that this fact was regarded under the circumstances of that case as of no importance.

Considering next the claim that, if the bank is not liable, the defendant Cranston, its cashier, must be held personally liable, this does not seem a necessary alternative. The creditor, who, by legal fiction or presumption, is held to rely upon the form of the registry of the shares, must also be held to possess the knowledge that the defendant bank has only incidental powers to hold stock in another national bank. "No express power to acquire the stock of another corporation is conferred upon a national bank; but it has been held that, as incidental to the power to loan money on personal security, a bank may, in the usual course of doing such business, accept stock of another corporation as collateral; and, by the enforcement of its rights as pledgee, it may become the

owner of the collateral, and be subject to liability as other stockholders. *Bank v. Case*, 99 U. S. 628. So, also, a national bank may be conceded to possess the incidental power of accepting in good faith stock of another corporation as security for a previous indebtedness. It is clear, however, that a national bank does not possess the power to deal in stocks. The prohibition is implied from the failure to grant the power. *First Nat. Bank v. National Exch. Bank*, 92 U. S. 122, 126." *Bank v. Kennedy*, 167 U. S. 362, 367, 17 Sup. Ct. 831.

Having declined to follow the argument of the complainant to the extent of holding that the registry showed that the bank was the owner (which argument, if adopted, would, of course, release Cranston from individual liability), and holding that the registry indicated, at most, that the bank had some special or qualified interest in the stock, we should consistently hold to the same view when we approach the question of the personal liability of Cranston. If the creditor is to rely upon the registry, he must read the whole of it. If it is ambiguous, and fails to indicate with certainty either Cranston or the bank as actual owner, he cannot invoke an estoppel; he must inquire or take the facts as they are. As we cannot ignore the words "F. A. Cranston," so we cannot ignore the words "Cashier Old National Bank, Providence, R. I." In *Mechanics' Bank of Alexandria v. Bank of Columbia*, 5 Wheat. 326, the question was whether an act was done by the cashier in his official or individual capacity; a check being signed, "Wm. Paton, Jr." The court said: "It is enough \* \* \* that there existed on the face of the paper circumstances from which it might reasonably be inferred that it was either one or the other." This should apply with especial force when the question is one of estoppel. See, also, *Falk v. Moebis*, 127 U. S. 597, 605, 8 Sup. Ct. 1319. In the present case there is much force in the argument that the inquiring creditor was fairly apprised by the entry of the actual nature of the holding. Both cashier and bank were apparently concerned in the stock. The bank could take only incidentally. It had manifestly not perfected a title. Therefore its interest in the stock must be as a security, and Cranston, its cashier, was presumably a proper person to whom to make a transfer by way of collateral security. Without finding it necessary to decide upon this contention, and not acceding to the request of the defendants' counsel that the court should take judicial notice of a general custom of national banks to take collateral security in the names of their cashiers, I am of the opinion that neither Cranston nor the bank is a shareholder or liable as a shareholder, within the meaning of the statute, and that neither is estopped by the registry from showing the actual nature of the holding. As the bill seeks to charge the other defendants both as executors and trustees, and as the answer discloses the existence of persons directly interested who are not made parties hereto, a decision upon this branch of the case is reserved until all persons in interest are brought before the court. The plea of the Old National Bank of Providence, R. I., and Francis A. Cranston, is allowed.

## ECONOMIST FURNACE CO. v. WROUGHT-IRON RANGE CO. et al.

(Circuit Court, D. Indiana. May 12, 1898.)

No. 9,576.

## 1. VIOLATION OF RESTRAINING ORDER—CONTEMPT.

A defendant guilty of continuous and repeated violations of a restraining order cannot excuse himself on the ground that the order is open to different constructions, and, construing it for himself, he had abstained from doing such acts as fell within the letter of the order. The spirit as well as the letter of the order should be obeyed.

## 2. SAME—INTENT.

A defendant who knowingly and purposely commits acts which are in violation of a restraining order is guilty of contempt, and it is no defense that he had no intention of violating the order.

Ferd. Winter, for complainant.

McKeighany, Barclay & Watts, McBride & Denny, and Croxton & Powers, for defendants.

BAKER, District Judge. On March 19, 1898, the complainant filed its bill of complaint against the defendants in the circuit court of Steuben county, Ind. The bill states that the complainant is engaged with teams and salesmen in selling cooking ranges from house to house in Steuben county, and in territory contiguous thereto, having headquarters at Angola, in said county, and that while so employed the Wrought-Iron Range Company came to the same place with a large number of teams and 25 men, and entered upon and practiced a scheme and system of interference with the complainant's business, having for its object the destruction of the same, by threats of violence, by pursuing the complainant's teams and salesmen by day and night, and by preventing it in various ways, which are set out at length, from carrying on its business. The bill prays judgment for damages, and that an order be granted restraining the defendants, and each of them, from continuing such interference until notice is given; and that upon the hearing after notice a temporary injunction be granted, and on the final hearing that a perpetual injunction be awarded. The judge of the state court set the hearing for March 22, 1898, and notice in writing of such hearing was duly served by the sheriff of Steuben county on all of the defendants except Dick, Allen, and Lanius. On the day set for the hearing, and before any hearing was had, all of the defendants appeared in the state court, and filed their verified petition and bond for the removal of said cause into the circuit court of the United States for the district of Indiana. The court sustained the petition, and ordered the removal prayed for. The transcript of the pleadings and proceedings in the state court was duly filed in this court on March 30, 1898. On that day the application for a temporary restraining order was heard by this court, Mr. Winter appearing for the complainant, and Judge McBride for the defendants. Upon due consideration the court granted a temporary restraining order as prayed for. Each of the defendants was thereby restrained and enjoined until the further order of the

court "from in any manner molesting, interrupting, hindering, disturbing, or otherwise interfering with, or threatening or intimidating plaintiff or any of its agents, servants, or employes in the prosecution or transaction of its business described in the bill of complaint." The restraining order was duly served upon the defendants. On April 9, 1898, a verified application and motion was presented to the court for the punishment of the Wrought-Iron Range Company, James K. Dick, its manager, and A. R. Maupin, Rollie De Witt, Harry Middleton, and F. Van Camp, employes, for contempt in having violated the restraining order; and thereupon the court issued a rule against said defendants to show cause why they should not be punished for such alleged contempt. A hearing has been had, and a large amount of evidence has been heard in the contempt proceeding. The evidence is too voluminous to justify its review. Upon a careful consideration of it, it seems very clear to the court that there was a deliberate and intended violation of the restraining order, both in letter and spirit. It was a continuous and repeated violation, and with no excuse whatever save that the violation was committed by parties who undertook to construe the order of the court for themselves; and in accordance with their construction of it they claim that they abstained from doing such acts as fell within the letter of the order. But the duty of the defendants was obedience not only to the letter, but to the spirit, of the order. "It has been declared that those who undertake to see how near they can come to doing the prohibited acts without passing the line will be very apt to overstep the bounds, and render themselves guilty of contempt." *Craig v. Fisher*, Fed. Cas. No. 3,332. It is of no avail that the defendants have all testified that they had no intention of violating the restraining order. They knowingly and purposely committed the acts which worked the violation of the order. "The rule as to the intention in proceedings for contempt is analogous to that which prevails in a prosecution for crime, viz. the intent required to be proven is not an intent to violate the law or the order of the court, but to do the act which the law or the order of the court forbids." 10 Am. & Eng. Enc. Pl. & Prac. 1104, citing *Gage v. Denbow*, 49 Hun, 42, 1 N. Y. Supp. 826; *Lindsay v. Hatch*, 85 Iowa, 332, 52 N. W. 226. There can be no successful claim made that the defendants did not deliberately and purposely do acts which were in violation of the restraining order. It is of no avail for the defendants to say, even if the order were justly subject to that criticism, that it is broader or more general in its prohibition than was warranted by the bill; or that by reason of its generality or otherwise it was open to different constructions. It is well settled that under such circumstances the parties should apply to the court to modify or dissolve the order, or to construe it so as to remove doubts as to its meaning. 10 Am. & Eng. Enc. Pl. & Prac. 1105; *Shirk v. Cox*, 141 Ind. 301, 40 N. E. 750; *Hawkins v. State*, 126 Ind. 294, 26 N. E. 43. The court, however, is of opinion that the order is not broader than is warranted by the bill. The general purpose and scope of the bill was to procure an order enjoining the



defendants from wrongfully interfering with the complainant in the prosecution of its business of selling stoves and ranges. There were in it specific allegations touching the manner in which the defendants had been molesting, hindering, interrupting, and interfering with the business of the complainant. The court ordered, in general terms, that the defendant corporation and its agents and employes should refrain from molesting, interrupting, hindering, disturbing, or otherwise interfering with, or threatening or intimidating the complainant in the prosecution of its business mentioned in the bill of complaint. This language is descriptive of and includes in one or the other of its various terms each of the acts mentioned in the bill as having been done by the defendants, and which it is alleged were injurious to the business of the complainant. The law does not require that an injunction or restraining order should describe in language identical with that of the bill the acts prohibited. None of the cases cited by defendants' counsel support any such proposition; nor do we think that any of them lend support to the proposition that the language used in the restraining order in this case is too uncertain and vague to apprise the defendants of the acts which they were forbidden to do.

Upon the whole case, so far as the court can perceive, the order of the court exerted no influence in restraining the defendants from pursuing the same wrongful course of conduct which had been indulged in before the restraining order was issued. They knowingly and persistently continued to practice the prohibited acts which interfered with and disturbed the complainant in the transaction of its business, and which, if tolerated, would have resulted in substantially destroying its business. The court feels persuaded that the purpose sought to be accomplished by the defendants was to destroy the business of the complainant, as it clearly appears that during nearly two months, with the number of teams and men employed by it, the defendant company had made no sales of stoves or ranges, and apparently had made no bona fide effort to make any such sales; but had been constantly engaged in pursuing the complainant wherever its teams and employes went, with the purpose and effect of interfering with its business. Nor does the court think the defendants engaged in the course of practice pursued by them for the purpose of protecting the trade-name and rights of the defendant company from infringement. If the complainant was engaged in wrongfully representing its ranges to intending purchasers as the manufacture of the defendant company, the proper method of redress was by an application to the court for injunctive relief, and not by taking the vindication of real or fancied wrongs into its own hands. The complainant was fully justified in moving against the defendants for contempt, and it is entitled to its costs, and a reasonable allowance for solicitors' fees and other expenses incurred in protecting itself from the wrongful invasion of its rights by the defendants. *Indianapolis Water Co. v. American Strawboard Co.*, 75 Fed. 972. An order may be prepared adjudging the Wrought-Iron Range Company, James K. Dick, its manager, A. R. Maupin, Rollie De Witt, Harry Middleton, and F.

Van Camp, guilty of contempt in disobeying the restraining order heretofore granted, and assessing a fine against them of \$500, to be paid to the clerk of this court for the use of the complainant, together with the costs of this proceeding to be taxed.

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HINDMAN v. FIRST NAT. BANK OF LOUISVILLE et al.

(Circuit Court, D. Kentucky. February 15, 1898.)

1. REPRESENTATIONS BY BANK—CORPORATE POWERS.  
Representations by a bank that an insurance company has a certain amount of paid-up capital stock and surplus, are ultra vires.
2. SAME.  
Representations by the officers of a bank to an insurance commissioner, that an insurance company had on deposit in such bank a certain amount which had been paid in as capital stock and net surplus, are not ultra vires.
3. FALSE REPRESENTATIONS—LIABILITY TO THIRD PERSONS.  
A bank whose officers make false representations to an insurance commissioner, concerning the amount which an insurance company has on deposit with it, whereby the commissioner is induced to issue a license, is not liable to a third person who was induced to purchase shares in the company by the fact that such license had been granted.

Phelps & Thum and Abbott & Rutledge, for plaintiff.  
Humphrey & Davie and Dodd & Dodd, for defendants.

BARR, District Judge. This is a reformed petition filed by order of the court, and there is a motion to strike out part of it, and a general demurrer filed by the First National Bank, one of the defendants. The grounds of the demurrer are that the facts are not sufficient to constitute a cause of action against the bank, and that the matter complained of in the bill is in excess of the powers conferred upon the defendant bank in its charter, and there cannot be a cause of action against it. It seems from the allegations of the bill that the plaintiff purchased from one C. B. Sullivan, who was an officer of the Columbian Fire Insurance Company, 80 shares of the stock of the said insurance company on the 6th day of February, 1893, for the sum of \$10,000 cash; and the purpose of the bill is to recover from the defendants the First National Bank, Hart, and Sullivan the \$10,000 thus paid to Sullivan for the stock sold. The basis of this claim is that Hart and the others combined and confederated together to deceive the insurance commissioner of Kentucky, and did deceive him, and by their deceptions induced him to grant a license to said insurance company to do business. The particular allegations of false representations, so far as the bank is concerned, are these:

"The plaintiff further states that shortly before or on or about the 1st day of January, 1893, certain persons associated themselves together for the purpose of establishing and organizing a fire insurance company under the laws of the state of Kentucky, to be known by the name of the 'Columbian Fire Insurance Company of America,' and for that purpose said persons duly executed and acknowledged articles of incorporation, which were duly recorded and filed with the secretary of state of Kentucky as required by law. \* \* \* Said Columbian Fire Insurance Company of America, being so incorporated, applied to the commissioner of insurance for a license to do business in the state of Kentucky as a fire insurance company, and the said company purporting to have

a capital stock of two hundred thousand dollars and a surplus of fifty thousand dollars. Said commissioner of insurance for the state of Kentucky, on being so applied to, entered upon an investigation of the affairs and conditions of the said company to ascertain whether or not it was entitled to receive a license to do business as a fire insurance company, as he was so required to investigate by the laws of the state of Kentucky and in the performance of his duty. During the course of said examination the said Columbian Fire Insurance Company of America falsely represented to the said commissioner that its capital stock of two hundred thousand dollars had been in good faith subscribed for and paid up in full in cash, and that in addition thereto it had on hand a surplus of \$48,182.90, or a total of \$248,182.90, which it claimed and represented to said commissioner that it then had on hand as cash assets, being said capital stock and surplus paid in, in cash, and that the same was free of all debts and pecuniary obligations. The said sum of \$248,182.90 was by said insurance company represented to said commissioner to be on deposit to the credit of said insurance company in the First National Bank of Louisville, and subject to the check of said insurance company. The said insurance commissioner, desiring to verify the statements and representations of the said insurance company, applied to the said First National Bank on the 31st day of December, 1892, and through its officers sought to ascertain whether or not the said insurance company had on deposit with said bank the said sum of \$248,182.90; and the officers of said bank, knowing the purpose which said commissioner had in view in seeking said information, caused the cashier of said bank to give said commissioner a sworn statement to the effect that the said insurance company had on deposit with said bank on said day the aforesaid sum of \$248,182.90, which had been paid in as the capital stock and net surplus of said company; and the said commissioner of insurance, believing and relying on the said statement so given to him by said bank, on the faith thereof issued to said insurance company a license to do business as a fire insurance company in Kentucky; and, on the faith of said license so issued by the insurance commissioner of Kentucky, the said insurance company was enabled to and did acquire license to do business as a fire insurance company in Kentucky, and in various other states of the United States, and at once proceeded to carry on said business and issue policies of insurance against loss by fire in Kentucky and elsewhere, and to advertise and hold itself out as a solvent insurance company, with a paid-up capital and surplus amounting to \$248,182.90. Plaintiff says that the sworn statement made by the cashier of the First National Bank of Louisville on the 31st day of December, 1892 (which was made in the regular course of his duties and with the knowledge of and by the direction of his superior officers and the directors of said bank), and on the faith of which the insurance commissioner of Kentucky issued a license to the said Columbian Fire Insurance Company of America, was untrue, and was given for the fraudulent purpose of enabling the said insurance company to deceive said insurance commissioner, and obtain a license to do business when it was not lawfully entitled to one. The plaintiff avers that the officers of said insurance company and said bank, and the said C. B. Sullivan, A. W. Hart, E. L. Butler, and James R. Skinner, fraudulently conspired and confederated together, and co-operated with said bank, in its fraud herein set forth, to deceive said insurance commissioner, and did deceive him, and by their deception induced him to grant a license to said insurance company, and thereby set on foot said fraudulent insurance company."

It is alleged that the consideration for the making of these false representations by the bank was the agreement of the insurance company to make deposit with the bank of all of its moneys, which deposit would be and was valuable to it. It is further alleged that the insurance company, by reason of not having a full paid up capital stock, became insolvent in the spring of 1894, and the complainant lost his entire stock, as the assets of the company will pay its creditors only a small percentage of its debts.

There is no allegation in the bill that there was not really at the

time to the credit of the insurance company the sum stated, but it is alleged that the insurance company did not have full and immediate control of these deposits. It is also alleged that \$25,000 of the deposit was made up by a certified check issued by a New York bank under an agreement that the money was not to be withdrawn from that bank until after the company was a going concern and had received premiums, and that it was not actually paid until some two months thereafter; and it is alleged that these deposits were made up in part by the bank discounting notes of stockholders given for the stock itself, which were indorsed by the insurance company, and that in fact the whole of the capital stock and surplus was not fully paid up at the time; that the capital stock, to the extent of something like \$100,000, was never paid up. It is also alleged that the complainant relied upon the fact that the license had been granted to the insurance company to do business by the insurance commissioner of Kentucky. Knowing that the law required the capital stock to be paid up, he relied upon that fact, and was induced thereby to buy this stock from Sullivan, in February, 1893, paying therefor \$10,000 cash. But it is not alleged that the national bank or any of its officers made any representation to him whatever, nor is it alleged that the complainant had actual knowledge of the representations which are alleged to have been made by the cashier of the First National Bank to the insurance commissioner at the time of his purchase of the stock. The Kentucky statutes (section 622) provide that "no insurance company shall be authorized to commence business until the minimum amount of capital stock named in the articles of incorporation has been subscribed and actually paid in." There are other allegations in the bill which seemingly allege that after the license was granted to the insurance company the bank united with that company in making publications as to its having a paid-up capital stock and surplus of \$248,182.90. But this allegation is obscurely made, and it was not presented by counsel on the oral argument as one of the grounds upon which the liability of the bank was claimed. But, if it be conceded that this allegation is definitely made, we think that such a declaration was certainly beyond its corporate powers, and would be ultra vires, and need not be further considered in the consideration of this question. See *Dresser v. Bank*, 165 Mass. 120, 42 N. E. 567.

The reformed bill is quite difficult of construction, and somewhat ambiguous in its allegations, but I think the foregoing statement includes all that is material to the consideration of the questions under submission. It is insisted by the demurrant that the representations made by the cashier or other officers of the First National Bank, as alleged, were beyond its corporate powers, and that the bank is not, therefore, liable for any injury caused to the complainant thereby; and, secondly, that if these representations as alleged were false, and are within the corporate powers of the First National Bank, and that it is clearly alleged to have been to deceive Mr. Duncan, the insurance commissioner, into granting a license to the insurance company, still the defendant bank is not liable

for any injury which might arise to the complainant for the loss of his stock in the insurance company thus licensed, because there is not a sufficient connection between the false representations to the insurance commissioner and the loss by the complainant of the value of the stock to authorize a recovery. We will consider these propositions in their order.

Among the powers given by the national banking act to its board of directors or its authorized officers or agents are "all such incidental powers as shall be necessary to carry on the business of banking; by discounting and negotiating promissory notes, drafts, bills of exchange or other evidences of debt; by receiving deposits," etc. As the First National Bank had the right to accept the deposits of the insurance company, it would seem to follow, as an incident to receiving deposits, that the cashier might state orally or in writing, to those authorized to inquire, the amount of the deposits and the nature of the deposits,—whether on account of capital stock or surplus or whether a general deposit. That far he was acting under the corporate powers and in the usual course of his business. He had also the corporate power, in the course of his business, to state more than what the books of the bank showed, if he personally knew the fact, or assumed to know the fact, in the performance of his official duties, as to the amount of the deposit or the character of the deposit. In the absence of any evidence, and assuming that the allegations of the bill are true, it may be presumed that thus far the facts stated by the cashier of the First National Bank in regard to the character of the deposit, whether it was capital stock, or capital stock and surplus, was such as the books of the bank showed, or such as the cashier of the bank and the custodian of the deposits had a right to know and might communicate. So that if he knew the deposit was made up by discounts credited with the intention of swelling the deposit, with a view to deceiving the insurance commissioner into believing that the capital stock was paid up, it would be within the bank's corporate powers. The liability in such a case would be because the false representations were made about a thing which was the bank's business in connection with its corporate powers, and in the usual course of the business of the cashier of the bank. We think the case of *Fisher v. Bank*, 12 C. C. A. 413, 64 Fed. 674, sustains this view; nor do we think that this view is contrary to the doctrine announced in the case of *Weckler v. Bank*, 42 Md. 581; or that of *Bank v. Pirie*, 27 C. C. A. 171, 82 Fed. 799. In the last case the court used quite strong language on the subject of guaranty, holding that the guaranty was beyond the powers of the national bank, in a case where a vendor endeavored to set aside a sale of goods made by him on the ground of fraud of the vendee. It appeared that the vendee had presented, among other things, to the vendor, the guaranty of the national bank. The court held that such a guaranty was beyond the powers of the national bank; that the national banking act conferred no authority to make such a guaranty by express terms or by fair implication; and further held that, in contemplation of law, the vendor knew when he sold the

goods in question that the guaranty was of no value, even though he supposed it had been executed with the sanction of the board of directors, and therefore he was not defrauded. But here we think no such view can be taken, as Mr. Duncan, the insurance commissioner, had the right to rely upon a statement made by the cashier of the First National Bank in regard to the deposits in the bank to the credit of the insurance company and upon what account. In passing, it is not, however, intended to say that, if part of this deposit was made up by discounting notes of stockholders, even though such notes were indorsed by the insurance company, such fact would be itself fraud upon the law, or that it would be a false statement in regard to the paid-up capital stock.

Assuming, therefore, that so far the representations of the cashier of the First National Bank were not *ultra vires*, and that these acts were so far in the course of the business of the First National Bank, and in the course of the employment of the cashier, and did, as alleged, induce, or tended to induce, the issuing of the license by the insurance commissioner, the next inquiry is, can the complainant, who purchased his stock when the insurance company was a going concern, and to whom no representations were made, and who knew nothing of the representations made to the insurance commissioner, recover the value of his stock upon the ground that false representations had been made to the commissioner, and that the commissioner was thereby induced to license the insurance company?

We think the general doctrine is very well stated by Mr. Cooley in his work on Torts (page 493). He says:

"No one has a right to accept and rely upon the representations of others but those to influence whose actions they were made. \* \* \* When statements are made for the express purpose of influencing the action of another, it is to be assumed they are made deliberately and after due inquiry, and it is no hardship to hold the party making them to their truth. But he is morally accountable to no person whomsoever but the very person he seeks to influence, and whoever may overhear the statements, and go away and act upon them, can reasonably set no claim to having been defrauded if they prove false. Fraud implies a wrongful actor and one wrongfully acted upon; but in the case supposed there is no privity whatever. Therefore one may even be the person to whom the false representations are made, and yet be entitled to no remedy if they were made to him as agent for another, and to affect the action of the other, and were not intended to influence his own action. But some representations are made for the express purpose of influencing the mind of the public, and of inducing individuals of the public to act upon them; and whoever in fact does receive, rely, and act upon these in the manner intended has a right to regard them as made to him, and to treat them as frauds upon him, if in fact he was deceived to his damage. Cases of this sort are those in which the projectors of corporate undertakings publish prospectuses containing misrepresentations calculated to influence others to invest moneys in their project. The cases are numerous in which the courts—sometimes of equity and sometimes of law—have given relief to parties defrauded by such misrepresentations."

The learned author refers in a note, to sustain this view, to the case of *Wells v. Cook*, 16 Ohio St. 67. In that case an agent bought for his principal some diseased sheep under false representations made by the vendor that they were sound, and afterwards purchased them of his principal, and suffered damages in consequence

of the spread of the disease. The court held that he was not entitled to any redress against the first vendor. The case itself is exceedingly carefully considered. In that opinion of the supreme court of Ohio, delivered by Judge Brinkerhoff, after reviewing the cases, the court uses the following language:

"The influences of human conduct, good or bad, are far-reaching, and are often seen and felt in consequences exceedingly remote, but uncertain and complicated. It is simply impossible that municipal law should take cognizance of all these consequences. From necessity, a large share of them must be left to the jurisdiction of public opinion, individual conscience, and finally to the retributions of another world. There must somewhere be fixed a limit between the near and remote, direct and indirect, consequences, beyond which the law will not take cognizance of them. And in this case we are satisfied that one of the prescribed limits is this: that the false and fraudulent representations must have been intended to be acted on in a matter affecting himself by the party who seeks redress for consequential injuries."

This case was approved by Judge Leavitt, district judge of the Ohio district, and applied in the case of *Ware v. Brown*, 2 Bond, 268, Fed. Cas. No. 17,170. In that case there was a leasehold for oil purposes of a certain piece of land in West Virginia. Certain parties owned three-fifths of the leasehold, and one Cochran owned the other two-fifths. There was a conveyance made by the parties who owned only the three-fifths of the entire leasehold, and in the conveyance Cochran, the owner of the other two-fifths, was falsely united as a conveyer. This was certified by Brown, a notary public, i. e. that Cochran personally appeared before him, and acknowledged and signed and sealed the same in his presence. This conveyance was to one Buffington, who made several conveyances thereafter of the entire property, but the defect in the title was not found until after the several conveyances, and it caused the remote vendee a considerable sum of money to perfect his title. He sued the notary public, Brown, for false representations. The court held that Buffington could recover damages, but that the wrong committed was not assignable in fact or by operation of law, and that the plaintiff, Ware, could not recover. The case of *Hunnewell v. Duxbury*, 154 Mass. 286, 28 N. E. 267, seems to be in principle on all forms with the case at bar. In that case the Massachusetts law required that foreign corporations should have a certificate filed with the commissioners of corporations of the state of Massachusetts, in order to be allowed to do business in that state. Such a certificate was signed by the defendants, with a jurat which stated that the capital stock of the corporation, which was a Maine corporation, amounted to \$150,000, and had been paid in, and that the electrical advertising devices, to the value of \$149,650, had been transferred to it. It was held that the defendants who made this statement were not liable for damages, for false representations, to a person who had taken the notes of the corporation, and who had been informed by his attorney, who had read it, of the statement in the certificate. The court say:

"The statement which was made to enable the corporation to do business was too remote from any design to influence the action of the plaintiff in taking the notes of the corporation to make it the foundation of an action of deceit. To sustain such an action, the misrepresentations must either have been made to

the plaintiff individually, or as one of the public, or as one of a class to whom they are in fact addressed, or have been intended to influence his conduct in the particular of which he complains."

We have not seen, nor has our attention been called, to any case which either controverts or overrules the principles announced in the above case.

In the great case of *Peek v. Gurney*, L. R. 6, H. L. 373, which was a case decided in 1873, all of the English cases that were pertinent to the question were reviewed and most elaborately considered by the then lord chancellor, Lord Cairns, and the other judges. In that case one Peek, the appellant, purchased a large number of shares in a corporation called the "Overland & Gurney Company." This company was formed in 1865, for the purpose of getting new money for use in the business of Overland & Gurney, an established company, who had been previously considered very prosperous. A prospectus was issued by certain parties, in which a statement was made in regard to the assets and business of the previous company and its profitability. These statements were false statements and material. Peek, however, was not one of the original allottees, i. e. one of the parties who subscribed and paid for the stock which was originally issued by the company, but bought from a party who was an allottee of such stock. The company failed in a little while, and he lost all of his stock; besides, he had to pay a very large amount on his shares in the winding up. The inferior court dismissed the bill, on the ground that he waited too long. When the case came to the house of lords, they discussed the question on its merits, and refused to affirm upon that ground, but did affirm upon the ground that he had no right of action against the original signers of the prospectus, as he was not an original allottee; that the liability for the false statements was only to the original allottees of the stock. The grounds, as we understand, of this most elaborate consideration and decision of the nonliability of the defendants, signers of the prospectus, was that the purpose of issuing the prospectus was to obtain the original subscription. The original subscribers who were influenced by the prospectus were entitled to recover, but not those who acquired stock subsequently, although they may have known, as did the appellant in the case, of the statements, and had been influenced in the purchase of the stock by what was therein stated. While it was a general statement that all might read, it was with a definite purpose, and the liability for the wrong done was only to those who were influenced to subscribe originally under the invitation of the prospectus. This we conceive to be the principle which is announced by Mr. Cooley in general terms, and also by the supreme court of Ohio in *Wells v. Cook*. It may be that there are some cases in the United States which may hold those who signed a general prospectus, and issued it to the public, for the organization of a corporation, or the promotion of enterprises, to be liable for whomever may be injured by the false representations. In such cases, it must be that they are put upon the ground that it is intended to deceive any one to whom the knowledge may come, and who may act upon the repre-



sentations, and for an indefinite time. But, if the principle upon which those cases are decided be conceded to be sound, it should have no application to the case at bar, since the misrepresentations which are alleged to have been made by the bank's officers, within the scope of its corporate authority, were only made to Duncan, the insurance commissioner, and only influenced him, and were only intended to influence him, if we assume, as we must, that all the allegations of the petition are true. We conclude, therefore, that on this ground the defendants' demurrer should be sustained; and it is so ordered.

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TOBIN v. ROARING CREEK & C. R. CO. et al.  
(Circuit Court, E. D. Pennsylvania. April 27, 1898.)

No. 42.

1. PROOF OF CORPORATE OFFICER'S AUTHORITY—SECONDARY EVIDENCE.

Where the authority of the president of a corporation to make the contract sued on is alleged to be conferred by a resolution of the board of directors, plaintiff's oral testimony to the contents of a copy of such resolution, under corporate seal, attested by the secretary, is inadmissible, where no steps have been taken for the production of the alleged copy.

2. RAILROAD COMPANIES—AUTHORITY OF PRESIDENT—CONTRACTS.

The president of a railroad company has no inherent authority to make a contract with an individual whereby the latter is to procure a loan of \$150,000 for the company in consideration of receiving 10 per cent. of that sum.

This was an action at law by Eugene Tracy Tobin, a citizen of Pennsylvania, against the Roaring Creek & Charleston Railroad Company, a West Virginia corporation, and Cassius L. Dixon, a citizen of West Virginia, who is receiver of the said railroad company, to recover money alleged to be due under a contract. The case was heard on a motion to strike off a nonsuit.

Francis Tracy Tobin, Henry Budd, and Samuel G. Thompson, for plaintiff.

Henry C. Terry and John G. Johnson, for defendants.

DALLAS, Circuit Judge. This action was brought to recover \$15,000, with interest, alleged to be due to the plaintiff by the corporation defendant, by virtue of an alleged contract by it with him that, if he (the plaintiff) would procure a loan of \$150,000, to be made to the corporation, it would pay to him the sum of 10 per cent. of said \$150,000. Two statements of plaintiff's claim were filed, one upon June 29, 1896, and the other upon October 7, 1897. At the outset of each of them it is said:

"The Roaring Creek and Charleston Railroad Company, by a resolution of the board of directors at a meeting of the board duly held, authorized and empowered Samuel B. Diller, the president of said corporation, to make any and all contracts for the transaction of the business and the prosecution of the work of said corporation which he, the said Samuel B. Diller, as president thereof, might see proper to make."

This allegation is a material one. The plaintiff, upon the trial, attempted to present his case in accordance with it. He under-

took to show that power to make the contract sued upon had been given to Samuel B. Diller in the manner stated; but he wholly failed to accomplish this undertaking. He offered to testify, as a witness on his own behalf, to the contents of a copy, under corporate seal, attested by the secretary, of a resolution of the board of directors, by which he asserted the special authority relied upon had been conferred upon Mr. Diller. But this offer of oral evidence of the contents of a writing being objected to, I, in substance, said: Plaintiff is here setting up a contract which he alleges was made with him on behalf of the defendant corporation by an agent, whose authority to make that contract plaintiff says is evidenced by a certain resolution. Hence the fact now sought to be established is the existence of the authority alleged. The ordinary manner of showing that authority would be by the production of the minute book, and finding there a resolution vesting the power to make the contract in the person who made it. I do not think, and do not desire to be understood as holding, that the absence of such a resolution from the minute book would be conclusive upon the plaintiff, but the method by which he has sought to establish its existence is by showing that there was a certain certificate exhibited to him; and therefore it is essential for him to show that there was such a certificate. He proposes to prove that there was, not by its production, but by secondary evidence of its contents of the lowest degree; that is, by the oral testimony of the plaintiff himself. Such evidence is not to be received until the trial judge is satisfied that notice to produce has been given, and that production is refused in answer to that notice, or, perhaps, that a witness having its custody has been subpoenaed to produce the writing, and has failed to do so. As neither of these necessary preliminary steps appears to have been taken, the proposed oral evidence must be excluded. I still entertain the opinion which was thus expressed, and think that the judgment of nonsuit, which was entered mainly upon the ground of failure of proof of Diller's alleged authority to make the contract in suit, ought not to be disturbed. As I have said, the plaintiff, in his declaration and upon the trial, set up a specific authorization. Failing to establish it, he now contends that the necessary authority was inherent in Diller, as president of the company; but I cannot assent to this. The transaction which it is claimed the corporation employed the plaintiff to make was an extraordinary one, and quite beyond the sphere of its ordinary business and the customary scope of the agency of the president of such a corporation. There was no evidence of express ratification of Mr. Diller's alleged arrangement with the plaintiff, and the argument that the railroad company accepted the fruit of Mr. Tobin's alleged services with knowledge that they had been rendered is, I think, wholly unsupported in point of fact; and it is by no means clear that Mr. Tobin ever obtained for the railroad company such a loan as he asserts he was employed to obtain. The defendants' motion to strike off the nonsuit is denied.

## HUGHES v. UNITED STATES.

(Circuit Court, D. Washington, E. D. April 19, 1898.)

## 1. LOCAL LAND OFFICE—REIMBURSEMENT FOR OFFICE RENT—SUIT AGAINST THE UNITED STATES.

Where the receipts of a land office were in excess of the maximum allowed by law for compensation of the register and receiver and all expenses of the office, but, because of insufficient appropriations for incidental expenses, the department refused to honor requisitions to pay office rent, the receiver may, by timely action against the government, recover the amount paid by him for office rent.

## 2. SAME—SUIT FOR OFFICE RENT PAID—LIMITATION.

Under 1 Supp. Rev. St. (2d Ed.) 559, providing that no suit against the government shall be allowed unless brought within six years after the right accrued, a receiver can only recover so much of a claim for rent of the land office as was paid by him within six years immediately before bringing suit therefor.

Feighan & Ludden, for plaintiff.

Wilson R. Gay, U. S. Atty.

HANFORD, District Judge. This is an action by Joseph H. Hughes, ex-receiver of the United States district land office for the district of Spokane, to recover money paid by him for rent of offices occupied and used by him and by the register during his term of office ending April 17, 1894. The fees earned during each year of said term were largely in excess of the maximum allowed by law for compensation of the register and receiver and all expenses of the office, but, on the ground of insufficiency of the appropriations to pay incidental expenses, the department refused to honor requisitions which were made from time to time to pay office rent. The facts bring the case fully within the rule of law in the case of *U. S. v. Swiggett*, 27 C. C. A. 465, 83 Fed. 97, except that in this case the claim includes money expended more than six years prior to the date of commencing the action. The act authorizing the bringing of suits against the government of the United States (1 Supp. Rev. St. [2d Ed.] 559) contains a proviso "that no suit against the government of the United States shall be allowed under this act unless the same shall have been brought within six years after the right accrued for which the claim is made." On this ground the court disallows the claim as to all money paid prior to August 1, 1891. Upon the authority of the decision of the circuit court of appeals for the Ninth circuit in the case above cited, a judgment will be entered in favor of the plaintiff for the sum of \$917, that being the amount actually paid, within a period of six years prior to the date of commencing this suit, for office rent from the 1st day of August, 1891, to and including April 17, 1894. Said judgment will bear interest at the rate of 4 per cent. per annum from this date until paid, and the plaintiff is awarded the amount of costs taxable under the statute.

**MEMORANDUM DECISIONS.**

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**BARROW S. S. CO. v. KANE.** (Circuit Court of Appeals, Second Circuit.) Questions of law certified to the supreme court of the United States. See 18 Sup. Ct. 525.

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In re **BOWLAR.** (Circuit Court of Appeals, Ninth Circuit. February 7, 1898.) No. 402. E. N. Harwood, for petitioner. Before GILBERT, ROSS, and MORROW, Circuit Judges.

**PER CURIAM.** This is an application for a writ of habeas corpus similar in all respects to the application of Abraham L. Huntley, just considered and determined (85 Fed. 889). The facts being similar in all respects, for the reasons given in the opinion delivered in Re Huntley, the writ prayed for by the present petitioner will be issued.

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**DIKE v. UNION PAC. RY. CO.** (Circuit Court of Appeals, Second Circuit. March 2, 1898.) No. 40. Appeal from the Circuit Court of the United States for the Southern District of New York. Frederick A. Wood, for appellant. E. Ellery Anderson, for appellee. Before WALLACE, LACOMBE, and SHIPMAN, Circuit Judges.

**PER CURIAM.** The opinion of Judge Coxe (78 Fed. 216) so carefully and satisfactorily disposes of the questions discussed in this court that we deem it unnecessary to enlarge upon his views, and affirm the decree upon his opinion.

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**HUNT v. ARCHIBALD et al.** (Circuit Court of Appeals, First Circuit. April 20, 1898.) No. 232. Appeal from the Circuit Court of the United States for the District of Massachusetts. Before PUTNAM and WEBB, Circuit Judges, and ALDRICH, District Judge.

**PER CURIAM.** Whereas no judge who concurred in the judgment (28 C. C. A. 641, 84 Fed. 1018) desires that the petition for rehearing be granted, or permitted to be argued, it is ordered that the same is denied, and that a mandate issue forthwith.

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**THE JOHN G. STEVENS.** (Circuit Court of Appeals, Second Circuit.) Questions of law certified to the supreme court of the United States. See 18 Sup. Ct. 544.

**END OF CASES IN VOL. 86.**